

UPOA, Johnson v. DOP, 45 OCB 4 (BCB 1990) [Decision No. B-4-90 (IP)]

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

UNITED PROBATION OFFICERS
ASSOCIATION and ANDREA JOHNSON,

Petitioners,

-and-

Decision No. B-4-90
Docket No. BCB-1147-89

CITY OF NEW YORK DEPARTMENT OF
PROBATION,
Respondent.
- - - - - X

DECISION AND ORDER

The United Probation officers Association ("the Union") filed an improper practice petition against the City of New York Department of Probation ("the City" or "the Department") on March 3, 1989 on behalf of Andrea Johnson, alleging that the City had violated New York City Collective Bargaining Law ("NYCCBL") §12-306a(3)¹ by giving her an overall performance evaluation rating of "satisfactory" rather than "outstanding" in retaliation for her union activities. The City filed its answer on March 17, 1989. The Union filed its reply on March 29, 1989.

A hearing was ordered and held before a Trial Examiner

¹Section 12-306a(3) provides that:

It shall be an improper practice for a public employer or its agents:

(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;

designated by this Board on July 12, 1989. The Union and the City filed post-hearing memoranda on August 14, 1989 and August 15, 1989, respectively.

Background

Andrea Johnson is a Supervising Probation Officer ("SPO") at Manhattan Adult Supervision, Branch B, 100 Centre Street, Manhattan ("MASB"). She currently supervises 6 Probation Officers ("POs") and Probation officer Trainees ("POTs") and one clerical employee. She earned a bachelors degree in social services from the State University of New York and an M.S.W. from Hunter College. The Department does not currently employ many individuals with an M.S.W. degree.

Johnson began work with the City in 1983 as a PO, a position which she held for 4 1/2 years, not including a period in which was not employed by the Department between March and September, 1984. After she returned, she took the civil service examination for SPO, passed it and was placed on the civil service list. Her Branch Chief, Irene Prager, recommended her appointment as an SPO.

As an SPO, Johnson was originally assigned to the Department's Harlem office on 125th Street, but she did not want to work there. Prager spoke to Assistant Commissioner Bertram Zipkin and "pleaded" with him to have Johnson stay in MASB. In 1987, Johnson was assigned to MASB as an SPO.

Prager is Johnson's immediate supervisor and was the City's only witness at the hearing. Zipkin is Prager's immediate supervisor, but he did not testify at the hearing.

Union Activity

From June, 1986 through August, 1987, Johnson was a Union delegate. As a delegate, she represented the Union's interests in a variety of work-related issues and filed grievances on behalf of the Union and unit employees. She did not file any grievances on her own behalf. At about the time of her appointment as a SPO, in July, 1987, she helped to organize a demonstration of approximately 100 PO's during their lunch hour in front of 100 Centre Street to protest the involuntary transfer of 18 supervisors throughout the City.

Johnson joined the Union's executive board in August, 1987. As a member of the board, she has the primary responsibility to oversee the administration of the collective bargaining agreement for MASB. She has also helped produce a Union newsletter, Manhattan Shop Talk. Upon becoming an SPO she also became active in organizing other SPO's in a subgroup of the Union called the Supervising Probation Officers' Committee.

Since Johnson was assigned as a SPO at MASB, there have been far more grievances filed from the Department's Manhattan offices than from its offices in any other borough. The grievances have been over many issues, including out-of-title work questions as

well as health and safety issues. For example, Johnson became involved, in her official Union capacity, in an arbitration arising out of a shortened work day. Zipkin was told by his superiors to release employees early on an extremely hot day in July, 1988. He apparently did not tell the employees about the order until it was past the time to go home. This prompted the Union to file a grievance.

The Union, with Johnson's assistance, has been involved in arbitrations over working conditions at the facilities at 100 Centre Street. Johnson also took part in an arbitration arising out of the Department's failure to give the Union access to certain areas at 100 Centre Street. She was also involved in assisting another SPO who received a rating of "satisfactory" on an evaluation in the latter half of 1988 which was resolved in the lower steps of the arbitration procedure.

She has been active on behalf of Union members who have filed improper practices against the Department. Specifically, she assisted POT Eddie Cohen in an improper practice petition filed on his behalf (Docket No. BCB-1126-89) arising out of the City's alleged retaliation against him for his testimony in an out-of-title work arbitration, discussed in greater detail infra.

She was also instrumental in having a Union bulletin board installed at 100 Centre Street. Before getting a separate Union bulletin board, Johnson caught Zipkin rearranging items on a board which the Union shared with the City. Johnson complained

of the incident to Director of Labor Relations Ann Rozakis who told her that Zipkin should not have been involved with the board. Subsequently, the Union secured a separate bulletin board for its use.

Zipkin's Relationship with Johnson

Johnson testified that Zipkin knows of her union activities and of her position as a member of the Union's executive board. She sees no conflict between the assistant commissioner and herself concerning her role as SPO although they "may disagree on certain policies..."

Johnson was "instrumental" in filing a complaint with the United States Equal Employment Opportunity Commission in December, 1987 along with 10 complainants from the bargaining unit alleging that Zipkin had engaged in racial discrimination.

