L.1757, DC37, et. al v. City, Levitt, et. al, 45 OCB 67 (BCB 1990) [Decision No. B-67-90 (IP)]

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

-between-

LAMAR McNABB and ASSESSORS, APPRAISERS and MORTGAGE ANALYSTS, LOCAL 1757, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioners,

DECISION NO. B-67-90

-and-

DOCKET NO. BCB-931-86

THE CITY OF NEW YORK, JUDITH A. LEVITT, as PERSONNEL DIRECTOR OF THE CITY OF NEW YORK, and PAUL A. CROTTY, COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION and DEVELOPMENT,

Respondents.
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SECOND INTERIM DETERMINATION AND ORDER

This matter was commenced on December 23, 1986, when Lamar McNabb and Local 1757, District Council 37, AFSCME, AFL-CIO (hereinafter "petitioners" or "the Union") filed an improper practice petition alleging that the City of New York, its Director of Personnel and the Commissioner of the Department of Housing Preservation and Development (collectively referred to as "respondents" or "the City") violated Sections 12-306a(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL") by failing to promote McNabb and other members of petitioner Local 1757 who were on the eligible list and were denied appointments to Associate Mortgage Analyst ("AMA") positions.[1]

[1] This Interim Determination and Order is limited to allegations concerning McNabb, as discussed infra.

The first Interim Determination and Order in this matter (Decision No. B-48-88) was issued because the City, in defense of the improper practice charge, raised an issue of first impression for the Board of Collective Bargaining ("Board"). The City argued, inter alia, that to the extent the Union relied on participation in a lawsuit[2] as an element of proof toward establishing improper motivation, it had failed to state a "case or controversy" within the Board's jurisdiction. Maintaining that a lawsuit brought to enforce rights under the Civil Service Law was not protected activity within the contemplation of Section 12-305 of the NYCCBL,[3] the City sought a Board ruling to

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[2] Matter of Habler v. City of New York, Index No. 15545/85, Sup. Cit., N.Y., Spec. Term, Pt. 1 (10/25/85) (brought by petitioner local on behalf of itself, McNabb, Steve Kaufer, Nestor M. Camacho, Carrie Gadson, and all others similarly situated). Therein, the Union initiated an Article 78 proceeding seeking to invalidate the City's continuing use of provisional employees in the AMA title for periods in excess of nine months, to compel the City to conduct a civil service examination for the AMA title by a date certain and, thereafter, to establish a list from which candidates would be hired to replace all provisional appointees (Union Exhibit A).

[3] Section 12-305 of the NYCCBL provides, in relevant part:

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

that effect. The Board held otherwise.[4]

In addition to the specific ruling set forth in Decision No. B-48-88, the Board directed that a hearing be held before a Trial Examiner in order to establish a factual record from which it may determine whether the denial of promotions to Local 1757 chapter chairperson McNabb and to chapter treasurer Kaufer violated the NYCCBL.[5] If the Union can demonstrate that either or both were rejected for reasons prohibited by Section 12-306a(1) and (3) of the NYCCBL,[6] the Board held, an improper practice may be found. In ordering the hearing, the Board stated:

> [T]he burden is now upon petitioners to establish that the denial of promotions to McNabb and Kaufer was motivated by employer animus related to their participation in the Union

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[4] Decision No. B-48-88 was issued on September 20, 1988. Therein, the Board found that because the lawsuit was brought in the names of the president of petitioner local and interested union members "on behalf of themselves and all others similarly situated" and that the action was "sufficiently related to the employment relationship," the activity was within the scope of employee rights granted under Section 12-305 of the NYCCBL.

[5] For reasons fully set forth in Decision No. B-48-88, the Board limited its consideration of the matter docketed as BCB-931-86, to improper practice allegations concerning McNabb and Kaufer only.

[6] Section 12-306a of the NYCCBL provides, in relevant part:

> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;...
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> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;....

lawsuit, by their activities as chapter officers of Local 1757, or by other union activity [Decision No. B-48-88, at 21-22].

