UPOA (for Cohen) v. Probation Dep't., 45 OCB 3 (BCB 1990)
[Decision No. B-3-90 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of
UNITED PROBATION OFFICERS'
ASSOCIATION for P.O.T. EDDIE COHEN,

Petitioner,

Decision No. B-3-90
Docket No. BCB-1126-89

-and-

NEW YORK CITY PROBATION DEPARTMENT,

Respondent.
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DECISION AND ORDER

On January 9, 1989, The United Probation officers' Association ("the Union") filed an improper practice petition on behalf of its member, Eddie Cohen, alleging that the New York City Probation Department ("the City" or "the Department") violated the New York City Collective Bargaining Law ("NYCCBL") §12-306a. Although the Union did not specify which portion of NYCCBL §12-306a the City violated, it appears, as set forth herein, that the Union has alleged a violation of NYCCBL §12-306a (3).[1] The City filed an answer to the petition on January 23, 1989. The Union filed a reply on February 2, 1989.

[1] Section 12-306a provides, in relevant part, that:

> [i]t shall be an improper practice for a public employer or its agents:
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> * * *
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> (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.

A hearing was held before a Trial Examiner designated by the Office of Collective Bargaining on March 28, 1989. The City submitted a post-hearing brief on May 19, 1989. The Union submitted a post-hearing brief on May 22, 1989.

Background

Cohen and His Assignment at 100 Centre Street

Eddie Cohen was hired by the Department as a provisional Probation officer Trainee (“P.O.T.") on or about October 19, 1987. Throughout his tenure with the Department, he was employed at 100 Centre Street in Manhattan. At one time, he had a caseload of approximately 150 probationers. From at least October, 1988 until his termination, he worked a regular shift of 8:00 a.m. until 4:00 p.m. although he could come to work as late as 9:30 a.m. under flexitime. He testified that he accumulated over 100 hours of overtime, often by coming into work at 7:30 a.m. The overtime work which he performed consisted of overflow work from Probation Officers ("P.O.s") that was not part of a P.O.T.’s normal work assignment.

Cohen's supervisor until October or November, 1988 was Andrea Johnson, a member of the Union's executive board. George Pittell was assigned as Cohen's supervisor after Andrea Johnson. The branch chief of Manhattan Adult Supervision Branch B, the branch to which Cohen was assigned, and the immediate superior of Johnson and Pittell was Irene Prager. She was subordinate to

Assistant Commissioner Bertram Zipkin. Johnson and Prager testified at the hearing, but Zipkin and Pittell did not.

Evaluations of Cohen's Work

Prager regularly reviewed random samples of P.O.T.s' work in order to obtain first-hand knowledge of the quality of work being produced. By memorandum to Johnson dated February 2, 1988, Prager noted certain deficiencies in case files being handled by Cohen.

Johnson first evaluated Cohen on or about June 16, 1988 for the period from October, 1987 through February 21, 1988. She gave him an overall rating of "superior"[2] and recommended that he be retained. Her justification for her rating was that Cohen:

> came to the department as a P.O.T. in an extremely large unit and was given a large caseload [sic] which recently had a high turnover of probation officers. The caseload he received was basically in disarray. His supervisor [Andrea Johnson] was newly appointed in the position with up to 12 officers to supervise including Mr.Cohen. As a new P.O.T. he was forced to work independently and has done exceptionally well with the limited training available to him. The poor working conditions at the 100 Centre Street location are also taken into consideration in Mr. Cohen's evaluation.

Prager also reviewed the evaluations made by her subordinates. In her comments, dated July 8, 1988, on Johnson's

[2] There are several rating grades. They include "unratable," "unsatisfactory," "conditional," "satisfactory," "superior," and the highest grade which is "outstanding."

July evaluation of Cohen, Prager stated that she had reviewed Mr. Cohen's work and found it "satisfactory," but she did not believe that he deserved an overall rating of superior.