Subsequently, in or about June or July, 1988, Johnson assisted a group of MASB employees in preparing and submitting to commissioner Kevin Smyley of the Department, a petition complaining about Zipkin's allegedly racist "behavior." A meeting was subsequently held with Department officials on August 24, 1988. Among the items raised at the meeting were difficulties employees had with Mr. Zipkin. The following are excerpts from a letter drafted by, among others, Johnson, summarizing the meeting:

Due to the fact that Mr. Zipkin's reputation and tactics of intimidation are well known

among the employees in Brooklyn, Queens and now Manhattan, it is difficult to ask anyone to speak openly for fear of retaliation: The employees in Manhattan work directly or indirectly with him and will continue to do so, making that fear all the more real. Nevertheless, we are able to document examples of his poor managerial skills

* * *

Mr. Zipkin told the branch Chief to inform the supervisors never to enter her office when he was speaking with her. This action eliminates access to the Branch Chief in the event of an emergency.

During the last two months, as a result of Mr. Zipkin's direct orders, the lunch time sheet has become the main priority. Employees have been called at his order to sign the sheet due to his regular 'audits.' All employees in supervision were told that paychecks would be withheld if they did not sign each and every day per order of the Assistant Commissioner.

Mr. Zipkin refuses to speak to workers whom he does not like, despite their effort to initiate a conversation or to offer a greeting.

The signatories, on behalf of Union members, asked that Zipkin be removed from his position.

Prager admitted to Johnson that "whenever, . . . she discusses [Johnson] with Mr. Zipkin for whatever reason, he gets very angry and yells and screams about [Johnson] and that this puts pressure on [Prager] when he gets upset like this." Prager cited her treatment of Johnson in the incident involving POT's Quidley and Cohen, described infra, as an incident where she was asked to be tough on Johnson by Zipkin.

Prager testified that Zipkin has complained about Johnson's union activities. Prager could not recall any specific statements that he made, but she knew "that there have been situations between the two of them" referred to above, that "created bad feelings between the two of them." She described Zipkin as being a "tough boss" who makes "a lot of demands of" his subordinates. He has told Prager "in the abstract. . . to be tough on [Johnson]."

Evaluations of Johnson

Johnson has been evaluated several times since she was hired by the City. She has been rated on a scale ranging from "unsatisfactory," "conditional," "satisfactory," "superior," to "outstanding."

As a PO, Johnson was first evaluated for the period November 21, 1983 through March 16, 1984. Her overall rating was "superior." She later received an overall rating of "outstanding" for the period September 4, 1984 through June 5, 1985. She received an "outstanding" for the period June 5, 1985 through June 16, 1986.

Although it was not produced at the hearing, Johnson received an overall rating of "superior" the first time she was evaluated as an SPO.

Johnson was evaluated again on June 10, 1988 as a SPO for the period of January 13, 1988 through June 10, 1988 ("Early 1988

Evaluation.") This evaluation was presented to Johnson for her comments on June 15, 1988. She was also evaluated on November 15, 1988 for the period July 1, 1988 through October 30, 1988 ("Late 1988 Evaluation.") This evaluation was presented to Johnson for her comments on January 9, 1989. Each evaluation was broken down into a series of tasks. Because the Early 1988 Evaluation and the Late 1988 Evaluation are the basis for the instant petition, they will be set forth in their entirety.

Evaluation: Task No.1 -- Administratto
Early 1988 Evaluation

SPO Johnson has a unit of 4 regular probation officers as well as 3 P.O.'s who specialize in return on warrant duties. For a period, SPO Johnson was supervising as many as ten probation officers when one supervisor left and we did not receive a replacement. She has handled her assignment capably and efficiently. Her excellent organizational skills were in evidence as her controls and statistics were accurate and submitted in a timely manner no matter how many P.O.'s she was responsible for.

With the advent of the ROW unit, a new record keeping system needed to be devised.

SPO Johnson came up with new systems which were later incorporated by ORT. SPO Johnson maintains the Absence Control Plan in accordance with departmental procedure. SPO Johnson has performed these duties in an outstanding manner.

Rating: Outstanding

Late 1988 Evaluation

SPO Johnson has a unit of 5 probation officers and 2 probation officer trainees, three of whom specialize in return on warrant

duties. SPO Johnson keeps track of updates, PSI's, DSPI's classified and the absence control for her unit. Other controls were suggested and are now being maintained.

Rating: Satisfactory

With respect to Task No. 1, Prager claims that Johnson had just started as an SPO and was responsible for 8 PO's. She had also started up the return-warrant-unit ("ROW unit"). She was able to handle the job under poor, difficult circumstances, and Prager felt that Johnson deserved credit for it.

During the period covered by the Late 1988 Evaluation, Johnson was supervising seven POs and POTs and conditions had improved, according to Prager, who said she had more of a chance to see the kind of work Johnson could produce. Prager found that some things were not being done and felt that Johnson failed to follow up on whether POs were doing their job. Johnson said that she trusted that the POs were doing their jobs but she would try to keep better controls on their work in the future.

Evaluation: Task No. 2 - Training
Early 1988 Evaluation

SPO Johnson is extremely aware of the importance of teaching and sharing her social work knowledge with her unit. She has even taken it one step further. She and P.O. Rosalie Torres who also has an MSW, have organized biweekly groups case work meetings which they co-lead. This group is made up of primarily P.O.T.'s and new staff who can most benefit from this group.

