UPOA (behalf of L. Kelly) v. City, DOP, 47 OCB 4 (BCB 1991) [Decision No. B-4-91 (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-4-91

UNITED PROBATION OFFICERS
ASSOCIATION, ON BEHALF OF
LARRY KELLY,

DOCKET NO. BCB-1222-89

Petitioner,

-and-

CITY OF NEW YORK,
DEPARTMENT OF PROBATION,

Respondent.
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DECISION AND ORDER

On November 8, 1989, the United Probation Officers Association ("the Union") filed a verified improper practice petition against the New York City Department of Probation ("the Department") contesting the discharge of Probation Officer Larry Kelly ("the Petitioner"), allegedly in retaliation for his union activities. The petition asked the Board to rescind the Petitioner's termination of employment and order the Department to cease and desist from such retaliation.

The City of New York Office of Labor Relations ("the City"), on behalf of the Department, did not answer, but, instead, on December 4, 1989, moved to dismiss the petition on the ground that it failed to state a prima facie claim of an improper practice under the New York City Collective Bargaining Law ("NYCCBL"). On December 8, 1989, the Union filed an answering affidavit opposing the motion.

On June 27, 1990, the Board of Collective Bargaining, in Interim Decision No. B-32-90, held that the Union had stated a prima facie claim of improper practice within the meaning of Section 12-306a. of the NYCCBL[1]

[1] NYCCBL §12-306a. (formerly §1173-4.2) provides as follows:

Improper practices: good faith bargaining.

sufficient to withstand the City's motion to dismiss the petition. The Board ordered the City to serve and file its answer within ten days.

The City filed its answer on July 23, 1990. The Union filed a reply on August 31, 1990.

On September 11, 1990, a hearing was ordered before a Trial Examiner designated by the Office of Collective Bargaining. The hearing was held on October 30, 1990, and on November 14, 1990. The parties had a full opportunity to call witnesses, introduce documentary evidence, and examine and cross-examine witnesses. The parties submitted posthearing briefs on December 21, 1990. Thereupon, the record was closed.

FACTS

Petitioner Larry Kelly was hired to work as a provisional Probation Officer on October 20, 1986. In January of 1987, he became a union delegate, responsible for representing probation officers at the Manhattan Adult Services branch. He also served on one of the Department's labor-management committees. In his capacity as union delegate, the Petitioner helped a group

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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 (formerly §1173-4.1) of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(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;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

of probation officers file a racial discrimination complaint with the federal Equal Employment Opportunity Commission (EEOC). The complaint accused Assistant Commissioner Jerome Zipkin of administering reading tests to Afro-American, but not white, probation officers. The Petitioner also served on the Union's city-wide grievance committee, and he participated in pressing the "space grievance" concerning working conditions at the Department's 100 Centre Street facility. During this time, he and a co-worker founded a local newsletter, Manhattan Shop Talk, which printed articles that were critical of management.

In late 1988, the Petitioner's name was selected from a civil service list and he became a permanent Probation Officer, subject to a one-year probationary period. In August of 1989, the Department opened an internal investigation into the Petitioner's conduct after it learned that he had been having unofficial communications with a convicted felon who was serving time at the Sullivan Correctional Facility, a state penal institution located in upstate New York.

Between February 22, 1989, and May 15, 1989, the Petitioner sent at least five letters to the prison inmate. The letters were of a romantic nature, but they also referred to the Petitioner's alleged involvement in drug use, his alleged investigation by the Department's Field Services Unit, and his alleged arrest after having been "swept up" in a drug raid. The Petitioner wrote that he was able to avoid being "booked" during the latter incident because "[I] had my shield on me." He also sent music cassette tapes, money, and his business card from the Department of Probation to the incarcerated inmate.

On October 6, 1989, the Petitioner was ordered to appear at an inquiry scheduled for the following week at the Probation Department's Office of the Department Advocate. On October 12, 1989, accompanied by his Union president, the Petitioner presented himself at the meeting as ordered. After being shown copies of several letters, the Petitioner asked for and was granted an

adjournment so that he could be represented by legal counsel.

On October 17, 1989, the inquiry reconvened. The Petitioner was asked to identify copies of five of the letters that he was believed to have written. The Petitioner acknowledged that he wrote the letters, and others as well, but he stated that their contents were false. On October 23, 1989, the Probation Department discharged the Petitioner. The Petitioner still was a probationary employee at the time of his termination.

EVIDENCE

The parties presented one witness each. The Petitioner testified in his own behalf. David J. Vogel, the Department Advocate for the Department of Probation, testified for the City. Copies of five of the letters written by the Petitioner to the prison inmate were admitted into evidence.