Prager also spoke to Johnson about the "superior" rating and indicated to her that it was not an appropriate evaluation at the time. Prager testified that a supervisor usually acceded to the branch chief's recommendations with respect to evaluations but in this instance, Johnson did not. Johnson testified that she was under the impression that Prager approved her overall rating of Cohen. Later, by memorandum dated July 20, 1988 to Johnson, Prager noted certain deficiencies in a case file handled by Cohen.

Johnson again evaluated Cohen on or about August 3, 1988 for the period of March, 1988 through June 27, 1988. Once again, citing inter alia, the conditions at 100 Centre Street, she gave him an overall evaluation of "superior" and recommended that he be retained.

Prager received the evaluation on or about August 10, 1988 and commented on that date that although "the potential is there for [Cohen] to be a superior worker," she did not believe that he had yet demonstrated that he deserved that rating.

By memoranda dated August 17, 1988 and September 7, 1988 to Johnson, Prager indicated further deficiencies in case file folders handled by Cohen.

Zipkin subsequently indicated that he received the June and August evaluations of Cohen on November 21, 1988 and in comments dated November 23, 1988, said that he concurred with Prager's opinion of Cohen's work.

The Arbitration Hearing and the "Full Breakfast" Rule

On October 5, 1988, Cohen, along with other P.O.T.s including Maurice Quidley, testified at an arbitration hearing. The subject of the arbitration was the alleged assignment of work more properly assignable to P.O.s to P.O.T.s at less pay than that received by P.O.s. Prager said that she knew at or about the time of the hearing that Cohen was one of the P.O.T.s who testified.

Following the arbitration, Prager learned that the P.O.T.s who testified had claimed that they were not receiving enough training. Because Quidley and Cohen testified and were supervised by Johnson, Prager spoke to Johnson and told her that she was responsible for providing additional training to the P.O.T.s in her charge.

At the time that Cohen and the other P.O.T.s testified, the City alleges that certain rules governing conduct at the workplace promulgated by Zipkin in the spring or summer of 1987 were in effect. Some of these rules were set forth in a memorandum, a copy of which was not produced at the hearing, entitled "Inappropriate Work Practices," the existence which was

not disputed by the Union. According to Prager, the memorandum stated that employees could not leave the building after punching in the time clock and return with a "full breakfast." While it was permissible for an employee to purchase coffee and "a bun" while coming to work in the morning and then eat the items at his or her desk, it was not proper to leave the building to purchase the same and return to work.

According to Johnson, there was an informal practice among employees to go out and purchase "a bun" or a “danish” along with a beverage after punching the time clock in the morning. The Union alleges that fifty to sixty percent of the employees engaged in such a practice. No one was disciplined for a breach of the rule until October 7, 1988.

On October 7, 1988, Cohen arrived at work at 7:30 a.m. At about 8:30 a.m., he and Quidley left the building to go to a delicatessen that was located one or two blocks from their office. Unknown to them, Zipkin observed them leaving and followed them to the delicatessen where he witnessed Cohen purchasing a can of "Apple Slice," a carbonated, non-alcoholic beverage and a bagel. Zipkin followed them back to 100 Centre Street where he promptly reported the breach of the rule to Prager.

He told Prager that he had seen Cohen and Quidley buy breakfast and return to the building. He ordered Prager to proceed to the fourteenth floor where Cohen and Quidley worked

and see if they were, in fact, eating breakfast. Prager testified that she was upset about the incident and knew that because Zipkin had seen a violation of a rule that he had promulgated, the matter would be taken out of her hands and there would be serious repercussions. Thus, Prager did as she was instructed and found Cohen and Quidley eating the food they had purchased.

She told Cohen and Quidley that they were "in trouble" with Zipkin for their misuse of business time although she did not indicate what, if any, would be the consequences of their behavior. Prager also informed Johnson of the breach of regulations and ordered her, at the insistence of Zipkin, to prepare a full written report of the incident. Johnson testified that she had never been asked to write a report concerning an incident involving her subordinates about which she did not have first-hand knowledge until that time.