The hearing was commenced on January 18, 1989. At the conclusion of the Union's case-in-chief, the City moved to dismiss the complaint with respect to McNabb. The hearing was adjourned after the parties agreed to submit post-hearing briefs on the City's motion. The submission of briefs was completed on July 27, 1990.[7]

Background

McNabb has been employed by the Department of Housing Preservation and Development ("HPD") in various titles since 1978. Although McNabb was permanently appointed as a Mortgage Analyst from a certified eligible list for that title in 1981, he continued to serve in the title of Assistant Project Development Coordinator ("APDC"), a position he was then holding provisionally, until July 1983. At that time, McNabb took a leave of absence, during which he was terminated from the APDC position. Upon return from the leave later that year, McNabb was reinstated to his current position as a Mortgage Analyst.

There is no dispute that McNabb has been an elected official of petitioner Local 1757 since 1985. According to the Union, respondents became aware of McNabb's union post on June 11, 1985, through a letter he sent to the

[7] In March 1989, counsel for the Union had sought and received permission to reopen the record, based on its stated intention to introduce personnel records (to be obtained from the City by judicial subpoena) concerning other candidates who had been promoted to AMA. In September 1989, the Union withdrew its request to reopen and, thereafter, several extensions of time to submit post-hearing briefs were granted.

Commissioner of HPD concerning an "unsafe" situation at his work site (Union Exhibit G).[8] Therein, McNabb identified himself as a Vice President of petitioner Local 1757 and Chairman of its Mortgage Analyst chapter.

On June 25, 1985, the Union initiated an Article 78 proceeding in which McNabb and Kaufer were named plaintiffs, to compel the City to administer a civil service examination for the AMA title.[9] On January 6, 1986, the court ordered the City to conduct a competitive examination for the title no later than May 15, 1986, and to make appointments from the list of eligibles promulgated therefrom, pursuant to this lawsuit. Accordingly, an examination was held and a list of eligibles was established.[10] McNabb was among the successful examinees and was ranked number seven on a list of eight eligible candidates. Co-petitioner Kaufer was ranked number two.

On August 20, 1986, McNabb, Kaufer and four other candidates were interviewed for AMA positions.[11] The employment interviews were conducted by Inna Schwartz, Lynn Shulman, and Alyce Slosberg, representatives of HPD's offices of Development, Evaluation and Compliance, and Personnel, respectively. On or about August 28, 1986, McNabb was notified by Mark L.

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[8] The City took exception to the Trial Examiner's ruling which permitted the introduction of this evidence.

[9] See Matter of Habler, supra, note 2, at 2.

[10] Among the named plaintiffs in the lawsuit, only McNabb and Kaufer actually took the exam.

[11] The remaining two candidates included on the list of eligibles did not appear for interviews.

Mendelsohn, HPD's Personnel Officer, that he was not selected for appointment or promotion (Union Exhibit J).[12]

Positions of the Parties

City's Position

The City alleges that petitioners have failed to allege facts at the hearing sufficient to support the conclusory allegation that McNabb was not promoted in retaliation for union activity. The City asserts that the Union's offers of proof are wholly insufficient to support an improper practice claim with respect to McNabb, and moved to dismiss the Union's petition for the following reasons:

First, the City submits that the Union has not demonstrated that the four HPD representatives involved in the candidate selection and notification process had knowledge that McNabb ever participated in protected activity. There is no evidence in the record, the City argues, which would support a conclusion that these individuals knew that McNabb was involved in the Article 78 proceeding brought by the Union to compel the administration of the AMA examination. Moreover, the City maintained at the hearing, the Board's finding in Decision No. B-48-88, deeming McNabb's participation in that lawsuit "protected activity," is an error of law and fact (Tr. 35).[13] In this connection, the City argues that because Decision No. B-48-88 was not a final order, it was precluded from seeking judicial review of the Board's Interim

[12] Of the six candidates interviewed for AMA positions, only those ranked number one, three, four and six on the list were appointed.

[13] Page references are to the official hearing transcript.

Determination and Order.[14] The City also stated that it intends to appeal this ruling if and when a final order in this matter is rendered by the Board.

The City further contends that apart from McNabb's participation in the Article 78 proceeding, the Board should not entertain any other evidence offered in support of his involve-ment in union activity. At the hearing, the City argued:

> The sole issue is whether McNabb's participation in that lawsuit, which the Board deemed to be protected activity, which obviously the City disagrees with, led to Mr. McNabb not being promoted off that list ... [Tr. 29].