Petitioner Kelly's Testimony

The Petitioner testified that his work as union delegate frequently brought him into conflict with management, and he recounted several incidents that involved Assistant Commissioner Zipkin. In addition to the EEOC discrimination complaint over the alleged misapplication of reading tests, the Petitioner said that, on another occasion, he intervened on behalf of a co-worker in a dispute with the Assistant Commissioner over ownership of a telephone extension cord. Following that incident, the Petitioner said that the Assistant Commissioner sarcastically questioned him about his health several times, and once, during a discussion with a supervisor allegedly called him "that fat union delegate."

The Petitioner then recounted a dispute with a Branch Chief concerning the supervision of clerical workers by probation officers. He said that the Chief subsequently rescinded the plan, but that he had gotten very angry when the Petitioner told him that "we'd have to file a grievance" because probation officers are "not in management and they shouldn't be supervisors." The

Petitioner said that when the Department terminated his employment he was running for office as union vice president, and he was sure that management knew him to be a union delegate when it discharged him.

The Petitioner recalled that during the departmental inquiry on October 12, he explained that he had written the letters to the prison inmate because the prisoner was a friend. The Petitioner denied being a drug user, and he said that he had never received anything less than the "top two" performance evaluations from his supervisor.

Under cross-examination, the Petitioner acknowledged that the EEOC dismissed the racial discrimination complaint filed against Commissioner Zipkin because there were "no grounds" to support it. He also acknowledged that he had identified himself as a probation officer in his letters to the prison inmate, and that he had sent the inmate his official business card.

Department Advocate Vogel's Testimony

Mr. Vogel testified that he first became aware of the allegations against the Petitioner when the Department's Inspector General referred the matter to him for investigation on August 31, 1989. He said that he reviewed the Petitioner's letters, and then he discussed their contents with the Commissioner of the Department. Mr. Vogel said that although he pointed out that the Petitioner could be terminated administratively because he was still a probationary employee, the Commissioner directed him to conduct a full investigation pursuant to Executive Order No. 16, effective July 26, 1978.[2]

Mr. Vogel testified that after listening to the Petitioner's explanation of why he wrote letters and sent gifts to a prison inmate, he decided to recommend the Petitioner's discharge. He explained that while the "totality"

[2] Executive Order No. 16, effective July 26, 1978, details, inter alia, the responsibilities of inspectors general for investigating allegations of City employees' misconduct in matters relating to the performance of their official duties, and for instituting disciplinary proceedings against them if warranted.

of the letters describing the Petitioner's involvement with drugs, his financial difficulties, and various other problems, was serious enough, it was the Petitioner's accounts of his illegal activities that most concerned his office and formed the basis of the termination recommendation. Among the alleged fabrications that the Department Advocate considered the most serious were the Petitioner's claims that he had a drug problem, that he had been the subject of a search warrant at his home by the Department's Field Services Unit, and that only the kindness of another probation officer had saved him from arrest for possession of drug paraphernalia. In Mr. Vogel's opinion, the Probation Department could not afford to take the risk of having someone like the Petitioner working for it, "who lacked such basic judgment as to write in these letters all these illegal acts he said he had committed."

The witness acknowledged that the Petitioner had explained why he fabricated an involvement with drugs: "because he did not want the inmate to think he would be a mule. . . . If [the inmate] knew he had a drug problem and other personal problems, then he would not ask [the Petitioner] to bring drugs onto the premises." He did not credit the Petitioner's explanation, however:

> It was my opinion that by bringing the topic up of drug use and using drugs and his ability to have access to drugs would make it more likely, rather than less likely for [the inmate] to ask [the Petitioner] to bring drugs on the prison premises.

Under cross examination, Mr. Vogel said that he had been unaware of any problems with the Petitioner's work performance, or of any allegations concerning alcoholism or substance abuse. He admitted that it was not illegal for a probation officer to correspond with or send gifts to a prison inmate, and he acknowledged that the Department had no indication that the relationship between the Petitioner and the inmate was anything other than personal. The witness also said that when the case was referred to him, he did not know who the Petitioner was, and he had no idea that the Petitioner

was active in his union. He reiterated that he based his termination recommendation, not upon the legality or illegality of the Petitioner's acts, but upon his "severe lack of judgment" as evidenced by the contents of the letters.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union recites the standard used by this Board when an improper practice petition involves alleged violations of Section 12-306a.(1) and (3) of the NYCCBL, and it notes that, in cases involving discharges allegedly motivated by anti-union discrimination, a petitioner must show that the employer had knowledge of an employee's protected activity, and that the activity was a motivating factor in the employer's termination decision. According to the Union, the evidence in this case has satisfied both elements of the test.