Johnson told Cohen and Quidley that Zipkin had observed them violate his policy against purchasing food on City time. She then drafted a memorandum which stated that they had violated policy by misusing official time, and she asked them to sign the memorandum.

Quidley claims that Johnson advised him not to sign the memo, because it constituted an improper practice. Nonetheless, he signed it. Cohen, however, refused to sign the memorandum. A day later, another supervisor was brought in to witness Cohen's

refusal to sign the document. This was the first time that Cohen had been reprimanded by a supervisor.

Johnson later drafted a memorandum summarizing the incident with Cohen and Quidley at the request of Prager and Zipkin. They subsequently rejected the memorandum which, in their perception, was written by Johnson in her capacity as a union advocate rather than as a supervisor. She was then asked to revise the memorandum.

Shortly thereafter, Zipkin personally removed Cohen from the voluntary overtime list. Cohen, concurrent with his removal from the voluntary overtime list, was assigned to another supervisor, George Pittell, but he continued his work at the same location as a provisional P.O.T.. Johnson was not given an explanation as to why Cohen was assigned to another supervisor.

The “Harbarjan” Incident

The next incident involving alleged misconduct by Cohen occurred on or about November 15, 1988. He arrived at work that day at about 8:00 a.m. and greeted his co-workers, Quidley and Mary Simpson. The parties dispute what occurred next between Cohen and a clerk who assisted P.O.s and P.O.T.s, Radica Harbarjan.

Cohen claims he also greeted Harbarjan. According to Johnson, there was no history of animosity between Cohen and Harbarjan. They typically engaged in playful repartee.

Cohen testified that Harbarjan, who was pregnant at the time, “rolled her eyes and walked away” from him after he came into work. He also testified that at one point in time, he may have told Harbarjan's supervisor, Celinda Burns, that she was not doing her work. The City, however, claims that on the morning of November 15, 1988, Cohen cursed at Harbarjan and otherwise verbally abused her.

Harbarjan apparently told Burns about her contact with Cohen. Burns spoke to Cohen late in the afternoon of November 15, 1988 and told him he had been disrespectful, and that she would have to speak to Prager about his behavior. Cohen testified that Burns told him that Prager was "trying to get rid of" him.

Burns then told Prager that Cohen had cursed at Harbarjan and had upset her. She was afraid that Harbarjan would be subjected to great stress which might result in a miscarriage if Cohen's behavior continued.

Shortly thereafter, Cohen told Harbarjan that he would no longer speak to her. Harbarjan left work on November 16, 1988 and did not return to work for the next three days.

Harbarjan told Johnson that she was upset that Cohen had told her supervisor that she was not doing her work. Although no longer Cohen's supervisor, Johnson tried to remedy the situation. Johnson recommended to Prager that Cohen be given his own office and taken out of the crowded conditions on the 14th floor at 100

Centre Street. As Prager noted at the hearing, 100 Centre Street was "no place to put a human being."

After Cohen's contact with Harbarjan, Pittell also spoke to Cohen and asked him to draft a memo on why he cursed at Harbarjan. Cohen drafted a memorandum that stated that he did not curse at Harbarjan. Pittell rejected the memo.

Subsequently, on the day after Thanksgiving, November 25, 1988, after consulting with Zipkin and Prager, Pittell moved Cohen out of the office which he shared with other P.O.s and P.O.T.s into the hallway. Harbarjan told Johnson about Cohen's desk being moved and suggested to her that she was being forced to write memoranda concerning the incident against her will. Cohen claimed that no other P.O.T. or P.O. had been moved into the hallway.

Johnson testified that P.O.s were often placed in the hallway because of space problems although it was not a preferred place to be. However, she was unaware of any P.O.T. ever being moved from an office into the hallway. Prager testified that the hallway into which Cohen was moved now holds permanent P.O.s until more space can be made for them.