Beyond having been a named plaintiff in the lawsuit, the City maintained, testimony concerning other "protected activity" is not germane or material to this proceeding. Therefore, the City took exception to the Trial Examiner's ruling which permitted the Union's counsel to elicit testimony from McNabb concerning his union activities on behalf of members of the Mortgage Analyst chapter apart from his participation in the Article 78 proceeding (Tr. 31-36).[15]

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[14] Section 12-308 of the NYCCBL provides, in relevant part:

> **Judicial review and enforcement of a final order of the board of collective bargaining relating to an improper practice.**
>
> **a.** Any order of the board with respect to any improper practice specified in section 12-306 of this chapter shall be ... reviewable under article seventy-eight of the [CPLR] upon petition filed by an aggrieved party within thirty days after service by registered mail or certified mail of a copy of such order upon such party....

[15] In this connection, we note that the City's post-hearing brief is devoid of any reference to protected activity other than McNabb's participation in the lawsuit.

Furthermore, even assuming, arguendo, that McNabb's involvement in that lawsuit was "protected activity," the City contends that the Union has failed to demonstrate that his participation therein was a decisive factor in the employer's decision not to promote him. The evidence offered at the hearing, the City argued, "simply does not establish any improper motivation."[16] The City asserts that McNabb's direct testimony on this point is based on pure conclusion and speculation while the record reveals that the City had proper and sound motives for not selecting him from the list.[17]

In support of its position, the City points out that on cross-examination, McNabb revealed that he had received an undesirable discharge from military service because of a civil conviction in the 1960's (Tr. 69-70) and that his employment history up to the time of the alleged improper practice included performance evaluation ratings of "unsatisfactory" (Tr. 72) and "conditional" (Tr. 73) in 1982 and 1985, respectively. In addition, the City contends that McNabb took a leave of absence in 1983 to avoid a possible demotion from his APDC position (Tr. 72). Finally, the City submits that all of the candidates selected over McNabb ranked higher than he on the list of candidates eligible for appointment to AMA (Jt. Exhibit No. 1).

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[16] City's post-hearing brief, at 8.

[17] The City cites Section 12-307b of the NYCCBL, which provides, in pertinent part:

> It is the right of the city ... to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; ... determine methods, means and personnel by which government operations are to be conducted; ....

Therefore, the City argues, because there is no evidence, other than pure conjecture, which demonstrates either employer knowledge or improper motivation, the petition fails to sufficiently state a prima facia case that McNabb was discriminated against for reasons prohibited by the NYCCBL.[18] Accordingly, the City asserts, "the burden of proof has not shifted, nor can it shift," to the City to come forward with evidence to show that its actions with respect to McNabb were properly motivated.[19]

Union's Position

Petitioners submit that the record clearly establishes that HPD's decision not to promote McNabb (and Kaufer) was motivated by anti-union hostility for their independent and collective union activity.[20] According to the Union, it has demonstrated sufficient evidence to satisfy the applicable legal standard set forth in City of Salamanca.[21]

In support of its position, the Union alleges that during McNabb's two terms in office as a Union official (1985-87 and 1987-89), he has openly represented the interests of his members on matters affecting their working conditions, e.g., issues concerning fire safety (Tr. 27); quality of worklife

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[18] The City cites City of Salamanca, 18 PERB ¶3012 (1985) and Decision No. B-3-88.

[19] City's post-hearing brief, at 10.

[20] Although the City's motion to dismiss is limited to the sufficiency of the petition with respect to McNabb, the Union submits as relevant to the Board's consideration herein, allegations in support of the claimed discriminatory treatment of Kaufer.

[21] 18 PERB ¶3012 (1985).

(Tr. 28); and a particular unsafe situation at his work site allegedly created by a supervisor (Tr. 37).[22] Therefore, the Union claims, there can be no doubt that the employer was aware of McNabb's independent union activity on behalf of HPD's Mortgage Analysts.

In addition, the Union submits, the record establishes that during his tenure as Chairman of the Mortgage Analyst chapter, McNabb was successful in accomplishing his "number one priority,"[23] which was to secure a civil service examination for the AMA title. In this connection, McNabb stated:

> It was my mandate, as it were, from the union constituency to try to secure this exam so they could have an opportunity to advance themselves through promotion, and since the agency had never given an exam in this area, it became quite a task, ultimately forcing the City through a court action, to bring about this change [Tr. 27].