SPO Johnson's unit consists of three P.O.'s

who have been on staff less than 6 months. She has spent quality time in training and teaching them the specific body of knowledge necessary for their role in the criminal justice system. She holds regular unit meetings for the purpose of sharing information introducing new ideas and assisting the probation officers in coping with their workload. The three new workers have demanded a great deal of attention. One P.O. took over a caseload which had been uncovered for over 4 months. The other two, one a P.O. and the other a P.O.T., joined the ROW unit. Aside from learning the job they had to adapt to the newly created role in the ROW pilot project. SPO Johnson had to teach them as well as deal creatively with each new situation as it developed. She handled this in an outstanding manner.

Rating: Outstanding

Late 1988 Evaluation

SPO Johnson instructs her unit on caseload management. She maintains excellent resources which are kept in a central area for easy access by the members of her unit. SPO Johnson has expressed reluctance to provide additional training to the P.O.T.'s in her unit.

Rating: Satisfactory

During the period covered by the Early 1988 Evaluation, Prager found that Johnson was deeply involved in instructing employees in the unit, particularly those individuals working in the ROW unit which was being started up. Johnson, along with another SPO, Rosalie Torres, organized bi-weekly workers' meetings to deal with problems. These meetings were held over a period of a couple of months. The classes met less frequently

over the summer of 1988 as it became hard to find a place to hold meetings in Manhattan. Members of the group began dropping out, and Johnson believed that most of the people in the group had already gotten enough out of the class.

Following an arbitration that took place during the period covered by the Late 1988 Evaluation, at which various Pos and POTs testified, including POTs Eddie Cohen and Maurice Quidley, both of whom were supervised by Johnson, Prager had her first and only discussion with Johnson regarding training. An issue was raised during the arbitration over the adequacy of training given to POT's who were being asked to perform work typically performed by PO's. Prager claims that she spoke to all of her SPOs about their obligations to train their subordinates. Prager did not specify, at the time, the kind of training SPO's had to provide, merely that POs "need more training." Prager testified that Johnson said that she would not provide training even though she had been doing it in the past. Johnson told Prager that it was not her job, as an SPO, formally to train POT's. Johnson believes that while on-the-job training is a PO's supervisor responsibility, an SPO is not responsible for more structured training.

Mary Simpson, a PO who has only been supervised by by Johnson, testified that Johnson trained her in writing pre sentence reports and updating reports for the court for which she received feedback from Johnson.

Evaluation: Task No. 3 - Case Consultation and Reviews
Early 1988 Evaluation

SPO Johnson reviews all reports before they are submitted to court in order to insure that they meet department standards. Her recommendations are appropriate and consistent with the material in the case record.

Rating: Outstanding

Late 1988 Evaluation

SPO Johnson reviews the reports submitted by her unit before they are sent to court. Her recommendations have at times contradicted departmental policy. She had upon occasion, substituted her own judgment when she does not agree with department's policy. We had discussed this matter and SPO Johnson will adhere to departmental policy in the future.
Rating: Satisfactory

Prager felt that Johnson was doing an outstanding job during the Early 1988 Evaluation period given the number of cases over which she had responsibility.

During the period covered by the Late 1988 Evaluation period, Johnson began openly asserting that the Department's policy mandating incarceration in all violation of probation cases, was improper. Prager found a case where incarceration had not been recommended when under Department policy, it should have been.

Johnson was told by her superiors to either recommend incarceration or withdraw the violation of probation without prejudice. She argued that it was not "ethically right" to

request POs to make a recommendation about treating violations of probation when, in fact, they have no real choice. She disagreed with the department policy during the period covered by the Early 1988 evaluation but had discussions with her superiors on it during the period covered by the Late 1988 Evaluation. Johnson did not perceive that the policy recommending incarceration was a "cardinal rule." When she found it was policy, she wrote a memorandum to Zipkin and Deputy Commissioner Grimaldi explaining why she thought it was unethical.

Evaluation: Task No. 4 - Staff RValuations
Early 1988 Evaluation

SPO Johnson Determines the effectiveness of the P.O.'s use of time and work priorities and controls. She evaluates the P.O.'s work as to both quality and quantity and has ability to work under pressure. She meets with the P.O.'s in individual conferences to review all aspects of the P.O.'s work.

Rating: Superior

Late 1988 Evaluation

SPO Johnson evaluates the P.O.'s performances and works to strengthen their weaknesses. She succeeded in getting P.O. Ross off "steps" improving her previous excessive use of sick leave. However there have been times when she has been adverse to disciplining members of her unit.

Rating: Satisfactory

Cohen/Quidley Incident

The statement on the evaluation that Johnson was "adverse to disciplining subordinates" refers to an incident in which two POTs, Maurice Quidley and Eddie Cohen, were disciplined for violating a Department rule, promulgated by Zipkin, barring employees from leaving facilities to bring back food to the office. Zipkin saw the two POTs leave the building on October 7, 1988, but Johnson did not see them leave.

Zipkin reported the incident to Prager and told her to make sure that the offending personnel were appropriately dealt with. Prager saw Cohen but not Quidley eating breakfast at his desk and told both that Zipkin had observed them leaving the building. Because both Cohen and Quidley had clocked in early and were claiming overtime, Prager described the incident as a "serious matter."

Johnson was directed by Prager orally on October 7, 1988, and later, in a memorandum dated October 11, 1988, to discuss the incident with the offending POTs, prepare a report to her on the incident, and "write [Cohen and Quidley] up." Prager said she asked Johnson to act in her role as "disciplinarian" and not as an "advocate."

