L.1087, DC37 v. NYFD, 45 OCB 50 (BCB 1990) [Decision No. B-50-90 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between- DECISION NO. B-50-90

LOCAL 1087, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, DOCKET NO. BCB-1158-89

Petitioner,

-and-

NEW YORK CITY FIRE DEPARTMENT,

Respondent.
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DECISION AND ORDER

On April 18, 1989, Robin Salvatore filed an improper practice petition against the Chief of Communications of the New York City Fire Department ("the Respondent" or "the Department"). The petition alleges that the Department violated Sections 12-306a.(1) and 12-306a.(3) of the New York City Collective Bargaining Law ("NYCCBL")[1] [formerly NYCCBL Sections 1173-4.2 (1) and 1173-4.2 (3)] by reassigning Petitioner Salvatore; by "coercively punishing" him with onerous job assignments; and by denying him access to the telephone and to co-employees.

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[1] NYCCBL §§12-306a.(1) and (3) provide as follows:

> **Improper practices; good faith bargaining.**
> **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;

The Respondent, appearing by the City of New York Office of Municipal Labor Relations ("the City"), filed an answer to the improper practice petition on May 1, 1989.

On May 12, 1989, Local 1087 of District Council 37 ("the Union") filed an amended improper practice petition on behalf of Petitioner Salvatore. The amended petition elaborated upon the initial allegations and it added a new charge of retaliatory discipline. The remedy being sought was a cease and desist order against the Department, and that the Petitioner be made whole.

The City filed an amended answer to the amended petition on May 22, 1989.

On June 21, 1989, a hearing was ordered before a Trial Examiner designated by the Office of Collective Bargaining. The hearing notice defined the issue as "whether Respondent has engaged in conduct which has violated and continues to violate Section 12-306a. of the New York City Collective Bargaining Law as alleged in the petition, as amended, filed herein." The hearing began on October 2, 1989, was continued on October 26, 1989 and January 3, 1990, and was concluded on January 17, 1990. The parties submitted posthearing briefs on April 20, 1990. Thereupon, the record was closed.

Facts

The New York City Fire Department operates a radio repair shop that is located in Long Island City. The shop employs Radio Repair Mechanics who repair the Department's communications equipment in motor vehicles, fire houses and communications centers throughout the City. Radio Repair Mechanics are skilled employees who hold various classes of Federal Communication Commission licenses and certifications.

Radio Repair Mechanic work is divided into two areas. In the first, known as "shop" operations, Mechanics perform equipment repairs within the confines of the Long Island City facility. In the second, known as "field"

operations, Mechanics travel in Department vehicles to different fire houses and communications equipment locations throughout the City. The shop employs a total of eleven Radio Repair Mechanics; eight are assigned to shop operations and three are assigned to field operations.

Only one Mechanic works in the field at a time, however. The three field Mechanics rotate through a three-week cycle, during which they work eight, sixteen hour tours plus a single eight hour tour. Since field coverage is necessary 365 days a year, a certain amount of premium pay for weekend and holiday work is automatically built into the schedule.

In 1974, three of the shop's Mechanics filed a grievance alleging that premium pay was being unequally distributed. It was resolved by order issued by the then-Assistant Chief in Charge of the Division of Fire Communications. The order became known as "the Field Agreement." It reads as follows:

> 1. I have reviewed the grievance submitted by Radio Mechanics Knipenberg, Salvatore, and Jackson. In connection with this grievance I have also met with Radio Mechanics representing the Field Operation (FO), and the Shop Operation (SO), as well as with Mr. G. Sepich of Local #3. I have carefully studied the file and surveyed other Agencies with similar functional needs.
>
> 2. I have come to the following conclusions:
>
> > 2.1 The primary pay schedule is based upon the [shop operation pay scale] with premiums and differentials accruing to [field operation] assignments. This is the nature of the job, and is available to [senior] Mechanics of the radio section.
> >
> > 2.2 It is therefore logical that those Mechanics with less seniority are paid on the base schedule until such time as openings occur in the [field operation].
>
> 3. To insure the operation of the system:
>
> > 3.1 The Division of Fire Communications will indicate the number of men required for the [field operation] and the number of men required for the [shop operation] in accord with the needs of the Dept.
> >
> > 3.2 In all cases of shortages of personnel the [field operation] shall be maintained at full strength.
>
> 4. Opportunities occur from time to time to cover vacations or illness in the [field operation] and assignment to such duties shall be as follows:

4.1 [Senior] [shop operation] members will be notified of the schedule to be filled.

4.2 Each other man will be notified on a seniority basis until the assignment is accepted by a [shop operation] Mechanic.

4.3 In any event, the [junior] [shop operation] member must accept the assignment to provide the temporary coverage.

4.4 A pattern indicating refusal by a member of the [shop operation] to accept such temporary assignments will preclude such member from permanent assignment as vacancies occur.

5. Scheduling and assignment of members is within the responsibilities of the Radio Supervisor within the guidelines established.

6. This Division will continue its efforts to institute a 7 day [shop operation].

Petitioner Salvatore has been employed as a Radio Repair Mechanic for the Department for seventeen years. During much of this time he has served as Union shop steward. Since 1986, he also has been Vice President of Local 1087. In July of 1989, he relinquished his shop steward position to Arnold Schoenbrun, a co-worker, but he retained the Union office of Vice President of the Local.