McNabb testified that after informal attempts to persuade the City to voluntarily schedule the exam had failed, he and Kaufer[24] enlisted the participation of other Mortgage Analysts who were willing to be named as plaintiffs in litigation, and the Union filed the aforementioned Article 78 petition, entitled Matter of Habler (Tr. 47-50).

The Union contends that, as a direct result of this effort, the City was ordered to hold a civil service examination for the AMA title and to consider qualified candidates, including McNabb and Kaufer, for permanent appointment.

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[22] As previously noted, the City took exception to the Trial Examiner's ruling which allowed the introduction of this testimony. See Background, supra, note 8, at 5 and City's Position, supra, at 7-8.

[23] Union's post-hearing brief, at 3.

[24] At that time, Kaufer was Treasurer of petitioner Local 1757 (Tr. 123).

According to the Union, of the six eligible candidates interviewed for six available AMA positions, only four candidates were appointed. Significantly, the Union points out, not only were co-petitioners McNabb and Kaufer the only eligible candidates who were considered but not offered a position, but three of the four who were appointed were non-members of the Union (Tr. 60-61). Moreover, McNabb testified, of the provisional employees who continue to serve in AMA titles at HPD, one of them was appointed prior to the lawsuit and should have been replaced by a permanent employee pursuant to the court order (Tr. 45, 63-66).

As for the interview process itself, the Union alleges that McNabb and Kaufer were interviewed in a perfunctory manner, as if the decision to pass them over had already been made. McNabb characterizes his interview as a "schmooz" session, stating that he was "known by the people" and "got the impression [that] there was nothing formal taking place [Tr. 54]." McNabb testified that one of the interviewers (Inna Schwartz) jokingly commented to him, "You actually showed up [Tr. 55]." Furthermore, the Union contends that McNabb underwent no pointed questioning other than an inquiry concerning his previously disclosed civil conviction.[25]

The Union also submits that the most compelling evidence of anti-union animus adduced at the hearing, which the Board must consider in the context of this proceeding, is the testimony of Steve Trynosky, Director of HPD's Soundview Neighborhood Program. Trynosky, who was subpoenaed to appear by the Union, testified the he "spent the better part of a year [1986-87] trying to

[25] Kaufer testified that his interview took less than five minutes (Tr. 127).

hire [Kaufer]" as his Deputy Director but was told by superiors at HPD that "[Kaufer] had been involved in some type of grievance action and therefore would not be an asset to the [Program] [Tr. 87-88]."[26] The Union maintains that, where, as here, it is shown that HPD's action against Kaufer was motivated by open hostility in response to protected activity, the Board properly may draw the inference that HPD was unlawfully motivated to retaliate against another union activist (McNabb).[27] In other words, the Union argues:

> [A]n employer does not have to be found to have formulated the specific discriminatory intent against a particular employee in order to be found guilty of discriminating against that employee where the employer was found to be unlawfully motivated against another union activist.[28]

Based on the foregoing, the Union contends that it has sufficiently established a prima facie case that respondents coerced and discriminated against McNabb and Kaufer in retaliation for their participation in union activity. The Union submits that the Board may reasonably infer from the record, given HPD's awareness of their participation in both collective and independent union activity, the parallels in both timing and circumstance between the two union activists, and the undeniable proof of anti-union hostility as to Kaufer, that compelling evidence exists to support a

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[26] In addition to Kaufer's participation in the Article 78 proceeding, Kaufer testified that he had prevailed on an out-of-title grievance the Union brought on his behalf in 1985 (Tr. 105-6). We note that the City also objected to the introduction of this testimony, based on the same grounds set forth in the City's Position, supra, at 7-8.

[27] The Union cites ARA Leisure Services v. NLRB, 782 F.2d 456, 121 LRRM 2598 (4th Cir. 1986); Accord, Dillingham Marine & Manufacturing Co. v. NLRB, 610 F.2d 319, 103 LRRM 2430 (5th Cir. 1980).

[28] Union's post-hearing brief, at 11.

conclusion that HPD's decision not to promote them was genuinely motivated by reasons violative of the NYCCBL.

Therefore, the Union requests that the City's motion to dismiss be denied and, further, maintains that the respondent now has the burden to show that the same action would have taken place even in the absence of protected conduct.