Johnson discussed the incident with Cohen and Quidley on October 11, 1988, and prepared a memorandum dated October 17, 1988 which she presented to Cohen and Quidley. She stated in the memo that Prager had "directly ordered" her to warn them that any

further misuse of time could result in their employment being terminated.

Subsequently, Prager told Johnson to make changes in the report which she prepared for Prager dated October 17, 1988. In relevant part, Prager objected to the following portions of Johnson's report:

After speaking to Mr. Cohen and Mr. Quidley it appears that they did clock in on 10/7/88, two days after testifying at a UPOA arbitration hearing regard the status of POTs in the department at 7:30 a.m. and 8:25 a.m. respectively.

* * *

. . . [T]hey could not have been observed [breaking Zipkin's rule.]

* * *

Both [POTs) are superior workers. . . Their situation has definitely added to the poor morale which already exists in this department and at 100 Centre Street in particular.

Prager felt that Johnson's comments were inappropriate and told Johnson to produce a report "limited to the facts within [her] capacity as a Supervising Probation Officer." Johnson refused to comply with Prager's request, claiming that Prager's proposed changes would render her report false.

Prager passed on Johnson's report to Zipkin. Prager felt that every subordinate should discuss with her superior the work of people below and for that reason, spoke to Zipkin regarding Johnson. Zipkin remarked to Prager about Johnson's "adversarial"

manner but he did not elaborate on what he meant by that term.

Johnson received a written reprimand dated December 12, 1988 from Zipkin over her "insubordination" in connection with the preparation of the above report which was placed in her personnel file. Johnson filed a grievance dated December 14, 1988 objecting to the reprimand, in which she argued that under the relevant collective bargaining agreement, she had to be brought up on disciplinary charges before being reprimanded. As a consequence, Zipkin withdrew the reprimand and issued a caution dated December 20, 1988 which stated that if Johnson were insubordinate again, she could be brought up on charges. Prager did not hear of the reprimand until after it had been issued.

Never before had Johnson "written up" anybody on charges. Another individual, Bronwen Job, who has been a supervisor since 1984, testified that she was unaware of any other supervisor who has been asked to write up a subordinate. Further, she had never been asked to provide a report to a branch chief when she had to discipline or otherwise caution a subordinate on his behavior. Herman Metnetsky, a supervisor for 16 years and a union activist also testified that he had never been asked to "write up" a subordinate by his supervisor, and that he had never given a reprimand or similar written warning to an employee, and had never been asked to do so.

Other Evaluation Problems

Johnson and Prager testified that her evaluation for Late 1988 was also based on "ongoing discussions" with Prager on how people should be evaluated which began in March, 1988 and the number of which increased over time. Prager testified that she "deliberated long and hard" before writing Johnson's evaluation on Task No. 4 on the Late 1988 Evaluation. Prager told Johnson that some of Johnson's subordinates did not deserve the evaluations she was giving them. Johnson had argued that as a superior, she had great discretion within the framework set by the Department in evaluating subordinates.

Previously, Johnson had dealt with time and leave problems of various subordinates. One subordinate with whom she dealt was taken off various sanctions and her attendance improved. Johnson described her style as not involving "writing people up" but "bring[ing] them back."

Prager has told Johnson that she has difficulty presenting evidence to back up her evaluations. Johnson admitted that "sometimes [Prager] is right" in that she has had a hard time presenting written evidence to go with evaluations. Johnson said she "tend[s) to be resistant" to coming up with written evidence.

Prager has had many discussions with Johnson regarding her evaluations of subordinates whom Prager has felt, from the beginning of Johnson's tenure as an SPO, were consistently given

"outstanding" and "superior" evaluations. Prager felt that no one coming into the job could possibly do the job in an "outstanding" manner and that it was unfair to other employees in MASB if Johnson's subordinates were given unfairly high evaluations. She told other SPOs that evaluations had to be fair and that all evaluations that were above or below "satisfactory" had to be substantiated. Prager testified that she had similar conversations with SPOs Gail Horton and Margaret Duffney around June, 1988 requiring them to lower high, unsubstantiated evaluations.

With respect to taking into account adverse working conditions, Prager said that under certain circumstances, it is appropriate to take them into account when evaluating subordinates. However, she said those conditions should be documented and explicitly set forth in an evaluation.

Prager began asking Johnson to justify subordinates' work between their evaluations. By memorandum dated December 16, 1988, for example, Prager requested further information on a report prepared by POT Quidley. This, according to Johnson, was an unusual inquiry. Prager made a similar request of Johnson regarding PO Thomas on June 26, 1989.

Zipkin specifically asked for one such justification in March, 1989. By memorandum dated March 3, 1989, Prager directed Johnson to conduct an audit of PO Kovics' case load. Kovics had come close to submitting a probation violation in an untimely

manner. Johnson pointed out the problem to Prager who informed Zipkin who in turn ordered Johnson to audit PO Kovics' entire case load.

Johnson testified that to her knowledge, although it was not unusual by June, 1989 for her to receive written comments and requests with respect to her evaluation of subordinates, it was unusual for other SPO's to be treated in that manner. SPOs Job and Metnetsky testified that they had never been asked to justify a subordinate's work to a superior.

Prager held a meeting on February 6, 1989, in which she said that the failure of SPO's to appropriately evaluate their subordinates would be taken into account when supervisors were evaluated. She also testified that, as a branch chief, she has given out ratings of "satisfactory" in the past.