For a twenty-one month period, between 1981 and January of 1983, the Department provisionally appointed Petitioner Salvatore to the managerial position of acting Shop Supervisor. He gave up his Union position during this time.

In 1982, Domenick Favuzza applied for a position of Radio Repair Mechanic. Part of the hiring process included a pre-employment interview with then-acting Shop Supervisor Salvatore. In August of 1982, Mr. Favuzza was hired as a Radio Repair Mechanic and he worked under the Petitioner's supervision. In January of 1983, the Department returned the Petitioner to his permanent position of Radio Repair Mechanic, and it elevated Mr. Favuzza to the position of Shop Manager. Petitioner Salvatore resumed his duties as shop steward.

Among his other responsibilities as the shop steward, the Petitioner filed grievances with Fire Department officials. Under normal practice, before filing a formal grievance, the shop steward speaks with a grievant's supervisor in an attempt to resolve a dispute informally. Due to the nature of the workplace, usually Domenick Favuzza was the supervisor with whom the Petitioner initially dealt.

When a dispute could not be resolved informally, the Petitioner would file a written Step I grievance with Gearhard Coorssen, the Department's Director of Systems Engineering and Maintenance, at Fire Department headquarters. If still unresolved, the grievance would be filed at the second step with the Department's Director of Labor Relations. The Petitioner made most of the presentations at the Step II hearings on the grievants' behalf. An unsatisfactory Step II decision could be appealed by the Union to the third step, which involved the City's Office of Municipal Labor Relations. Often the Petitioner made the Step III presentations as well.

During the past several years, approximately eight grievances were filed annually concerning various employment practices in the radio repair shop. The majority of these grievances were filed on behalf of Arnold Schoenbrun. Mr. Schoenbrun has been a Radio Repair Mechanic for approximately twelve years. He became shop steward in July of 1989, when the Petitioner relinquished the position to him.

In April of 1987, Glenn Pennington was hired as a provisional Radio Repair Mechanic pending the next civil service examination. He was, and continues to be, the shop employee with the least amount of seniority.

On January 30, 1989, the Petitioner was involuntarily reassigned from the field operations to the shop operations. Mr. Pennington was assigned to take his place in the field. The Petitioner also was assigned to Mr. Pennington's workbench, described by several witness as the least desirable work station in the shop because of its isolation and bad lighting. At the time of the reassignment, the Petitioner was the least senior of the three

Mechanics in the field. The reassignment made him the most senior of any Mechanic in the shop, however.

The Petitioner objected to the reassignment, and he has objected to a number of work rules that he has been subjected to since, including an assignment to rearrange and inventory the stockroom, which he considered out of title work, telephone restrictions, and the denial of a key to the shop entrance. Between January and June, 1989, Mr. Favuzza issued seven written disciplinary warnings to the Petitioner. The first was for turning his radio off while in the field, and the remaining warnings concerned entry omissions from the radio shop log, books, and records. In several of these, the Petitioner was accused of "deliberately trying to harass the Department by your continued attitude and performance," and being up to "shenanigans."

The Union's Evidence

Four current Radio Repair Mechanics testified in the Union's behalf. Each described the nature of his work and recounted some or all of the incidents referred to in the improper practice petitions.

Petitioner Salvatore was the Union's lead witness. He began his testimony by describing his Union activities, and he said that he has processed many grievances over the years on behalf of his co-workers. He told of two specific instances where a departmental official allegedly acted with hostility and ridicule toward him because of his grievance filing activities. On one occasion, as he was presenting a written Step I grievance to Gearhard Coorssen, "[Coorssen] looked at it and got very angry and threw it in the garbage can, hitting the side of the desk." On the other occasion, the Director of Labor Relations allegedly called his grievances "senseless, nonsensical and frivolous."

The Petitioner then discussed the implications of his transfer from the field into the repair shop. He described the 1975 Field Agreement, and explained how the shop seniority system worked. He also explained how he had

enough seniority to be allowed to go from the shop to the field following his 1983 demotion: "When I was knocked off as supervisor, I went back on the bench, and a large reason for my going into the field was to try to distance myself from Domenick because I realized that I hired Domenick and that it would be better for both of us if I tried to keep my distance." Nevertheless, the Petitioner stated that in January of 1989, Shop Manager Favuzza ordered him back into the shop, despite the provisions of the Field Agreement and despite his seniority.

According to the Petitioner, his reassignment to a 40-hour work schedule "cost me $7,000" in lost premium pay:

> "The [Comptroller's] determination has set a Saturday, Sunday and holiday rate which works out to be time and a half. So sixteen hours Saturday or a 16-hour Sunday is paid at time and a half. . . . [T]hat's one of the lucrative aspects of the field."

The Petitioner also explained how the reassignment affected his vacation accrual:

> [I]f I had been on the [field] schedule when I took my vacation for three weeks, I would have been entitled to four days off. So where I took fifteen days vacation, if I had been on the [field] schedule I would only have used eleven vacation days because I would have been entitled to four days off if I took the vacation right after Saturday and Sunday, which is what I usually do. Because I was off the [field] shift, it cost me four more vacation days than if I had been on the shift.