Discussion

In the instant proceeding, respondent's motion to dismiss is based on the premise that at the close of the Union's case at the hearing, the record as to McNabb is devoid of any facts which would support the conclusion that the conduct complained of was improperly motivated. According to the City, the Union has failed to satisfy the test set forth by PERB in City of Salamanca,[29] and adopted by this Board in Decision No. B-51-87,[30] which requires the petitioner to establish that: (1) the employer's agent responsible for the challenged 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. Therefore, the City argues, because the Union has not established a prima facie case, the burden has not shifted to respondents to come forward with evidence in support of the legitimacy of its actions with respect to McNabb.

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[29] 18 PERB ¶3012 (1985).

[30] See also, Decision Nos. B-24-90; B-4-90; B-3-90; B-61-89; B-36-89; B-28-89; B-25-89; B-8-89; B-7-89; B-1-89; B-46-88; B-12-88; B-3-88; B-58-87.

It is well-settled that, when making a motion to dismiss, the moving party concedes the truth of the facts as alleged by the petitioner.[31] Moreover, in considering such a motion, the petitioner is entitled to every favorable inference that could be drawn from those assumed facts.[32] In its review of a hearing officer's decision to grant a motion to dismiss after the presentation of the charging party's evidence, PERB, in County of Nassau, 17 PERB ¶3013 (1984), stated that such a motion:

> should not be granted without careful deliberation.... We would reverse a hearing officer's decision to grant such a motion unless we could conclude that the evidence produced by the charging party, including all reasonable inferences therefrom, is plainly insufficient even in the absence of any rebuttal by the respondent to warrant a finding that the charge should be sustained.[33]

Applying this standard to the instant matter, for the reasons that follow we are satisfied that the Union's unrebutted account of management's conduct, including all reasonable inferences therefrom, warrants a finding that the charge as to McNabb is sufficient to withstand the motion to dismiss.

Petitioners contend, and we agree, that the record reflects sufficient evidence to impute knowledge of McNabb's protected conduct to the employer's agent(s) responsible for the challenged decision. Had it not been for the actions taken by McNabb and Kaufer, it is conceivable that the competitive examination for the AMA title might still be pending. The City was compelled by court order to hold that examination and the suggestion that the City's

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[31] See e.g., Decision Nos. B-2-90; B-7-89; B-38-87; B-7-86; B-38-85; B-17-83; B-25-81.

[32] Decision No. B-26-90; B-34-89.

[33] County of Nassau, at 3030; See also, Hornell Police Benevolent Association, 19 PERB ¶4543 (1986).

agents in HPD were unaware that McNabb and Kaufer - named petitioners in that litigation - were activists as the heart of the matter, strains credulity. In resolving an improper practice charge based on a complete record, we will not attribute a generalized mental state of anti-union animus to agents of the employer in the absence of probative evidence which warrants the drawing of such an inference.[34] However, in the context of this motion, we must accept McNabb's assertion that he "was known by the people" who interviewed him on August 20, 1986 for the AMA position.

Moreover, we note McNabb's unrebutted account of this interview, wherein, McNabb alleges that one of the interviewers (Inna Schwartz) casually remarked that she could not believe he "actually showed up." Assuming the truth of this allegation and giving McNabb the benefit of all reasonable inferences to be drawn therefrom, this statement is susceptible to an interpretation which supports the Union's claim that the decision to pass over McNabb had already been made. Whether this decision was made by those conducting the interview or at someone else's direction is of no consequence to our determination here.

We also find support in the record for petitioner's allegation that the motivating reason for the denial of a promotion to McNabb was anti-union animus. We base this conclusion, in part, on the Union's assertion that McNabb was better qualified than the four other candidates selected, three of whom were non-union fee-paying members. In this connection, we note that the City attempted to demonstrate, through its cross-examination of McNabb, that he was not the most qualified candidate among the list of eligibles. However,

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[34] See e.g., Decision Nos. B-24-90; B-3-90.

such a comparison cannot be made in a vacuum. Nor can we credit the City's contention that McNabb ranked lower on the list than all of those appointed, inasmuch as the Union has demonstrated that ranking was not a decisive factor in the City's decision-making process. On this point, we note that three of the four candidates who were chosen ranked lower than Kaufer, who was number two on the list.