The Union contends that the Department was aware of the Petitioner's union activities because of his high profile as a local union delegate. It points out that the Petitioner signed and helped bring grievances, was a member of several committees that dealt with working conditions in the Department, and founded and published a newsletter critical of Probation Department administration. The Union also notes that the Petitioner's position brought him into conflict with several members of management, and that the Assistant Commissioner allegedly called him "that fat union delegate."

The Union argues that not only was the Petitioner a well-known defiant union activist, but, at the time of his discharge, he was campaigning for higher union office as well. According to the Union, management likely would be very interested in the backgrounds and histories of people who run for union office. If nothing else, the Petitioner's candidacy allegedly would have alerted Department officials to his presence in the union and his

dedication to it.

The Union also disputes the City's contention that the Department Advocate's investigation was not influenced by anyone with knowledge of the Petitioner's union activities. It notes that the Petitioner received notice of his termination from Assistant Commissioner Zipkin, and it concludes that some communication of the Petitioner's persona and activities had to have been transmitted to the investigators, either by Assistant Commissioner Zipkin, or by another Department administrator.

The Union then contends that the Petitioner's termination would not have occurred except for his union activities. It points out that during his two year and nine month tenure as a probation officer, the Petitioner had never been disciplined and had always performed his duties in an exceptional manner. He found himself under investigation, however, simply because he wrote some personal letters to a friend in prison. The Union argues that just because the letters contained certain fabrications, that fact, by itself, did not merit his termination.

In the Union's view, the letter writing merely was a convenient excuse for the Department to rid itself of an outspoken union member, delegate, and higher office-seeker. The Union notes that it is not unlawful for anyone, including a probation officer, to correspond with prison inmates or to have them for friends. It contends that the Petitioner had been writing to his inmate friend for "quite a while," and that he continues to write to him. The Union questions why the Department, after receiving copies of the letters in August, waited for almost three months, when it knew the Petitioner was campaigning for higher union office, to fire him. It also questions how and why the few letters in evidence were chosen, out of many that the Petitioner allegedly had written.

In conclusion, the Union asserts that, under these circumstances, the Petitioner's termination was not mandated. It maintains that the letters were a pretext for his discharge because of his union activities. As a result, the

Union contends that the Petitioner should be reinstated with back pay.

City's Position

The City agrees with the Union's description of the standard utilized by this Board when a petitioner alleges anti-union discrimination or retaliation. It insists, however, that the Department terminated Petitioner Kelly's employment, not for union activity, but for a legitimate business reason unrelated to his position as a union official or a union member.

The City argues that the record proves that Department Advocate Vogel had no knowledge of the Petitioner's union activities when he conducted his investigation. It points out that the inquiry focused solely on the question of whether the Petitioner's behavior was inappropriate and detrimental to the reputation of the Probation Department. According to the City, the investigation was unbiased and thorough, and it was not influenced by anyone who had contact with the Petitioner in his union capacity.

In support of its position, the City notes that the Petitioner admitted that he wrote the letters precipitating the investigation, and that the contents of the letters were key in the ultimate decision to terminate him. It argues that sending "scandalous" letters to an incarcerated felon showed an "incredible" lack of judgment on the Petitioner's part. In the City's view, even though the letters contained false statements, they could only provide an inmate in a state correctional institution with the impression that the Probation Department has officers working for it who are involved in drug distribution and other forms of corruption.

The City dismisses the explanation offered by the Petitioner as "ridiculous at best," because, in the City's view, it is "wholly illogical" to believe that the statements made in the letters would discourage the prisoner from seeking the Petitioner's aid in drug trafficking. In fact, it argues, the statements would have the opposite effect. Further, the City points out that it was the Petitioner himself who brought the Department into the

investigation by sending his business card to an incarcerated felon and by using his business address as the return address on his letters. It maintains that without these official actions, the correspondence would have been, and would have remained, a private matter between the Petitioner and the prison inmate.

The City concludes that the Department terminated the Petitioner's employment strictly for legitimate business reasons. It insists that the Department could not tolerate the slander to its reputation and integrity caused by the Petitioner's irresponsible behavior, and it asks that the improper practice petition be dismissed in its entirety.

DISCUSSION

At the outset, we note that personnel actions, including employee discipline, generally are matters within management's statutory prerogative to direct its employees and to take disciplinary action under Section 12-307b. of the New York City Collective Bargaining Law (the statutory management rights provision). As such, they are not normally reviewable in the improper practice forum. However, the exercise of this authority may give rise to an improper practice finding if it can be shown that punishment was used as a pretext for interference with an employee's rights under Section 12-306a. of the Law.