According to the Petitioner, between January 30 and October 2, 1989, he lost a total of twenty-five days' pay, eight vacation days, and one compensation day.

In the Petitioner's view, the reassignment to the shop was only the first step in a series of retaliatory measures that progressively became more onerous. When he reported to the shop, allegedly he was assigned to a work area that no one else wanted because of its isolation. Several weeks later, the Manager assigned him to work in the repair shop's stockroom taking inventory. The Petitioner testified that for six weeks he was forced to work mostly alone in a "filthy, dusty" room with four aisles and shelves stacked

from the floor to the fourteen foot ceiling. He stated that neither he nor anyone else ever had been assigned to perform inventory work for such a long time, and that he considered it out-of-title work for a Radio Repair Mechanic.

The Petitioner also said that the radio installation work that the Shop Manager assigned to him was more difficult and dangerous than anyone else's. He claimed, for example, that it was unusual for one Mechanic to do a cable installation in a vehicle. Yet, according to the Petitioner, he was given a number of installations to perform alone during times when other co-workers were available but were not assigned to help him. As a result, his installation work allegedly was more difficult, time-consuming and physically taxing than anyone else's.

The Petitioner then described the unique close supervision to which Mr. Favuzza allegedly had subjected him. He said that the Shop Manager periodically would check up on him to make sure that he was working, and he would complain if he thought the Petitioner was taking too long to complete an assignment. Allegedly the Manager also closely monitored the Petitioner's break times and meal periods, making sure that he was punctual. Yet, at the same time, overtime allegedly was denied to both him and Mr. Schoenbrun. It was not until after they filed a denial of overtime grievance that the Department allegedly directed Mr. Favuzza to equalize the overtime in the shop and permit the two men an equal opportunity to earn it.

At about the same time, Mr. Favuzza also implemented a strict telephone policy, allegedly applicable only to the Petitioner and to Arnold Schoenbrun. Under the policy, Mr. Favuzza was accused of intercepting and screening their incoming calls. The two men also allegedly were forbidden to make outgoing calls without express permission. As a result, the Petitioner's grievance processing responsibilities assertedly were interfered with, and, on two occasions, important incoming calls were denied to both him and Mr. Schoenbrun.

In addition to the telephone policy, the Shop Manager allegedly tried to

take the Petitioner's and Mr. Schoenbrun's door keys away from them. When they refused to give up their keys, he changed the locks on the doors and gave everyone else keys except the two of them. The result was that they could not get into the building if they arrived for work early, and they had to make a lengthy detour to get back in through the front entrance if they left the building for any reason.

Finally, the Petitioner described the unusual level of discipline that he had been subject to. He said that during his entire seventeen year career with the Department, he had only once before received a written warning. Yet, between January and June of 1989, he was written up seven times for what he regarded as "petty nonsensical infractions." The first one, for example, happened just before his reassignment to the shop, and it was issued because he had mistakenly left his portable radio switched off. The Petitioner explained that his radio had been causing interference with another radio near where he was working, so he turned his radio off and he forgot to switch it back on again. He said that no one before had ever been issued a warning notice for having a radio turned off. He noted that one of his co-workers does not carry a radio, and said that he did not believe he was required to take a radio with him. He received other warning notices for leaving entries out of the shop log, books and records. According to the Petitioner, however, all the Mechanics occasionally omit a date or an entry from the log, and allegedly no other employee has ever received a warning notice for such an omission.

In the Petitioner's opinion, there was a direct connection between the grievances that he had filed and the discriminatory working conditions to which he had been subjected. The City chose not to conduct cross-examination. Thus, there was no direct challenge of the Petitioner's opinion nor of the claims that he had raised.

John Sand, a sixteen-year Radio Repair Mechanic, was the next Union witness to testify. He described the difficulty of radio installation work,

and he said that the work normally required two people. Mr. Sand stated that he has had a key to the shop ever since he began working in it, and that his access to the shop telephone for making and receiving occasional personal calls has never been restricted. He said that he was unaware of the restrictions that the Shop Manager had placed on telephone access.

Concerning shop discipline, Mr. Sand said the issuance of six warning notices to a Radio Repair Mechanic in three and a half months was unprecedented. To his knowledge, no one ever received a warning notice for not having a radio turned on, and, as far as he knew, Mechanics were not even required to carry radios with them. Mr. Sand said that on the occasions when he went into the field, he did not take a radio with him. The witness acknowledged that he too occasionally omitted entering dates in the repair logs. He said that omissions were a fairly common occurrence, and that he knew of no other Mechanic who had been disciplined for such an oversight.

Edward Jackson, a seventeen-year Radio Repair Mechanic, was the next witness to testify. He began by explaining how the shop's logging and recordkeeping system worked. He said that he has occasionally omitted entering information in the books, and that he has never received a warning notice for this mistake. Mr. Jackson concurred that installation and reinstallation work is a dirty job, and one that normally requires two people. He also concurred that work in the storeroom was dirty and unpleasant, and he noted that the Department usually hires outside helpers to do this work. Concerning the telephone, Mr. Jackson said that during the last six months the Shop Manager has been screening incoming telephone calls. His calls always were forwarded with no problem, he said, but he noticed that Mr. Favuzza told callers seeking to reach either the Petitioner or Mr. Schoenbrun to call back during break times or after work.