Evaluation: Task No. 5 -- Implementation of Departmental Policy
Early 1988 Evaluation

SPO Johnson insures that her unit fulfill their duties as directed by orders and requests from court. She responsibly facilitates the work flow to make sure that the services are accomplished. SPO Johnson takes a leadership role in staff discussions. She is quite vocal in bringing to the attention of administration any situation or directions which she perceives as problematic.

Rating: Superior

Late 1988 Evaluation

She responsibly facilitates the work flow to make sure that our responsibilities are met.

SPO Johnson takes a leadership role in staff decision. She is quite outspoken in bringing to the attention of administration situations she perceives as problematic.

Rating: Superior

There was little or no testimony with respect to Task No. 5. Johnson's rating for that task did not change over the evaluation periods.

Evaluation: Task No. 6 - Communications and Resource Development
Early 1988 Evaluation

SPO Johnson communicates well with her colleagues. She is very quick to identify problems in the branch and make suggestions for their resolution. She is sensitive to the needs of the community we service.

Rating: Superior

Late 1988 Evaluation

SPO Johnson communicates well with her colleagues. She is very quick to identify problems in the branch and make suggestions for their resolution. She is sensitive to the needs of the community we service.

Rating: Superior

There was little or no testimony with respect to Task No. 6. Johnson's rating for that task did not change over the evaluation periods.

Evaluation: Overall Rating
Early 1988 Evaluation

SPO Johnson has demonstrated outstanding ability as a supervising probation officer. She is selfstarting, innovative and goal orientated. No task is complete unless it is done to the best of her capabilities. She has also taken a leadership role in her relationship with staff. SPO Johnson is a dedicated and highly motivated supervisor, who well deserves an outstanding evaluation.

Overall Rating: Outstanding

Major Complaints (If any)

None

Late 1988 Evaluation

SPO Johnson's attendance and punctuality are good. She has the talent and skills to do an excellent job but I have found that her perception of the role of the supervisor does not always mesh with that of the department's.

Overall Rating: Satisfactory

Major Complaints (If any)

Her definition of the role of SPO.

Prager, with respect to Johnson's overall rating in the Late 1988 Evaluation, told Johnson that she had her "supervising role and role as union official confused."

Prager testified that Johnson did not clearly define her role as supervisor. Prager envisioned the role of SPO as including the supervision, training and disciplining of subordinates. Prager expected her subordinate supervisors to

follow her management style.

Evaluations: Comments by Zipkin
Early 1988 Evaluation

Ms. Prager's evaluation appears somewhat excessive. While Ms. Johnson has been very active in establishing the ROW unit. She has been reluctant to take action against her non-complying P.O.'s

Late 1988 Evaluation

Read and accepted. Ms. Johnson's main problem is her adversarial position. she rejected legitimate instructions on occasion. She has been given an official caution letter based on her refusal to comply with [Prager's] instructions.

Zipkin's comments on both evaluations were dated January 20, 1989. Prager testified that she showed the Late 1988 Evaluation to Zipkin after she wrote it. She typically discussed all SPOs' performances with him.

Effect of Prager's Evaluation

It was announced in January, 1989, that evaluations would form the basis for merit increases for SPO's. Johnson and Metnetsky also testified that only supervisors with a rating higher than "satisfactory" would receive merit increases. Of 154 SPO's evaluated, 11 received satisfactory evaluations, none received lower. In discussions with other supervisors, Johnson learned that there were a disproportionate number of SPO's with ratings of "satisfactory" in Manhattan.

The other SPO's who testified, said that they had never heard of an SPO having an evaluation lowered, much less lowered two steps although SPO Job had discussed the topic of downgrading, in a theoretical sense, with her supervisor. Prager had only done successive evaluations on two people since becoming Branch Chief, thus she had no experience in downgrading an SPO two rungs until she evaluated Johnson for the second time.

Positions of the Parties

Union's Position

The Union argues that it has satisfied the burden of proof for establishing an improper practice adopted by the Board in Decision No. B-51-87. With respect to the first part of the test, the Union claims that it has shown that the employer's agent responsible for the alleged discriminatory action knew of Johnson's union activity. Johnson had written letters and circulated petitions critical of Zipkin who, while not present at the hearing, undoubtedly knew of her activities. The Union relies on Prager's testimony that Zipkin gets extremely upset when the subject of Johnson comes up and puts "pressure" on Prager when he gets upset. Zipkin's comments on Prager's evaluations of Johnson and comments with respect to her "adversarial" position were clearly aimed, according to the Union, at Johnson's union activities. Prager admitted that Zipkin does not like Johnson's union activities.

Prager, as well, knew of Johnson's activities and was critical of her "adversarial" position. She became the instrument of Zipkin's anti-union animus.

Since joining the Department, Johnson had always received evaluations higher than "satisfactory." The Union argues that in light of the circumstances proven during the hearing, Prager's rationale for the lower ratings contained in the Late 1988 Evaluation are suspect.

Task No. 1

The length of Prager's comments on Task No. 1 for the Early 1988 Evaluation indicates, according to the Union, that Prager "could more easily generate praise of Johnson than criticism." The drop in the number of subordinates supervised by Johnson from 8 to 7 during the Late 1988 Evaluation was not noteworthy. Indeed, Johnson continues to supervise more individuals than most other SPOs. Moreover, the Union points to the fact that Johnson was criticized for not maintaining controls in the Late 1988 Evaluation. Nevertheless, she received favorable comments on controls in the Early 1988 Evaluation and fairly favorable comments on the Late 1988 Evaluation. When Johnson understood what controls Prager wanted, she agreed to maintain them.