Furthermore, we note the Union's argument with respect to the inference of improper motive to be drawn from the testimony of Trynosky, an agent of HPD management who was subpoenaed to appear by the Union. Trynosky, who attempted to hire Kaufer as his Deputy Director in 1986, stated that the reason he was denied permission to do so by his superiors was because Kaufer was "involved in some type of grievance action." Although we do not rely on the premise urged by the Union, i.e., that an alleged admission against interest as to one union activist vitiates the need to prove specific discriminatory intent towards another, we find the argument persuasive at least to the extent that for present purposes an inference favorable to petitioners' position may reasonably be drawn from the evidence provided by Trynosky. In this connection, we have had past occasion to note that in cases such as this, circumstantial evidence may be a necessary and significant factor in ascertaining the state of mind and assessing the motivation of an employer's agents.[35]

Finally, our inquiry herein is not limited to whether the Union has demonstrated a sufficient causal connection solely between the collective

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[35] See e.g., Decision Nos. B-24-90; B-17-89; B-8-89.

participation of McNabb and Kaufer in the Article 78 proceeding and the City's decision not to promote them, as the respondent urges. The City's contention that McNabb's participation in the lawsuit is the only relevant and material activity upon which the instant charges are based is patently untenable. Both the improper practice petition which initiated this proceeding and our Interim Determination and Order in this matter (Decision No. B-48-88) demonstrate that there is further substantial basis for the charges presented here. Therein, the Union alleged, and we reiterated:

> Petitioners contend that McNabb and Kaufer who, it is alleged, were better qualified for promotion to [AMA] positions than the individuals who were appointed, were denied promotions because of their protected union activity, which allegedly "included but was not limited to" serving as chapter officers of Local 1757 and participation in the aforementioned Article 78 proceeding [emphasis added]. (Decision No. B-48-88, at 4.)

To emphasize this point, we note that in ordering the hearing, we directed:

> [T]he burden is now upon petitioners to establish that the denial of promotions to McNabb and Kaufer was motivated by employer animus related to their partici-pation in the Union lawsuit, by their activities as chapter officers of Local 1757, or by other union activity [emphasis added]. (Id., at 22.)

Review of the record reveals that apart from McNabb's participation in the Article 78 proceeding, the Union has demonstrated a showing of other open and notorious activity undertaken individually in his capacity as Chairperson of the Mortgage Analyst chapter. For example, on June 11, 1985, McNabb wrote a particularly inflammatory letter on Union stationery to the Commissioner of HPD. This letter, copies of which were sent to the City's Directors of Personnel and Municipal Labor Relations, Corporation Counsel, certain members of the judiciary and others, demanded the psychiatric evaluation and removal

of a supervisor at McNabb's work site (Union Exhibit G).[36] Given the nature of this letter and the scope of its distribution, it is reasonable to infer that McNabb's allegations drew the unfavorable attention of HPD management. Assuming, arguendo, that a reviewing court might find that participation in a lawsuit is not "protected activity" within the meaning of the NYCCBL, petitioners' remaining offers of proof thus constitute separate and different support for the alleged causal connection between McNabb's union activity (apart from his participation in the Article 78 proceeding) and the act complained of, sufficient to survive the instant motion to dismiss.

In light of all these circumstances, we shall deny the City's motion to dismiss and order that the hearing in this matter go forward with respect to the entire petition. We are satisfied, in considering the instant motion, that sufficient material facts have been presented to find that the petition states a cause of action under the NYCCBL as to McNabb. However, we will not find, on the basis of an unrebutted account of the facts, that petitioners have conclusively established improper motivation.[37] Rather, we recognize that there may be additional facts relating to the events which form the basis of the Union's claims, which could have some bearing on our resolution of the

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[36] It should be noted that although we do not endorse McNabb's actions in this particular instance, we must recognize it as an element of proof toward establishing improper motivation in the context of this proceeding.