Mr. Jackson also spoke of his work relationship with the Shop Manager. He testified that once Mr. Favuzza said to him: "I am Sicilian. I never forget, and I always get even." The witness said that that statement made an

impression upon him: "It's something that I never really tried to test. You know, you get the message and you are stupid if you don't take it for what its worth."

Arnold Schoenbrun, a twelve-year Radio Repair Mechanic and current shop steward, testified as a rebuttal witness. He said that the Shop Manager had retaliated against him for filing grievances on several occasions, and he described one instance in detail:

The witness said that in 1988, prior to going on vacation, he submitted a grievance seeking the equalization of flex time. He allegedly was told by Mr. Favuzza that "I am going to teach you a lesson and [the Petitioner] too, if he continues to assist you." Mr. Schoenbrun claimed that when his vacation was over, the Shop Manager ostracized him:

> The day I came back from vacation he said you no longer sit there, you no longer do what you were doing. Your position has been moved over to there, you will sit there, and from now on you will not do anything that you have been doing and you will do nothing but repairs.

The witness alleged that "people who came in and talked to me were warned that they were going to be fired if they continued to talk to me."

In Mr. Schoenbrun's view, the retaliation was caused by Mr. Favuzza's personal involvement with the grievance:

> [H]e said "I don't care about the grievance, but if you mention the fact that I had given Michael Toto or Frankie flex time in the shop, you are in trouble, I assure you." And I said I intend to tell the truth at the hearing and I did.
>
> . . . [Favuzza] told Mike what I said about the flex time and he said I was probably going to be responsible for taking away his privileges and he tried to get him to hate me and a few other people, and that's when he says, "Now I am going to get even with you."

Concerning the assignment of the shop's most junior Mechanic to the field, Mr. Schoenbrun insisted that the Shop Manager knew that he, among others, had wanted to work in the field. Instead, "he put Glenn Pennington

out there when he knew that I wanted to go. I was the first man he should have asked, the top senior man available for the field." The witness later conceded, however, that he thought that it was unsafe for one person to "drive at night around certain areas of this City, or stay in the shop alone with the door locked," as would be required of a Mechanic doing field work.

The City's Evidence

The City presented three witnesses in its behalf. Domenick Favuzza recounted how he had been hired as Radio Repair Mechanic and how he replaced the Petitioner as the Shop Manager. He said that he received a commendation in 1986 after he rearranged the shop and developed a procedure for reducing the amount of parts on hand to keep down inventory costs. He discussed the purpose and the need for accuracy behind the shop's recordkeeping system, and he said that the Petitioner's recordkeeping was "very poor."

Mr. Favuzza then described the nature of field work, and he said that licenses and qualifications were the criteria that he uses for assigning Mechanics to work in the field. He said that there were times when he did not feel that the field was being covered efficiently, and that was why he wanted to "have a back up for emergency purposes." He stated that "everybody's attitude is they don't care to go out in the field on a steady diet." He maintained that he sent Mr. Pennington into the field for training "because he was eager, had the willingness to go out there and work, and was conscientious and I felt this was the man I would like to have trained to work as backup man." The witness stated that he had scheduled Mr. Pennington's field training to last for one year, at which time he planned to send the Petitioner back to the field. He explained that he selected the Petitioner for assignment to the shop because he was the only one of the field Mechanics who had shop experience. He also said that when he made the assignments, he did not realize Mr. Pennington would be going on vacation the day after he was assigned to the field.

The Shop Manager denied demeaning the Petitioner or creating oppressive working conditions for him. He said that he assigned him to do installation work alone only when the shop was especially busy or when a vehicle being worked on was so small that two men would get in each other's way. He also insisted that all the shop Mechanics, at one time or another, had been assigned to work in the stockroom.

Mr. Favuzza defended the shop's telephone policy as reasonable and even-handedly applied. He estimated that the Petitioner and Arnold Schoenbrun received approximately seventy percent of all incoming calls, implying that this could explain why they felt that they were bearing the brunt of the policy's restrictions. Regarding the shop keys, the Manager said that he restricted possession of keys for security reasons, stating that "the less keys I felt were out there, I felt it would be better for the shop."

Mr. Favuzza initially testified that he had little to do with the handling or the resolution of grievances. Under cross-examination, however, he acknowledged that he was involved in the processing of all grievances, to some degree, throughout all the steps. Other serious contradictions in the witnesses' testimony also came to light. Mr. Favuzza alleged that his main rationale for assigning Mr. Pennington to the field was to gain experience repairing transmitters. However, subsequently the witness acknowledged that the shop contained three transmitters that occasionally required work, yet he did not specifically assign their repair to Mr. Pennington as a means of giving him experience before transferring him. In addition, when asked why he did not, instead, temporarily assign Mr. Pennington to the field to fill in and gain experience when another field Mechanic was sick or on vacation, the witness answered that "I couldn't take that chance until I was sure that he was able to handle himself." Earlier, the Shop Manager said that he specifically asked each shop Mechanic whether he would consider being reassigned to the field. Yet when pressed, he acknowledged that he never consulted with Mr. Schoenbrun. Instead, he claimed alternately that he did

not think that Mr. Schoenbrun was qualified or he did not think that he would accept the assignment.