Task No. 2

The Union points to the fact that Johnson provided training above and beyond that provided by other SPOs during the period covered by the Early 1988 Evaluation. She felt that it was not her responsibility to provide structured training to subordinates but was the responsibility of management. The issue of training arose, the Union notes, after a grievance was filed by the Union.

Task No. 3

Although Johnson has learned that mandatory incarceration is a firm policy of the Department, the Union argues that she knew other PO's who did not recommend it. She did not perceive it to be a cardinal rule.

Task No. 4

The Union argues that the basis for the lower rating on the Late 1988 Evaluation was the Cohen/Quidley incident. It was unprecedented, according to the Union, to order an SPO to "write up" a subordinate for conduct that the SPO had not witnessed. Zipkin orchestrated a situation which led to the issuance of an improper reprimand to Johnson which was later replaced by a caution. Even if this Board were to find that Johnson was insubordinate, the Union contends that the issuance of that

caution was illegally motivated by anti-union animus.² The Late 1988 Evaluation also recites Johnson's success at improving a subordinate's attendance record.

The Union notes that the evaluations on Task Nos. 5 and 6 did not change from one evaluation to the other.

In conclusion, the Union contends that the City failed to offer any justification or legitimate business motivation for its lowering of Johnson's evaluation by two steps. It noted that the Department's standard appears to be liberal with respect to evaluations, citing the fact that out of 154 SPOs evaluated, only 11 had received satisfactory evaluations and none had been dropped two levels. Thus, it argues that it has proven that the City violated NYCCBL §12-306a(3).³

City's Position

The City argues that the Union has failed to establish a causal connection between Johnson's union activities and management's actions. The City characterizes Johnson's behavior in the Cohen/Quidley matter as clearly insubordinate. If Johnson thought the order to discipline the POTs was improper, she should

² The Union cites Mulvey and UFT, 22 PERB ¶4537 (1989) in which it contends that the Public Employment Relations Board ("PERB") found that a reprimand, which would not have been issued "but for" an improperly motivated direction to conduct an investigation into an employee's conduct, constituted an improper practice.

³ The Union also cites Decision No. B-8-89.

have performed her function as a supervisor, and grieved the matter later.

The City notes that before being promoted to SPO and during Johnson's first two evaluations as an SPO, the City was well-aware of her union activities. However, there are no allegations or any evidence of retaliation from the earlier period.

The evaluation process, the City notes, is subject to a review and appeal process. The Union failed to avail itself of this process. It is attempting, in the instant proceeding, to circumvent the only appropriate avenue open to review evaluations by filing an improper practice.

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) and adopted by us in Decision No. B-51-87.⁴ 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
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

⁴ Decision Nos. B-17-89; B-51-87.

made a prima facie case of improper motivation.⁵ The burden then shifts to the employer to show that it would have taken the same action in the absence of the protected conduct.

In this matter, the Union alleges that the City's lowering of Johnson's rating from "outstanding" in the Early 1988 Evaluation to "satisfactory" in the Late 1988 Evaluation was solely motivated by anti-union animus. It particularly relies on the words and deeds of Zipkin and Prager, the City's agents responsible for the acts alleged herein. The City argues that any actions taken against Johnson and the administration of the evaluation process, in particular, were within management's preserve and were untainted by any illegal motivation.

Johnson's overall evaluation of "satisfactory" appears to be, in part, the sum of the various tasks, discussed supra, for which Johnson was evaluated by Prager. In assessing whether the Union has satisfied its burden of proof, we must therefore, examine each of the tasks which make up the evaluations.

We note, however, that the evaluation Johnson received for each task cannot be examined in a vacuum. The general relationship between Johnson and her superiors, the Union argues, pervades her Late Evaluation. It is the Union's contention that she was treated harshly on the evaluation of each task because of the City's general anti-union animus directed against her.

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

We note that it is undisputed in the record, that Zipkin was hostile to Johnson because of her Union activity. Indeed, the thrust of many of the Union activities in which she was involved, were directed against Zipkin, as, for example, the petition to Commissioner Smyley and the allegations of racial discrimination filed with the EEOC.

Her undeniable involvement with Union activities was also known to Zipkin because of her participation in the grievance procedure. The City's witness, Irene Prager, testified, in response to counsel's query as to whether Zipkin ever complained of Johnson's union activities, that he did complain of those activities. Prager also testified that Zipkin asked her to be "tough" on Johnson as in the Cohen/Quidley incident and that she deferred to her supervisor, as she wished that Johnson would defer to her. We note also that Zipkin's comments, dated January 20, 1989, on the Early 1988 Evaluation refer to the Cohen/Quidley incident which took place during the period covered by the Late 1988 Evaluation. Give the incongruous nature of his statement, which clearly relates to this incident, discussed in greater detail below, we find that his comments were motivated by anti union animus directed against Johnson.

We also note that Johnson was promoted and assigned to the work site of her choice by Zipkin with the recommendation of Prager at a time when she was active in the Union in 1987. Merely because these individuals did not act in a hostile manner

at all times, does not mean that they may not have acted in a hostile manner at some later date. Their earlier favorable treatment of Johnson is, however, one factor which we take into account when considering the Union's claims.