[37] We distinguish the instant matter from a case where the employer's discriminatory conduct "is so 'inherently destructive of employee interests'... that it may be deemed proscribed without proof of an underlying improper motive." In such cases, "an inference of improper motive [may be drawn] from the conduct itself." NLRB v. Great Dane Trailers, Inc., 388 US 26, 65 LRRM 2465 (1967); Accord, Decision No. B-7-89.

sufficiency of the improper practice charges as alleged. In this connection, we emphasize that it is not the function of this Board, in considering a motion to dismiss, to resolve questions as to the credibility and weight to be given one party's version of the facts.[38] In resolving this motion to dismiss, we limit our inquiry to the question of whether the facts, as alleged by the petitioner, constitute a sufficient basis for an improper practice claim within the meaning of the NYCCBL. Furthermore, we do not discern from the record in this matter that the City has conceded that its decision not to promote McNabb rested, in part, on improper motives.

In cases where the employer's motivation is at issue, the test which this Board has applied since our adoption, in Decision No. B-51-87, of the standard set forth by PERB in City of Salamanca, 18 PERB 3012 (1985),[39] provides that initially the petitioner must sufficiently show that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

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[38] Compare, Decision Nos. B-2-90; B-9-82 (where we held similarly when presented with two inconsistent versions of a disputed factual incident). Cf., County of Nassau, 17 PERB ¶3012, 3030 (1984), where PERB held that in considering a motion made after the presentation of the charging party's evidence, "a hearing officer must assume the truth of all of charging party's evidence and give all reasonable inferences that could be drawn from those assumed facts [emphasis added]."

[39] In Decision No. B-51-87, we noted that "the Salamanca test is substantially the same as that set forth by the National Labor Relations Board in its 1980 NLRB v. Wright Line decision [251 NLRB 1083, 105 LRRM 1169, enforced 662 F2d 899, 108 LRRM 2513 (1st Cir. 1981); cert. denied 455 US 989, 109 LRRM 2779 (1982)], and endorsed by the U.S. Supreme Court in NLRB v. Transportation Management Corp., [462 US 393, 113 LRRM 2857 (1983)]."

2. the employee's union activity was a motivating factor in the employer's decision.

If the respondent does not refute the petitioner's showing on one or both of these elements, then the respondent must establish that its actions were motivated by another reason which is not violative of the NYCCBL.

In other words, if the employer attacks directly and refutes the petitioner's showing on the elements of the above-test, the Board will find that the petition fails to prove improper motivation.[40] If the employer fails to rebut the Union's showing that the employee's conduct was a "substantial" or "motivating" factor in the employer's decision, the employer could avoid being held in violation of the NYCCBL by putting forward evidence, unrefuted by the petitioner, proving that its actions would have occurred even in the absence of the protected activity.[41] However, if the employer fails to rebut the Union's showing of improper motivation and also fails to persuade this Board that other legitimate reasons exist for the challenged action, then the employer will be found in violation of the NYCCBL.[42]

Applying these principles to the instant matter and in the context of our resolution of the City's motion, it would be premature to conclude that petitioner, given every reasonable inference, has proved beyond doubt improper motivation.[43] To do so, at this juncture, would deny the respondent an

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[40] See e.g., Decision No. B-24-90.

[41] See e.g., Decision No. B-17-89.

[42] See e.g., Decision No. B-50-90.

[43] In Draper Teachers Association, 18 PERB ¶3027, 3056 (1985), PERB held that "[g]iven the circumstance that the bald facts were consistent with the possibility of a violation but not

(continued...)

opportunity to refute the Union's evidence on one or both of the requisite elements. Rather, in going forward the City may attempt to rebut the petitioners' showing that McNabb's union activity was a motivating factor in HPD's decision not to promote him, attempt to establish that the decision not to promote McNabb would have occurred in any event and for reasons not violative of the NYCCBL, or both. Furthermore, once the hearing in this matter resumes, all inferences drawn herein must be set aside in favor of an examination of all the relevant and material facts surrounding the alleged elements of petitioner's improper practice claims.

Accordingly, we shall deny the City's motion to dismiss the improper practice petition with respect to McNabb and, in view of the passage of time, order that the hearing be expeditiously reconvened.

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[43](...continued)
sufficient to establish one, the ALJ properly determined that she needed greater clarification of the facts [and, therefore, did not err in holding a hearing] before issuing a 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 respondents' motion to dismiss the improper practice petition with respect to Lamar McNabb be,

and the same hereby is, denied.

DATED: New York, New York
October 17, 1990

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

THOMAS J. GIBLIN
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE B. DANIELS
MEMBER