The witness also acknowledged discrepancies in various office policies. He acknowledged giving the Petitioner a number of difficult radio installations to perform alone, even though other Mechanics were available to help him. He admitted specifically instructing his secretary not to give incoming calls to the Petitioner or to Mr. Schoenbrun, nor to allow them to make calls without his permission. He acknowledged giving keys to other Mechanics not doing field work after the locks were changed, even though initially he said that he took their keys away because people who were not working in the field did not need them. Finally, he said that he made a policy decision to issue more warning notices to the Mechanics in 1989, yet he was unable to show that anyone other than the Petitioner or Mr. Schoenbrun had actually received them.

The City's second witness, Gearhard Coorssen, the Department's Director of Systems Engineering, testified that he approved of the Petitioner's reassignment to the shop. He said that "we needed backup training . . . we needed somebody willing to work a sixteen-hour schedule," and he agreed with Mr. Favuzza's assessment that replacing the Petitioner with Mr. Pennington "was the most efficient way to do it."

Mr. Coorssen admitted throwing a grievance brought to him by the Petitioner on the floor and stepping on it, but he said that "in the context" it was "all part of a monkeyshine." He further explained that "because I have known Mr. Salvatore for many years, I have been friendly with him because he was Shop Manager at one point and we went back a few years. So I didn't think this would be taken poorly by him. But apparently it was."

The City's final witness, Franklin DeFiore, is an Assistant Electrical Engineer for Purchase of Fire Communications. His office is located in the Department's radio repair shop. He has no supervisory responsibility over the Petitioner or Mr. Schoenbrun or any other Mechanic. Mr. DeFiore said that, in

his opinion, personal animosity between the Petitioner and Mr. Favuzza, and the Petitioner's resentment of Mr. Favuzza replacing him as Shop Manager, was the actual cause of the Petitioner's improper practice charges. He said he thought that Mr. Favuzza had done a good job as supervisor.

Mr. DeFiore knew of the shop's telephone policy, and he said that "there have been several occasions when Mr. Schoenbrun has been on the telephone and he is very loud and very boisterous and very disruptive. And there have been several occasions where I have asked him to leave the room or to quiet it down so other people could work." He said that Mr. Pennington's paperwork is "done well" and "he seems to have a good attitude," whereas the Petitioner's information is often logged "in a disorderly manner." He also said that Mr. Schoenbrun "for sometime now has not had a good attitude about working," and that "he seems to take issue with every command that Mr. Favuzza has given him."

Mr. DeFiore admitted that he felt the Petitioner sometimes was overzealous in his union activities. He also could recall no other Radio Mechanic being assigned to work in the stock room for six weeks, and he admitted that the Petitioner was covered with dust and dirt when he was performing that work.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union contends that the Petitioner was arbitrarily and discriminatorily retaliated against by the Manager of the radio repair shop because of his Union activity. According to the Union, it has proved that, as shop steward, the Petitioner filed and processed many grievances on behalf of his co-worker, Arnold Schoenbrun, and it has shown that the grievances increasingly were directed at the Manager's personal conduct. As a result of being the focus of the grievances, the Union alleges, the supervisor reacted

with hostility and with retaliatory intent.

According to the Union, the Manager expressed his anger at the grievance activity by embarking on a course of conduct designed to punish the Petitioner. This punishment allegedly was manifested by the Petitioner's involuntary reassignment from the field to the shop, causing him to lose premium pay income of approximately $7,000 per year, and by assigning him to a workbench location that allegedly isolated him from his co-workers. The Union notes that while the City contends that the Petitioner's field job was given to the most junior Radio Mechanic, allegedly so that the junior employee could be trained to work on transmitters, in fact, that employee went on vacation the day after he was assigned to the field. It also observes that the junior Mechanic was not assigned to repair any of the three transmitters located in the shop prior to his assignment to the field. The Union further points out that the assignment of the most junior Mechanic to a field job was contrary to the Department's ordinary practice, as evidenced by the 1974 Field Agreement. Therefore, the Union argues, the City's explanation for the reassignment was pretextual, as the new Mechanic actually received only seven hours of transmitter work during the entire six months that he spent in the field. The Union further alleges that the Manager's assertion that the reassignment was temporary was an afterthought, noting that the Department produced no documentation to support its claim that it was to be temporary at the time the transfer was made.

In addition, the Union contends that the Petitioner's supervisor intentionally designed special work rules to interfere with his union activity as shop steward and Local 1087 vice president. It also claims that the supervisor harassed him by issuing bogus disciplinary warnings and by giving him repugnant work assignments. The Union concludes by arguing that every explanation offered by the City justifying the Manager's conduct subsequently was shown to be either pretextual of false.