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,[3] and endorsed by the United States Supreme Court in National Labor Relations

[3] 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).

Board v. Transportation Management Corporation.[4] We first applied the Salamanca test in Decision No. B-51-87, and we have employed it consistently since then.[5] 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 burden has been met, 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.

In this case, we have serious doubts that knowledge of union activity had anything at all to do with the Petitioner's termination. The record contains no indication, other than speculation by the Union, that the investigation leading to the Petitioner's dismissal ever took account of his union activities, or that it even considered his work performance record.

The evidence shows that on August 31, 1989, the New York City Department of Investigation, an independent anti-corruption agency, had been conducting its own investigation of the Petitioner, which it then referred directly to David J. Vogel, the Department of Probation's Department Advocate. Mr. Vogel testified that his office continued the investigation without interviewing field supervisors or officials, explaining that "in this particular instance it was certainly not necessary to speak to his supervisor, because I don't

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[4] 103 S.Ct. 2469, 113 LRRM 2857 (1983).

[5] Decision Nos. B-50-90; 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.

believe his supervisor would have been able to shed any light on it." The witness explained further: "If the allegation involved neglect of duty, of course we'd be speaking to the supervisors."

In his report to the Commissioner, Mr. Vogel recommended that the Petitioner's employment should be terminated based upon his inappropriate and detrimental behavior in corresponding with an incarcerated felon. The contents of the letters speak for themselves, and there is no evidence tending to show that the investigation was tainted, or that the Petitioner's union activities were anything more than simple coincidence.

Even if the Department Advocate was aware of the Petitioner's union activism, however, non-pretextual, non-disparate business reasons support the Department's decision to terminate his employment. In a letter mailed to the prison inmate on February 22, 1989, the Petitioner details how allegedly he foiled a drug search of his home:

> I was right there on top of the list. . . [But] when the list was issued to the Field Services Unit from the Investigator General's office, a very good and supportive friend - Linda, who is a supervisor in FSU, saw my name, phoned me (through a mutual friend whose name was not on the list) to warn me. . . . So I stayed away from my apartment - had a friend go over to my place - clean out all the paraphernalia - and keep it away from my place until Monday when I knew that no searches would be made (got the word from Linda).

In his letter dated March 27, 1989, in which he included his business card, the Petitioner spoke of his alleged drug use:

> I got back into drugs again - that's where a lot of my money has been going. I stopped paying my bills - and ran up a big phone bill with your calls - and put things on the credit card that I shouldn't have. So, just in the last two weeks I have stopped drugging it up.

The Petitioner's letter dated April 30, 1989 described his alleged drug arrest:

> Got arrested on 4-29-89 coming out of the store as I was approaching the door - realized something

> smelled bad and quickly reacted - I was clean when I walked out - but I got swept up. Had my shield on me and that sort of saved me - Kept all night in the Lower East Side Pct. then to 1 Police Plaza.
> I wasn't booked because nothing could be found and because I have a friend [working] in the building who vouched for me. They contacted the department, however, so I have to face that on Monday.

While writing to a convicted felon, the Petitioner held himself out to be a drug user and the subject of drug-related investigations, searches, and an arrest. In view of these representations, we believe that the Department fully was within its right to terminate the Petitioner's position as a probation officer, irrespective of his union positions and activities, or of his otherwise unblemished work record.

Further, the timing of the salient events in the Petitioner's employment history sheds additional doubt upon any alleged retaliatory motive. The Petitioner was hired as a provisional probation officer in October of 1986. He became a union delegate in January of 1987. By the Petitioner's own account, he helped found the newsletter, Manhattan Shop Talk, in late 1987; he worked on the "space" grievance "from 1987 on"; he became involved in the EEOC racial discrimination complaint during 1987; and he had a confrontation with a Branch Chief over alleged out of title work in 1988. Yet, late in 1988, when the Department easily could have passed over his name on the civil service eligibility list for Probation Officers, it chose to make his appointment permanent. The Department's evident toleration of the Petitioner's union activities does not support an inference of anti-union animus.

Based upon all the evidence, we are satisfied that the termination of the Petitioner's employment was the consequence of a legitimate business decision, which would have occurred despite his position as union delegate and activist, and regardless of whether he was running for a higher union office. Accordingly, we reject the allegation that the Petitioner's discharge violated Section 12-306a. of the NYCCBL, and we shall dismiss the petition herein in its entirety.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition of the United Probation Officers Association, on behalf of Larry Kelly, in Docket No. BCB-1222-89 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
January 24, 1991

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD SILVER
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