Quidley and other P.O.T.s who allegedly witnessed the Harbarjan incident drafted a memorandum to Prager that confirmed Cohen's version of the story and presented it to Prager on December 9. Prager rejected it because the individuals who submitted it did not sign it. Eventually the authors of the

memorandum signed it and resubmitted it.

Prager testified that in the past, she personally had helped resolve an interpersonal problem between a P.O. and a clerk. The P.O., in that incident, had mentioned the difficulty to her, and she spoke to the P.O.'s supervisor to resolve the matter.

Cohen's Termination

In the November 18, 1988 issue of The Chief, Cohen was listed as number 145 on the open competitive probations officer list, and he became eligible for permanent appointment to the P.O. title. He subsequently received a letter dated December 29, 1988 on or about January 4 or 6, 1989, which said that his provisional status had been terminated. Following receipt of the letter, Prager told him that he was not being appointed because of the "full breakfast" incident and the altercation with Harbarjan. Zipkin confirmed that these incidents were the basis for his termination. Cohen's last day of work was January 13, 1989. He later received a letter dated January 19, 1989 which indicated that his name had been certified by the Department of Personnel as being eligible for placement into the permanent P.O. title.

Johnson did not know of any other individual terminated for the conduct which formed the basis for Cohen's discharge. She was aware, however, of the City terminating a provisional P.O.T. for time and leave problems and of another provisional P.O.T. who

was forced to resign over an arrest.

By memorandum dated January 4, 1989, Zipkin informed Quidley that his October 7, 1988 violation of the "full breakfast" rule could be grounds for disciplinary action against him. A copy of the warning was placed in his personnel file.

Positions of the Parties

Union's Position

The Union claims that the City's treatment and subsequent termination of Cohen constituted an improper practice under the NYCCBL. Relying on the test this Board adopted in Decision No. B-51-87, the Union claims that it has proven that the City's agent responsible for the alleged discriminatory acts had knowledge of Cohen's union activity and that his union activity was a motivating factor in the City's decision to terminate him.

Specifically, the Union relies on Prager's acknowledgment that she knew Cohen testified in the arbitration over out-of-title work. The Union draws the inference that union activity was a motivating factor for the City's treatment of Cohen from the events which took place between October 5, 1988 and January 13, 1989.

The Union argues that the arbitration was an obvious irritant and embarrassment to the City as evidenced by Prager's advice to Johnson that she improve her training of P.O.T.s. The City also reacted by disciplining Cohen for an infraction of a

rule that the Union argues, and that the City admits, had never been enforced. Moreover, Cohen was deprived of overtime opportunities and assigned to a new supervisor.

The Union also alleges that the city unfairly disciplined Cohen for the Harbarjan incident without considering his version of the events. The City, according to the Union, was uninterested in conducting a meaningful investigation into the matter. The Union also points to a prior instance of employee interpersonal problems mediated by Prager. Rather than resolve the situation between Cohen and Harbarjan to the satisfaction of both of the principals, the City terminated Cohen using the Harbarjan incident, among other things, as a pretext.

The Union notes that the City made no effort to show that Cohen would have been terminated absent his participation in protected activity. Recognizing that the City need not show just cause for its decision to terminate Cohen, the Union contends that the City cannot simply rely on Cohen's status as a provisional employee or on the fact that other employees who had also testified had not been discharged. The Union claims that Cohen's discharge for the two incidents was unprecedented.[3]

[3] The Union cites Deer Park School Bus Drivers' Union and Deer Park Union Free School District, 22 PERB ¶3034 (1989) in which PERB found, inter Alia, that the employer committed an improper practice by assessing a penalty, which was inconsistent with other penalties imposed in other cases for violation of the same rule. Because the employer offered no explanation for the disparity, PERB held that they were discharged in retaliation for their appearance at a PERB hearing.

City's Position

The City argues that the Union has failed to establish a prima facie case of improper practice. It argues that the City's actions were motivated solely by the "unprofessional behavior" of Cohen as evidenced by his violation of department rules on time and leave and his alleged abuse of Harbarjan.