Respondent's Position

In the City's view, the improper practice charges should be dismissed because the Union failed to meet the City of Salamanca standard previously adopted by this Board.[2] Although the City initially agrees that the Department knew of the Petitioner's union activity:

> The City herein does not refute the fact that Mr. Favuzza knew of Robin Salvatore's dif-ferent positions within the Union over the course of many years. Nor does the City contest the fact that Mr. Favuzza knew about Mr. Salvatore's participation in various grievances, which involved, principally, Arnold Schoenbrun,

it disputes the allegation that the Shop Manager or the Fire Department was motivated by anti-union animus. To the contrary, the City maintains that the Department acted for a valid business reason, and it contends that the Union has not supplied any evidence to disprove the legitimacy of its action.

The City notes that both the Petitioner and the Shop Manager worked in the same place for seven years. It claims that the Petitioner's reassignment could not have been the result of a sudden union animus, because there was no unusual change of circumstances involving any union activity that would have caused the Petitioner's supervisor to retaliate against him.

According to the City, the Shop Manager did not hold any anti-union sentiment over the number of union grievances filed, or against any union members. It maintains that his only concern was that he not be attacked personally. In the City's view, Mr. Favuzza took issue with anyone who told him how to act, regardless of their status or affiliation. Thus, the City concludes, the supervisor's motivation was based upon personal differences, and not upon the processing of grievances. As such, anti-union animus was not a motivating factor in the decision to reassign the Petitioner to the shop, and the reassignment did not constitute a statutory violation.

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[2] The City refers to the standard employed by the PERB in City of Salamanca (18 PERB ¶3012 [1985]) and adopted by this Board in Decision No. B-51-87.

In the alternative, assuming the Union has established a prima facie case of improper practice, the City contends that legitimate business needs existed, and they explain the actions taken by the Shop Manager. The City maintains that the Department's supervisors have the authority, under Section 12-307b. of the NYCCBL (the statutory management rights clause)[3] to assign employees to particular job duties, subject only to external law and restrictions in the unit agreement. It claims that any monetary loss allegedly suffered by the Petitioner was for overtime or premium pay, and it insists that management alone retains the prerogative to determine the assignment of personnel and the distribution of overtime. Moreover, the City asserts that the Shop Manager acted for legitimate business reasons, and it maintains that the Petitioner's reassignment to the shop simply was a one-for-one exchange of work stations with another Radio Repair Mechanic. The City denies that there was an attempt to ostracize the Petitioner from his co-workers.

With respect to the 1974 Field Agreement, the City maintains that the order permits the temporary reassignment of a field Mechanic for the purpose of training a backup field Mechanic, and that when a vacancy occurs, it should be filled by seniority and ability to perform the job. The Shop Manager allegedly chose Mr. Pennington because he was the most willing to work the

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[3] NYCCBL §12-307b. reads, in pertinent part, as follows:

> It is the right of the city, . . . acting through its agencies, to . . . direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work.

full sixteen hour shift alone. The City claims that it was under no obligation to train Mr. Schoenbrun because of his clear intent to break the one-man field assignments. It also asserts that Mr. Schoenbrun's claim that he should have been trained ahead of Mr. Pennington under the Field Agreement is more appropriately left to the arbitral forum.

The City maintains that the telephone policy was intended to limit employees' use of the telephone, and allegedly the policy was designed in response to the Manager's perception that the Mechanics were abusing their telephone privileges. It contends that the policy equally applied to all employees in the shop, and it argues that the only way that the policy could be enforced was by screening calls.

Finally, the City denies that the Petitioner was "set up" for discipline. It contends that his record-keeping deteriorated after he returned to the shop on a full time basis, and it further notes that the Electrical Engineer had asked the Shop Manager to speak to all the shop Mechanics about omissions in their paperwork. The City supports the Manager's decision to increase the use of supervisory conferences as a necessary stronger method for correcting an ongoing problem; one that allegedly got worse after the Petitioner was reassigned to the shop.

The City concludes that it has met its burden of providing legitimate business reasons for the Department's actions, and it contends that the improper practice petition filed by the Union should be dismissed in its entirety.

DISCUSSION

When an improper practice petition involves alleged violations of Section 12-306a.(1) and (3) of the NYCCBL, we apply the test adopted by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985). As we have noted, this test is substantially the same as that set

forth by the National Labor Relations Board in its 1980 Wright Line decision,[4] and endorsed by the United States Supreme Court in National Labor Relations Board v. Transportation Management Corporation.[5] We first applied the Salamanca test in Decision No. B-51-87, and we have employed it consistently since then.[6] The test provides that in such cases, the petitioner has the initial burden of showing 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.

Once that has been done, the employer must present uncontroverted testimony and evidence that attacks directly and refutes the evidence put forward by the Union, or it must put forward evidence, unrefuted by the Union, that it had other legitimate and permissive motives which would have caused it to take the action complained of even in the absence of the protected activity.

The Evidence

The first prong of the Salamanca test is not in issue here. The City acknowledges that the Department "knew of [the Petitioner's] different positions within the Union over the course of many years" and that it knew of his "participation in various grievances." Thus, knowledge of the Petitioner's union activity is satisfied.

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[4] Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169, enforced, 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), cert. denied, 455 U.S. 989, 109 LRRM 2779 (1982).