We conclude that the City, through the testimony of its only witness, has admitted that Zipkin harbors anti-union animus towards Johnson. The Union still bears the burden of proving that anti-union animus was the motivating factor for Prager's "satisfactory" evaluation of Johnson and when it has, the burden is on the City to demonstrate that it would have taken the same action in the absence of Johnson's protected conduct.

Task No. 1

Task No. 1 addresses the SPO's skill in administering and overseeing her subordinates. In the Early 1988 Evaluation, Johnson was highly praised for her organizational skills and the controls she established for her subordinates. Prager testified that Johnson worked under poor and very difficult circumstances.

The comments on Johnson's Late 1988 Evaluation were less favorable. They could hardly, however, be characterized as overly critical of Johnson's organizational skills. The evidence adduced in the hearing points to a perception by Prager that Johnson's controls were lax during the period covered by the Late 1988 Evaluation. Prager also felt that the circumstances under which Johnson worked had improved and that she was supervising

fewer employees. The Union argues that the greater length of the Early 1988 Evaluation demonstrates that Prager found it easier to praise rather than criticize Johnson.

There is no evidence, however, that anti-union animus played any role in Task No. 1. It may be, as the Union infers, that a precipitous, sudden drop in Johnson's evaluation in this task given the paucity of detail in the Late 1988 Evaluation, may not be warranted. But it is not the function of this Board to second-guess the City's exercise of its managerial prerogative to evaluate its employees when there is no link to an improper practice; "satisfactory" may be the appropriate rating for Johnson's performance of the Task No. 1 in the eyes of Prager. Based on the evidence submitted and all reasonable inferences that can be drawn from it, we find that the Union has failed to establish a prima facie case of improper practice with respect to the evaluation given Johnson on Task No. 1.

Task No. 2

The parties do not dispute the basis for the discrepancies between the Early 1988 Evaluation and the Late 1988 Evaluation for Task No. 2. In the Early 1988 Evaluation, Johnson received kudos for the training sessions she began on her own initiative. The evaluation notes Johnson's awareness of the importance of training and the "quality time" she spent with her subordinates.

During the period covered by the Late 1988 Evaluation, an

issue arose over the inadequate training POTs received. Prager, as is clear from the record, was under pressure to see that more training be given. As she admitted, however, she never specified the kind of training which Johnson was expected to provide.

Johnson admitted she did not believe it was her function, as an SPO, to provide formal, structured training to POs and POTs. Rather, she felt that the burden was on the upper levels of management to provide training. Prager's requests over training came to the fore after an arbitration hearing concerning the training of POTs.

We note, as we did with respect to Task No. 1 supra, the precipitous drop in the rating received for Task No. 2. The explanation given by the City through Prager is that she spoke to all of her SPOs about their training obligations in light of the recent arbitration. She did not single out Johnson for these instructions. The record is void of any evidence that other SPOs rebuffed Prager on the issue. Thus, it appears that the rating and evaluation for Late 1988 represent a fundamental divergence between Prager and Johnson on the role of an SPO. Thus, even if hostility was felt towards Johnson for her role as a union activist, there was a legitimate business motivation for the evaluation given to her for Task No. 2.

Task No. 3

The parties do not dispute the underlying basis for Johnson's evaluation on Task No. 3. Although Johnson may have disagreed with the Department's policy on mandatory incarceration during the period covered by the Early 1988 Evaluation, she did not openly object to it until the period covered by the Late 1988 Evaluation. There was no dispute that some of her subordinates did not recommend incarceration for probation violators when under Department policy, they were required to. The Union argues that Johnson was unaware that the policy was a "cardinal" rule but when she found out that it was, she agreed to abide by it.

Once again, the evidence received with respect to the evaluation for Task No. 3 indicates a fundamental difference between Johnson's philosophy of under what circumstances probation should be revoked and the Department's. The right to disagree with such a policy is not protected by the NYCCBL which reserves to management the right to determine such fundamental questions of policy. Moreover, there is no evidence that the lowering of the rating was a facade for anti-union animus. Whether management could have more reasonably lowered Johnson's rating one rung on the rating scale or not lowered it at all is an issue beyond the perview of this Board. There is no evidence that "satisfactory" was an inappropriate rating for Johnson's performance of the task nor that the lowering of the rating was

tainted by Zipkin's anti-union animus.

Task No. 4

The crux of the Union's case with respect to the alleged improper practice against Johnson is the evaluation which Prager wrote for Task No. 4. The comments on the Early 1988 Evaluation remark favorably on Johnson's allocation of time and work among her subordinates and her evaluations of P.O.s' work.

The Late 1988 Evaluation, on the other hand, notes "there have been times when [Johnson] has been adverse to disciplining members of her unit." Significantly, it also notes Johnson's success in improving a PO's attendance and her ability to evaluate the performance of her subordinates and work "to strengthen their weaknesses."

Both parties agree that the Cohen/Quidley incident was, at least in part, the basis for the evaluation. At Zipkin's request, Prager asked Johnson to discipline two of her subordinates for committing an act which Johnson did not witness. Johnson orally warned them that future violations of the policy against purchasing food and bringing it back to the office could lead to their termination. She summarized her meeting with the offending POTs in a memorandum that she asked them to sign.

She was also requested to prepare a report for Prager, at Zipkin's request. In the report, she noted that both POTs had testified in an arbitration only two days before the alleged

violation and that their being disciplined would have a bad effect on morale. Prager told her to change her report and she refused. Prager reported her action to Zipkin who commented on Johnson's "adversarial" manner.