The City notes that Cohen's participation in an arbitration does not shield him from the consequences of his wrongful acts, and that he was not the only P.O.T. to testify at the arbitration hearing. Quidley testified, as well, and he also received a written reprimand for violating agency rules. He was not fired, the City argues, because he did not abuse a fellow worker.

The City also contends that Cohen was not fired in a technical sense. He was simply not appointed to a permanent position.

Finally, the City relies on NYCCBL §12-307b which states that the City has the right to " . . . determine the methods, means and personnel by which government operations are to be conducted." Citing Decision No. B-7-81, the City claims that this includes reserving to management the right to assign overtime. Accordingly, Cohen had no right to demand the assignment of overtime and no right to be supervised by Johnson.

Discussion

Where a union alleges a violation of NYCCBL §12-306a(3), as it has in the instant case, we apply the test fashioned by PERB in City of Salamanca and City of Salamanca D.P.W. Employees. AFSCME, Council 66, Local 1304c, 18 PERB ¶3012 (1985).[4] The test places the burden on the Union to show 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 satisfies both parts of this test, it will have made a prima facie case of improper motivation.[5]

If the Union makes a prima facie case, the burden shifts to the employer to show that it would have taken the same action in the absence of the protected conduct. In the present case, we find that the Union has failed to make a prima facie case.

Zipkin was clearly the agent of the City who initiated what the Union claims to be the first discriminatory act against Cohen. While Prager knew of Cohen's testimony and ordered Johnson to discipline him, she was uncomfortable in disciplining him for a breach of the "full breakfast" rule. Were it not for Zipkin's zealous insistence that Cohen be punished, Prager might

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[4] Decision Nos. B-17-89; B-51-87.

[5] City of Salamanca, 18 PERB ¶3012 at 3027 (1985); Decision No. B-7-89.

not have known of the infraction, and if she had learned of it independently, it appears that she might have treated the incident differently. The Union failed to produce any evidence that Zipkin knew of Cohen's and Quidley's involvement in the arbitration. The record is devoid of any evidence that the discipline of Cohen at the insistence of Zipkin for the breach of the rule was a pretext for discriminating against him for testifying at the earlier arbitration.

We recognize that in the absence of an outright admission of improper motive, proof of anti-union animus necessarily must be based on circumstantial evidence. However, the circumstances surrounding the breach of the "full breakfast" rule based on the record before us, do not warrant the drawing of an inference of such animus. The Union has only established that Cohen was disciplined shortly after his testimony in the arbitration for breach of a rule that was not consistently applied. The rule's enforcement was prompted by an assistant commissioner who actually witnessed the breach of the rule which he had promulgated, and whose actual knowledge of Cohen's union activity does not appear in the record. Further disciplinary action was pressed by a branch chief who was apparently reluctant to pursue the matter and might have dealt with Cohen in a different manner were it not for the assistant commissioner's insistence.

There is also no evidence in the record that anti-union animus played a part in Zipkin's removal of Cohen from the

voluntary overtime list and his assignment of Pittell as Cohen's supervisor.

The action taken against Cohen as a result of, and after the Harbarjan incident is even more removed from the arbitration hearing than Cohen's breach in October of the "full breakfast" rule. It occurred in November, over a month after Cohen's testimony at the arbitration. The Union offered no proof that the disciplining of Cohen for what was ostensibly his harassment of another employee, was a subterfuge for retaliation. The Union must adduce more than conclusory allegations that the City's conduct was motivated by anti-union animus. In the instant case, the Union has failed to offer any proof, circumstantial or otherwise, that anti-union animus played any part in the City's decision to discipline Mr. Cohen, regardless of whether it might have handled and resolved the differences between Harbarjan and Cohen in a different, less confrontational manner.

Because the Union has failed to make a prima facie case, the burden has not shifted to the City to establish that its actions otherwise were proper. Accordingly, we dismiss the Union's 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 the United Probation Officers' Association be, and the same hereby is, dismissed.

Dated: New York, New York
January 22, 1990

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