[5] 103 S.Ct. 2469, 113 LRRM 2857 (1983).

[6] Decision Nos. B-24-90; B-4-90; B-3-90; B-61-89; B-36-89; B-28-89; B-25-89; B-17-89; B-8-89; B-7-89; B-1-89; B-46-88; B-12-88; B-3-88; and B-58-87.

Proof of the second element of the test, i.e., whether the Petitioner's union activity was a motivating factor in the employer's decision to act, requires that we try to ascertain the employer's state of mind when it made the challenged decisions. In the absence of an outright admission of improper motive, proof of this element necessarily must be circumstantial. Upon careful examination of the record herein, we are convinced that the Union has met its burden of showing that the Petitioner's processing of unit grievances, particularly in Mr. Schoenbrun's behalf, was the principal motivating factor behind the Shop Manager's decisions to transfer the Petitioner from the field to the shop, to take disciplinary action against him, to give him unpleasant work assignments, to deprive him of shop keys, and to obstruct his telephone privileges. We note that the City, itself, appears to concur partially with our finding by observing that "Domenick Favuzza takes issue with anyone who tells him how to act or proceed."

Managerial Rights

On their face, personnel actions, including employee transfers, job assignments, promulgation of certain workrules, and imposition of discipline, generally are matters within management's statutory prerogative to direct its employees and to determine the methods, means and personnel by which government operations are to be conducted.[7] As such, they are not normally reviewable in the improper practice forum. However, the exercise of managerial authority may give rise to an improper practice finding if it can be shown that it was used as a pretext for interference with an employee's rights under the NYCCBL.[8]

The City argues that the Department had the managerial authority to

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[7] NYCCBL §12-307b. (the statutory management rights provision), supra note 3.

[8] Decision Nos. B-16-90; B-61-89; B-3-88; B-3-84; and B-25-81.

reassign the Petitioner, and if it violated the Field Agreement, the claim should be left for an arbitrator to remedy. The charge here, however, is not that the Department violated the Field Agreement, but that in transferring the Petitioner and in other specified acts affecting his working conditions, the Department violated the NYCCBL. That is a matter properly within this Board's jurisdiction and not that of an arbitrator. On this issue, the explanations of the Shop Manager were largely self-serving and were not credible.

The Petitioner's Transfer and Objectionable Work Assignments

The record discloses numerous shifting and conflicting reasons given by the Manager to justify the Petitioner's transfer. First he said that he chose the Petitioner because he had "recent bench experience" and the "ability to work on the different equipment." When it later developed that the "recent experience" occurred six years earlier, the Manager revised his explanation by stating that he wanted the Petitioner back in the shop to give him training "on Micor radios." The Manager also initially claimed that he wanted Mr. Pennington in the field to train him for transmitter work. Yet, the junior Mechanic's field training on transmitters was minimal, and he could have been trained in the shop on its own transmitters, or he could have been assigned as a backup field Mechanic for additional training, if necessary, instead of being designated as the Petitioner's permanent replacement. Moreover, despite the long-standing requirement that the field operations were to be "maintained at full strength," the record shows that Mr. Pennington went on vacation immediately upon being reassigned, leaving only two Mechanics in the field -- one less than the normal complement of three, and one less than before the transfers were ordered.

The Shop Manager further tried to justify the Petitioner's reassignment because his "recent bench experience" would avoid a backlog in the shop ("I didn't want to run into a problem where I would start having equipment back up on me and causing me to have to give out overtime."). Yet, the Petitioner

inexplicably was required to be away from his bench for six weeks after being ordered to inventory equipment in the storeroom. Several witness confirmed that this work was abnormal, dirty and physically taxing. The record also clearly shows that the Petitioner was more closely supervised and received less help with installation work than anyone else. Thus, the Manager's own testimony indicates that the legitimate business reason, put forward in defense of the Petitioner's transfer, was a pretextual justification.

Disparate Discipline

During the first six months of 1989, the Petitioner received seven separate disciplinary write-ups. Two witnesses said that this was unprecedented. The Petitioner testified that his work habits had not changed, and that previously he had received only one written warning during his seventeen years of employment by the Department.

The Shop Manager sought to justify the discipline by stating that he made a policy decision to issue more warning notices in 1989: "[1989] has been the first year that I handed out quite a bit. Prior to that, never," and that he issued them to other shop Mechanics beside the Petitioner. Yet, although the Manager claimed that he had filed other write-ups, and although the Hearing Officer requested that copies be produced, no evidence was ever offered to support this claim. We find, therefore, that, in this respect too, the reasons offered to justify the imposition of discipline were pretextual and that the Petitioner suffered disparate disciplinary treatment.

Telephone Privileges

The Shop Manager initially testified that private telephone usage was "very disruptive" and that it "interferes with work." Yet, he later admitted that his new telephone rule was selectively enforced against the Petitioner and against Mr. Schoenbrun, and that he screened only their calls. Although the Manager tried to explain that these men were responsible for most of the

non-business related calls, it became clear that the majority of their calls concerned grievance processing and other union-related matters. The Petitioner's unrefuted testimony that he witnessed a co-worker, in the Shop Manager's presence, make a call "to Art Linkletter [that] everybody, including, Mr. Domenick Favuzza, thought was very funny," and shop Mechanic Sand's statement that he was unaware that a new telephone policy even existed, further evinces the policy's selective enforcement.