Prager testified that this was one of the incidents in which Zipkin asked her to be tough and put pressure on Johnson. Almost two months later, Zipkin reprimanded Johnson for insubordination. The reprimand was later changed to a warning.

Two other SPOs testified that they had never been asked to "write up" subordinates who had breached a rule or, for that matter, write up subordinates for an offense that they had not witnessed. They also testified that they had never heard of any SPO being asked to, in effect, discipline an individual for an act that they had not seen. In light of the credibility of these witnesses, and the failure of the City to rebut in any way this claim, we take this testimony to be true.

Given the open animosity that Zipkin had shown to Johnson on a number of previous occasions, as testified to by the City's witness, and the disparate treatment to which Johnson was subjected with respect to the Cohen/Quidley incident, we find that the Union has satisfied its burden of proof in establishing a prima facie case of improper practice. Moreover, given the apparently unique instance of a supervisor being forced to "write up" employees concerning an incident which the supervisor did not observe, and then being disciplined for not preparing an

appropriate report, the Union has successfully rebutted the City's claim that it would have taken the same action even without Zipkin's anti-union animus.

We find, without commenting on the initial enforcement of the "no food" rule promulgated by Zipkin, that the subsequent pressure applied to Johnson by Prager at Zipkin's command was an attempt to provoke an act of apparent insubordination. Such behavior on the City's part cannot form the basis for an evaluation of an employee. To do so, would give credence to underhanded and sharp practices which violate the NYCCBL.

This case is similar, in many respects, to John Mulvey and Board of Education of the City School District of the City of New York, 22 PERB ¶4537 (1989). In Mulvey, the Administrative Law Judge found that the employer had committed an improper practice where it was shown that although actions committed by an employee might have formed the basis for a reprimand, they were only discovered as the result of an action which constituted an improper practice. Thus, while the evidence which formed the basis for a reprimand might have stood on its own, because it was the fruit of an improper practice, the reprimand could not be permitted to stand.

An act of insubordination can form the basis for a lower evaluation. However, the circumstance and facts proven to us show that Johnson was deliberately baited and bullied in a scenario orchestrated by Zipkin for improper reasons.

The City also relies on Johnson's failure to support the evaluations of her subordinates with documentation as another basis for the lower rating on Task No. 4. We note that this basis does not appear on the Late 1988 Evaluation. Johnson admitted during the hearing that she has trouble documenting her evaluations and this is a situation which existed during the period covered by the Early 1988 Evaluation. She was not, however, given a lower rating at that time.

With respect to the second aspect of Task No. 4, the City is entitled to set standards with respect to how its employees are evaluated, and Johnson has accepted these standards. Regardless of the City's anti-union animus, this criticism does not appear to be solely aimed at Johnson because of her union activities.

Overall Evaluation

The overall evaluation is, in part, a function of the evaluations of the other tasks. Prager, in the Late 1988 Evaluation, noted problems with Johnson's "perception of the role of the supervisor," which we believe refers to Johnson's handling of the Cohen/Quidley incident. As we have already found, the treatment of Johnson with respect to this incident constitutes an improper practice. To the extent the overall evaluation is tainted by this improper practice, it, too, constitutes a violation of NYCCBL §12-306a(3).

Continued Acts of Harassment -- Prager's Requests for Information

The Union also alleges that the City has continued to harass Johnson through Prager's continued requests that Johnson justify her subordinate's work. At least one of the requests in the past, that relating to PO Kovics, was prompted by Zipkin who asked Prager to put pressure on Johnson.

With respect to the Kovics request, we find that the Union has established a prima facie case of improper practice. It appears that but for Zipkin's request, the request for an audit of Kovics' work would not have taken place. We find that this constitutes an act of harassment which was motivated solely by Zipkin's anti-union animus

However, with respect to the rest of the requests for information, the record does not support a contention that each of the incidents was the product of an improper practice. A superior may reasonably ask that her subordinates oversee other employees in a more thorough manner. Prager's actions also do not appear to be unprecedented.

Conclusion

Accordingly, we find that the City has committed an improper practice by giving Johnson a rating of "satisfactory" on Task No. 4 to the extent that the reduction of her rating on that task was based on her handling of the Cohen/Quidley incident. Moreover, to the extent the reduction in her overall rating was also based

either on Task No. 4 or, independently on Johnson's handling of the Cohen/Quidley incident, it also constitutes an improper practice. We also find that Zipkin's request to Johnson with respect to justifying the work of PO Kovics constitutes an improper practice. Accordingly, the City is directed to reevaluate Johnson in light of this decision.

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, granted to the extent that the Union has alleged that the City's evaluation of Johnson on Task No. 4 and its overall evaluation on the Late 1988 Evaluation and the harassment of Johnson in dealing with PO Kovics constitute an improper practice, and it is

FURTHER ORDERED, that the City reevaluate Johnson in light of the instant decision of this Board and that as a result of such reevaluation, should Johnson be entitled to any merit increase or other increase in benefits and wages, that such increase be granted to Johnson retroactive to the earliest date she would have been entitled to the increase had she been evaluated without the City committing an improper practice, and it is

FURTHER ORDERED, that the City cease and desist from harassing Johnson in the manner described herein.

Dated: New York, New York
January 22, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD SILVER
MEMBER