Shop Keys

In comparison, the deprivation of the Petitioner's and Mr. Schoenbrun's shop keys, under other circumstances, may have seemed minor. However, the act contributed to the prevailing pattern of disparate treatment imposed upon these two men by the Shop Manager. The Manager initially gave the impression that he tried to restrict everyone's possession of keys for security reasons. Yet he later admitted that all the shop's employees once had keys, and that after he changed locks, he reissued keys to every Mechanic except the two people most closely associated with union activity. The Shop Manager was unable to give a credible explanation for the disparity.

Anti-union Environment

The record contains at least two credible instances where open hostility toward protected union activity was projected or communicated: The first of these occurred when the Petitioner handed a written grievance to the Department's Director of Systems Engineering. Both the Director himself and the Petitioner testified that as the Director received the grievance, he threw it on the floor and stepped on it. Several Department employees witnessed this event, and the Petitioner attributed the act to the Director's "stiffening attitude toward me."

The second instance concerned the Shop Manager's complaint to the shop's Electrical Engineer that the Petitioner would file and process any grievance

raised by Mr. Schoenbrun. The Engineer, described unconvincingly by the City as a "non-party witness," confirmed that he too believed that the Petitioner was overzealous in his union activities.

Based upon all the evidence and upon the underlying employment practices in the radio repair shop, we conclude that both Domenick Favuzza, the Shop Manager, and his immediate supervisor, Gearhard Coorssen, the Department's Director of Systems Engineering, were angered by the Petitioner's grievance filings. In particular, we find that, as the focus of the grievances being filed by the Petitioner on behalf of Mr. Schoenbrun shifted to the Shop Manager personally, the Manager's anger manifested itself through a course of retaliatory conduct that was intended to intimidate or punish the Petitioner for performing a legitimate responsibility as shop steward.

We have not ignored the possibility that personal animus could have been involved in this case. The record, however, does not support such a conclusion. Neither the Petitioner nor Mr. Favuzza gave testimony concerning their potential dislike toward one another. To the contrary, the Shop Manager sought to explain all his actions in terms of legitimate business necessities. Only the shop's Purchasing Engineer opined that personal animus could account for conflict between the two men. We do not credit his testimony, however, because it was given by someone who was not directly involved with the men's relationship, and who was outside their chain of command. Had Mr. Favuzza himself testified that he harbored personal animus toward the Petitioner, the Engineer's opinion could have added credence to that account. The Shop Manager never offered such testimony, however.

For all the above reasons, we conclude that the Petitioner's involuntarily transfer from the field to the shop, the disciplinary action taken against him, the objectionable work assignments he received, the deprivation of shop keys, and the obstruction of his telephone privileges, were impermissibly motivated by animus toward protected union activity. We are satisfied that the Union made a prima facie showing that union activity

was a motivating factor behind these decisions, which the City failed to rebut. It did not produce sufficient evidence to show that the Department acted for legitimate business reasons, and that it would have taken the steps that it did even in the absence of protected union activity. Accordingly, we find that these actions constitute an improper practice within the meaning of Section 12-306a. of the New York City Collective Bargaining Law.

Therefore, with respect to the Petitioner and to Mr. Schoenbrun, we shall order the Department to cease and desist from violating the NYCCBL in the manner described herein. With respect to the Petitioner, we shall order all "Supervisor's Conference With Employee" memoranda issued between January 1989 and July 1989 to be expunged from the Petitioner's personnel file. We shall further order the parties to negotiate in good faith and attempt to agree upon the sum of money necessary to make the Petitioner whole for the built-in or scheduled premium pay and vacation time that he lost as a consequence of his reassignment from the field to the shop, and we shall order the City to pay the agreed upon sum of money to the Petitioner as expeditiously as possible. In the event that the parties are not able to reach an agreement within forty-five (45) days of the date of receipt of this decision, the parties may submit the issue of remedial compensation to this Board for determination based upon evidence in the form of affidavits, and upon the record, if any, of any further hearings this Board may deem necessary. We shall retain jurisdiction in this matter until such time as final payment has been made.

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 Fire Department of the City of New York cease and desist from violating the NYCCBL in the manner described herein; and it is further

ORDERED, that the Fire Department of the City of New York expunge from the personnel file of Radio Repair Mechanic Robin Salvatore all "Supervisor's Conference With Employee" memoranda issued between January 1989, and July 1989; and it is further

ORDERED, that the parties negotiate in good faith and attempt to agree upon the sum of money necessary to make the Petitioner Salvatore whole as a result of the built-in or scheduled premium pay and vacation time that he lost due to his reassignment from the field to the radio repair shop; and it is further

ORDERED, that the City pay the agreed-upon sum of money to the Petitioner as expeditiously as possible; and it is further

ORDERED, that in the event that the parties are not able to reach an agreement on remedial compensation within forty-five (45) days of the date of receipt of this decision, they may submit this issue to this Board for final determination.

DATED: New York, N.Y.
September 17, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER