McNabb&L.1757,DC37 v. City & Dep't of Housing Pres.& Develop, 53 OCB 1 (BCB 1994) [Decision No. B-1-94 (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-1-94

-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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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. 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;...[1]
>
> (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 first Interim Determination and Order in this matter (Decision No. B-48-88) was issued on September 20, 1988, when the City, in defense of the improper practice charge, raised an issue of first impression for the Board of Collective Bargaining ("Board"). The question concerned whether participation in a lawsuit brought to enforce rights under the Civil Service Law was protected activity within the contemplation of §12-305 of the NYCCBL.[2] The

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[1] 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....

[2] In the Matter of the Application of HOWARD HABLER, as President of Local 1757, District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, STEVE KAUFER, LAMAR McNABB, NESTOR N. CAMACHO and CARRIE GADSON, on behalf of themselves and all others similarly situated v. THE CITY OF NEW YORK; JUAN ORTIZ, as Personnel Director of the New York City Department of Personnel; and ANTHONY B. GLIEDMAN, as Commissioner of the New York City Department of Housing Preservation and Development, Index No. 15545/85, Sup. Cit., N.Y., Spec. Term, Pt. 1 (10/25/85), was brought as 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

(continued...)

Board held that because the lawsuit was brought in the names of the president of the petitioner local and interested union members "on behalf of themselves and all others similarly situated," and 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. The Board also 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:

> ... was motivated by employer animus related to their participation in the Union lawsuit, by their activities as chapter officers of Local 1757, or by other union activity.[3]

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 submission of post-hearing briefs on the City's motion was completed on July 27, 1990. On October 17, 1990, the Board issued the Second Interim Determination and Order in this matter (Decision No.

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[2](...continued)
candidates would be hired to replace all provisional appointees (Union Exhibit "A").

[3] See Decision No. B-48-88, at 21-22. See also, the "Statement of the Nature of the Controversy" set forth in the petition that was filed in this matter, which provides, in pertinent part:

> 17. Upon information and belief Petitioner McNabb and Kaufer were not promoted because they had engaged in protected union activity including but not limited to serving as chapter officers of Local 1757 and by being petitioners in the legal proceeding brought by the Union to force the City to administer an examination for the title of Associate Mortgage Analyst. [Emphasis added.]

B-67-90), on the question of whether the facts alleged solely with respect to McNabb constitute a sufficient basis for an improper practice claim under the NYCCBL. The Board found that the Union's unrebutted account of the facts, including all reasonable inferences drawn therefrom, warranted a finding that the charge as to McNabb was sufficient to withstand a motion to dismiss. Accordingly, the Board denied the motion and ordered that the hearing go forward with respect to the entire petition.

Additional days of hearing were held on December 20, 1990, January 29, 1991, January 30, 1991, April 2, 1991, July 10, 1991, July 19, 1991, August 5, 1991, and October 15, 1991. The submission of post-hearing briefs was completed on July 20, 1992, whereon the record in this matter was closed.[4]

[4] There were several delays throughout this proceeding due to the unavailability of essential witnesses, changes of counsel for both parties and changes in the Trial Examiner assigned to this case.

Relevant Background and Facts

Housing Preservation and Development[5]

The New York City Department of Housing Preservation and Development ("HPD" or "the Agency") has three main operational offices, each headed by a Deputy Commissioner: The Office of Rent and Housing Maintenance, the Office of Property Management and the Office of Development. Each office has several programmatic divisions, each headed by an Assistant Commissioner or Executive Director. The primary divisions within the Office of Rent and Housing Maintenance are Evaluation and Compliance ("DEC"), Code Enforcement, Demolition, Equal Opportunity, and Rent. The primary divisions within the Office of Development are Financial Services and Production and Planning. The Neighborhood Preservation Program ("NPP") is within the division of Production and Planning. The primary divisions within the Office of Property Management ("OPM") are Property Management, Alternative Management, Homeless Housing and Relocation.

HPD's administrative functions are handled by its Office of Management and Administration, also headed by a Deputy Commissioner. While the Office of Management and Administration provides personnel and administrative oversight for the entire agency, within each operational office and, in some cases within a division, there exist separate personnel liaisons who are responsible for personnel-related processing for that office/
division.

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[5] The following organizational structure of HPD existed at the time of the events that form the basis of the instant petition.

Lamar McNabb

Petitioner McNabb's relationship with HPD began in 1978, when, under the auspices of the Mayor's Volunteer Action Program, he served as a non-salaried real estate manager for four months. On December 18, 1978, McNabb was placed on HPD payroll in its division of Production and Planning of the Office of Development. McNabb worked as a provisional appointee in various titles until he was permanently appointed as a Mortgage Analyst ("MA") in March 1981. At the time of his permanent appointment, McNabb was holding a higher paying position in the title Assistant Project Development Coordinator ("APDC") and worked at the Bedford-Stuyvesant NPP office under the supervision of Priscilla Cyrus.

When asked to describe the purpose of the NPP, McNabb replied:

> The Neighborhood Preservation Program was [created] in 1971. ... [T]he City Planning Department has designated certain areas throughout the City as Neighborhood Preservation areas. Within these areas, certain concentrated efforts are made in utilization of federally-assisted housing tools, such as low-interest loans, concentrating of Code Enforcement efforts and other team-targeted efforts as it relates to housing. [Tr. 16-17.][6]

McNabb described his duties at the Bedford-Stuyvesant NPP as follows:

> Having been assigned to one of the newly created designated areas, the Bedford-Stuyvesant community, I had a responsibility for helping to open and launch that office. ... I was the code enforcement coordinator responsible for negotiating, signing and monitoring voluntary agreements of property owners who had violations on their property. ... In addition, I worked as a loan packager under the 312 loan program, which is a low-interest, federally-assisted loan program, and 8A loan program, another federally-assisted low-interest program. [Tr. 17-18.]

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

McNabb was evaluated twice during his tenure at the Bedford-Stuyvesant NPP. The first, dated November 1980, was a First-Quarter Interim Evaluation for Probationary Employees, in which he received an overall rating of "Outstanding" (City Exhibit "8"). In the "Other Factors" section of the form, where the supervisor describes how factors such as "attendance, punctuality, unusual work situations, interaction with other employees" may have had an influence on the overall rating - or where "commendable, erratic or inappropriate observable behavior that affects performance" can be noted, Cyrus wrote: "No inappropriate observable behavior that effects his performance."

The second evaluation, dated October 21, 1981, was a Final Evaluation for Probationary Employees, in which Cyrus recommended "Retention". (City Exhibit "9".) In the section reserved for the supervisor's comments on "characteristics of the probationer's work performance in which improvement is required," Cyrus wrote: "Tolerance/Patience."

According to the testimony of Alyce Slosberg, the Director of Operations for the Office of Development, in 1982 Cyrus requested that McNabb be transferred out of the Bedford-Stuyvesant NPP. As the Director of Operations, Slosberg is responsible for the "budget, OTPS and personnel, in terms of personnel planning [and] organizing the various units within Development." (Tr. 154.) Slosberg's function was described by Kathleen Dunn, the Deputy Commissioner of Development, as the "central clearing house" for all Office of Development personnel matters (Tr. 784). Slosberg testified that Cyrus' request was based on an alleged incident involving McNabb and a tenant, and some questionable activity during office hours. (Tr. 419.) On cross-

examination, Slosberg explained that while she is aware of a police investigation, she is unaware of any resultant legal action. (Tr. 467.) McNabb transferred to the Harlem NPP sometime in 1982.

McNabb continued to hold the APDC title provisionally in the Harlem NPP and worked under the supervision of Roy Miller. On December 21, 1982, McNabb received an Annual Performance Evaluation with an overall rating of "Unsatisfactory". (City Exhibit "1".) In the section of the form which calls for a description of the employee's actual performance, Miller wrote:

> Task No. 1: Lamar has assisted City Planning Commis-sion in field study of CB #10. On several occasions I have asked Lamar to assist my Rehab Specialist Alfredo Figueroa to conduct building inspections for Voluntary Agreement Compliance. Lamar refused to assist Alfredo stating that field inspections is not his function, although he is the Voluntary Repair Agreement/Code Enforcement Coordinator for this office.
> Performance Rating on Task: Conditional
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> Task No. 3: Lamar was ineffective in his new assign-ment in this office requiring him to monitor Community Consultant Contract - Development Outreach Incorp due to an irrational act on his part that proved embarras-sing to this office. I subsequently reassigned the three Community Consultant Contracts previously dis-persed, to one staff person for greater accountability.
> Performance Rating on Task: Unsatisfactory
>
> Task No. 2B: Lamar was ineffective as coordinator of the 312 Loan Program. I was compelled to reassign a potential loan applicant to another staff person for further processing due to an unnecessary rejection letter sent out by Lamar without my approval.
> Performance Rating on Task: Unsatisfactory
>
> Task No. 4: Effectively conducts Voluntary Repair Agreements in office, particularly in response to CATA inquiries. I would like to see Lamar generate Voluntary Repair Agreements where it is appropriate within the areas of development activities.
> Performance Rating on Task: Satisfactory
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> Task No. 5: Lamar effectively does the Section 8 briefing interviews of tenants on a regular and consistent basis.
> Performance Rating on Task: Superior

In the "Other Factors" section of the form, Miller wrote:

> Lamar's performance during this past year has deteriorated. At times he is belligerent and uncooperative. He refuses to follow elementary office procedures and finds it difficult to function in a cooperative spirit. Therefore, it is my recommendation that Lamar McNabb should no longer be retained in the Harlem NPP Office. He is unquestionably dissatisfied with me as his Director. He would be better served to seek a transfer elsewhere within HPD. It would be beneficial to all concerned.

In the section of the form reserved for the employee's comments, McNabb wrote: "The statements contained herein are false."

As a follow-up to this evaluation, on May 4, 1983, Mark L. Mendelsohn, HPD's Director of Personnel, sent a memorandum to Slosberg. Mendelsohn's memorandum suggested that in light of the unsatisfactory performance rating, "perhaps you [Slosberg] should consider terminating his [McNabb] provisional services as Assistant Project Development Coordinator and returning him to his permanent title of Mortgage Analyst." (City Exhibit "5".)

In July 1983, McNabb began an unpaid personal leave of absence, during which he was terminated from the provisional APDC position by operation of law. (Union Exhibit "U".) According to Slosberg, at the time McNabb requested the leave, his demotion was being discussed. (Tr. 457-8.) According to McNabb, he needed a leave of absence for business reasons, pursuant to a contract he had to manage some real property. When asked on cross-examination if, in fact, he took the leave for child care, McNabb replied: "No, I originally had filed for a child care leave and the child care leave was denied, and I resubmitted and asked for a regular leave of absence." (Tr. 73.) Upon return from leave in December of that year, McNabb was reinstated to his civil service position of MA (Union Exhibit "V"), was assigned to the East Flatbush NPP and worked under the supervision of Steve Trynosky. In April

1984, Jeffrey Ewing replaced Trynosky as the Director of the East Flatbush NPP and, thus, became McNabb's immediate supervisor.

In early 1985, McNabb became an elected official of petitioner Local 1757. The employer was on notice of McNabb's union position on June 11, 1985, through a letter McNabb sent to the Commissioner of HPD, Anthony Gliedman, concerning an "unsafe" situation at his work site. (Union Exhibit "G".) This letter, which is on Union letterhead, demanded the psychiatric evaluation and removal of McNabb's supervisor, Ewing, who allegedly "became uncontrollable and violent while throwing materials about the office." (Id.) McNabb identified himself as a Vice President of petitioner Local 1757 and Chairman of its Mortgage Analyst chapter. Among those copied on the letter were the City's Director of Personnel, Director of Municipal Labor Relations, Corporation Counsel, Union leaders, various politicians and others.

On direct examination, Ewing gave his account of the "incident" referred to in McNabb's letter to the Commissioner and admitted that he threw a computer print-out at McNabb. Ewing testified that the episode was precipitated by McNabb's repeated refusal to get more involved in monitoring code enforcement agreements with building owners, a task that Ewing considered a major area of responsibility of McNabb's job. (Tr. 519.) According to Ewing:

> He [McNabb] told me he felt it was not his job to go to buildings. It was not his job to call owners. That his job was to send letters to them. [Tr. 520.]

Ewing testified that the incident occurred when McNabb "flatly refused" to go with a building inspector "to do the official re-inspection of the violations" on "a very big project," an assignment which Ewing considered to be a function

of code enforcement. (Tr. 520.) "As far as I was concerned," Ewing stated, "it was simply one of a continuing series of, in essence, refusals by Lamar to do as I asked him to do, things that were not unreasonable in terms of what his job was." (Tr. 521.)

On June 25, 1985, the Union initiated an Article 78 proceeding in which McNabb and Kaufer were named-plaintiffs.[7] The suit was brought to compel the City to administer a civil service examination for the AMA title. According to McNabb, "his number one priority" as Chairman of the Mortgage Analyst chapter was "to secure this exam so that [his constituency] could have an opportunity to advance themselves through promotion." (Tr. 27.) In addition to this goal, McNabb testified that he became involved in other matters affecting the working conditions of his members, e.g., building safety and quality of worklife issues (Tr. 27-8.)

On October 15, 1985, McNabb received an Annual Performance Evaluation with the overall rating of "Conditional". (City Exhibit "18".) In the "Other Factors" section of the form, Ewing wrote:

> Employee's attendance is satisfactory, and he seems to interact satisfactorily with other staff, with the exception of his supervisor. In the latter case, on a number of occasions he has become rude and hostile when asked to report on assignments or answer questions about the assignments. I believe the problem relates to the employee's feelings about supervision rather than me personally. On several occasions I have talked with the employee about his behavior and the difficulties it presents, and attempted to create an atmosphere of open communication. I have also expressed my feeling that employee is a bright and potentially very capable employee. Employee on such occasions has been unwilling to discuss the reasons for his rudeness and hostility, except to express his feeling that he has been dealt with poorly by the agency, that he will go no further than

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[7] See Matter of Habler, supra, note 2, at 2-3.

> compliance with the letter of his assignments, and that he is not interested in advancing himself within NPP.

In the section of the form reserved for the employee's comments, McNabb wrote: "Conditional rating is inappropriate inasmuch as it is based upon lies and impaired judgement."

On January 6, 1986, the court in Matter of Habler ordered the City to conduct a competitive examination for the AMA title and to make appointments from the list of eligibles promulgated therefrom. Pursuant to the court's order, an examination was held on or about May 15, 1986. Among the plaintiffs who were named in the proceeding, only McNabb and Kaufer actually took the examination.

On May 20, 1986, McNabb received a follow-up Performance Evaluation with the overall rating of "Good". (Union Exhibit "E".) In the "Other Factors" section of the form, Ewing wrote:

> Employee's attendance and punctuality as well as interaction with other employees have been satisfactory during the rating period. While in the past employee has shown some attitudinal problems, there has been a significant change in this respect, and no problems have occurred during the rating period. I feel, therefore, that employee is deserving of an increase in rating from the previous conditional to good [emphasis in original].

On June 18, 1986, a list of eligibles was established. (Joint Exhibit "1".) McNabb was among the successful examinees and was ranked number seven on a list of eight eligible candidates. On August 20, 1986, McNabb and five other candidates were interviewed for AMA positions. The remaining two candidates on the list of eligibles did not appear for interviews. The employment interviews were conducted by three persons: Ina Schwartz, a Personnel Liaison for the Office of Development, Lynn Shulman, a Personnel

Liaison for DEC of the Office of Rent and Housing Maintenance and a third person who was a representative of HPD's Personnel Office.

McNabb characterized 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 (Ina Schwartz) jokingly commented to him, "You actually showed up." (Tr. 55.) According to McNabb, he underwent no pointed questioning other than an inquiry concerning a civil conviction which he had previously disclosed on initial hire.

On August 28, 1986, McNabb was notified by letter that he "was not selected for appointment or promotion to a vacancy. Another candidate was selected instead." (Union Exhibit "J".) Of the six candidates interviewed for AMA positions, only those ranked numbers one, three, four and six on the list were appointed (McNabb ranked number seven).[8] Of the four appointees, only one was a member of Local 1757; the other three were agency fee-payers. (Tr. 61.) According to McNabb, as of the first day of hearing in this matter (January 18, 1989), two provisional employees were serving in AMA titles. (Tr. 61-62.) McNabb testified that Sandra Holder "was a provisional incumbent at the time the examination was given, in 1986, and I might add, she is a provisional incumbent today, even as I speak, even though the list is still in existence." (Tr. 45.) McNabb further testified that a second provisional AMA was appointed on July 25, 1988, "while the list was still in existence." (Tr. 62.)

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[8] According to ¶14 of the petition that was filed in this matter, "all appointments to the titles of Associate Mortgage Analyst were made retroactive to August 7, 1986."

According to Slosberg, she was responsible for identifying employees on the list that worked for the Office of Development and deciding "whether we [the Office of Development] would want to give them status or promotion." (Tr. 213.) When asked to describe her involvement in the selection process, Slosberg testified: "I would review the person's personnel file, I would discuss the employee with the supervisor, with the assistant commissioner involved [and] with the deputy commissioner, at times." (Tr. 214.) According to Slosberg, the decision not to offer McNabb an appointment was made on the joint recommendation of herself, Jose Cintron, the Assistant Commissioner of the division of Production and Planning, and Jean Lerman, the Director of the NPP. (Tr. 321.) Slosberg testified that the recommendation not to appoint McNabb was based on a review of his performance evaluations, the current difficulties he was having with his supervisor, Jeffrey Ewing, and her conversations with his other supervisors. (Tr. 323-4.) When asked to characterize McNabb's employment history at the time he was being considered for promotion to AMA, Slosberg described him as a "problem employee." (Tr. 339.) On cross-examination, when asked to define the term "problem employee", Slosberg replied: "An employee who has repeated problems with a supervisor, who has repeated history of unsatisfactory or conditional evaluations." (Tr. 422.)

With respect to the retention of Sandra Holder, a provisional AMA, Slosberg testified that "we discussed Sandra, that she was a good employee, that if possible, we would like to keep her, but we would have to see what happened with the list and what other candidates there were." (Tr. 443.)

Slosberg further testified that Sandra Holder was the only provisional AMA working for the Office of Development at that time. (Tr. 441.)

On October 23, 1986, at McNabb's request, he met with Mark Willis, Deputy Commissioner of the Office of Development, and Cintron. The purpose and nature of that meeting was described in a "confidential" memorandum written later that day by Willis. (City Exhibit "3".) The memorandum, which was addressed to Alfred Siegel, HPD's Inspector General, reads:

> I had a meeting with Lamar McNabb today to discuss a possible personnel action. Jose Cintron was also present. Mr. McNabb had been "passed over" on the promotional list for Associate Mortgage Analyst and was upset by that action. I began the meeting by explaining my position on the matter. I said that I understood there had been an improvement in his performance over the last six months which had not gone unnoticed. Although this certainly was to his credit, it only partially mitigated for his previous work record. (His latest rating was good, one step above his last rating of conditional and very mixed ratings previously.) I suggested that there were also questions about his relevant work experience in this job title. Also given the salary level, I explained that I probably would have to reassign him elsewhere in Development if he were given the promotion and I had no such slot at the present time. I told him that despite these questions and given that $10,000 salary increases are scarce budget commodities, I was prepared to review our decision six months from today. Although I offered no guarantees, I was clear that he would receive a fair re-evaluation.
>
> Mr. McNabb "respectfully disagreed" with my decision and proceeded to explain his position. He recounted his track record at HPD going back to when he started as a volunteer. He described himself as a producer and a team player who could respond to the challenge presented by the ten year plan. As for the fact that he did not have relevant experience in the mortgage analyst job title he said that was the fault of the agency itself. In fact, he continued, if the agency did not have so many people performing duties out of title he would have had the opportunity to gain the relevant experience. He said that coincidentally he was the President of his union local and that in this role he was the plaintiff in a lawsuit against the City challenging this very issue. He strongly urged me to reconsider my decision and to immediately pick him up off the list. He stated that this action would also enable him to put a stop to any litigation being prepared by his union and he indicated his readiness to do so.

> His offer to compromise his union's legal case if he received the promotion so startled me that I asked him to repeat what he had said. He did so, even though I indicated my distaste for blackmail in considering promotion decisions.
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> I rejected his offer again. As a compromise position, he then offered not to take any action if I were prepared to appoint him on November 20th which would be six months from the date of his last performance evaluation. At this point, I terminated the meeting indicating that I was not prepared to make such a decision at that time.

According to Slosberg, she was unaware that McNabb had been a plaintiff in any "lawsuit" until she was informed of McNabb's alleged offer to Willis to drop the "action" if he was promoted. (Tr. 439.) Slosberg also testified that she did not learn until "recently" that the AMA civil service examination was given as a result of the Article 78 proceeding, Matter of Habler. (Tr. 439.)

Steve Kaufer

Petitioner Kaufer's employment by the HPD began in June 1980, when he was hired as a MA and worked for the division of Evaluation and Compliance ("DEC"). Kaufer described his duties as follows:

> I would underwrite loans for the Article 8A Loan Program. I would be involved with the evaluation of financial statements submitted by the owner. I would go out and visit the site, determine the quality of the management of the building, and I would make recommendations for loans based on the findings of financial analysis, my evaluation of the building, the management of the building and the date it was submitted to me. [Tr. 98.]

Other than his first probationary performance evaluation in which he was rated "Satisfactory," every evaluation of Kaufer's performance as a MA prior to the time he was considered for pro-motion to AMA in 1986 indicated an overall rating of "Superior". (Union Exhibits "N-1" through "N-4", "N-6" and

"N-8".) In the "Other Factors" section of the forms, excellent attendance and Kaufer's ability to get along well with others was consistently noted.[9]

Beginning with the 1981-83 term of office, Kaufer held the following positions with the Union: Mortgage Analyst Chapter Chair 1981-83; Chapter Chair 1983-85; Treasurer 1985-87; and Vice-Chair 1987-89. According to Kaufer, his responsibilities as Chapter Chair between 1981-85 included "taking

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[9] The sections of Kaufer's performance evaluations reserved for the supervisor's observations on "Other Factors" read:

Exhibit "N-1": Attendance is excellent as is punctuality. He even came to work with a cast on his broken foot and only took time out for hospital visits. Gets along well with other employees. [Dated: August 28, 1980.]

Exhibit "N-2": Attendance, punctuality and attitude are excellent. Employee gets along well with other employees, and has learned quickly. Performance will continue to improve as he gains additional experience and confidence. [Dated: December 11, 1980.]

Exhibit "N-3": Employee has an excellent attendance and punctuality record. He is a hard worker and has made excellent progress in the program. He gets along well with others and requests help when needed. During the next three months he should try to become more confident in his ability to present problems to owners. [Dated: April 24, 1981.]

Exhibit "N-4" : Employee's attendance and punctuality record continue to be excellent. He is a conscientious and diligent worker and gets along well with others. He has excellent potential and will improve even further as he gains confidence in the field. [Dated: June 3, 1981.]

Exhibit "N-6": His attendance is excellent. During the last six to nine months he has made great strides in working well with the employees in office. Has shown diligence in his work by working overtime to complete his assignments. [Dated: December 30, 1982.]

Exhibit "N-8": Stephen's attendance is excellent. During the last year he has improved his working relationship with other office employees. He has maintained his diligence and usually completes cases on time. [Dated: August 16, 1983.]

care of grievances at the work place, signing up new employees as union members and telling them about the various benefits of being a union member." (Tr. 123.)

On May 30, 1985, the Union filed an out-of-title grievance on Kaufer's behalf, alleging that he had been performing the duties of an AMA since July 26, 1984. (Union Exhibit "CC".) The duties claimed as more appropriate to the AMA title included "training new employees, expediting loan closings, preparing monthly closing reports, developing models for SRO loans, reviewing co-op leasing, meeting with landlords and performing related work." (Union Exhibit "DD".) In a Step II decision dated September 5, 1985, HPD's Director of Labor Relations found that Kaufer was performing out-of-title work. As a remedy, the decision directed that Kaufer be paid "the difference between his salary as a Mortgage Analyst and the minimum salary of [AMA] for the period May 30 through August 27, [1985]," which is the date Kaufer voluntarily transferred to the Office of Property Management ("OPM"). (Id.)

According to Robin Weinstein, the then Director of Operations of DEC, if Kaufer had not transferred to OPM, "he would have been granted the [AMA] title." (Tr. 641-2.) In a memorandum dated July 11, 1985, from Weinstein to HPD's Department of Personnel, which was appended to a "Position Evaluation Request," she proposed that an AMA title be established for Kaufer. (Union Exhibit "AA".) Weinstein further testified that:

> ... the combination of duties carried out by Steve Kaufer during that period of time were of sufficient difficulty and senior level work in terms of more complex loans, in terms of the work on training, that the promotion to Associate Mortgage Analyst was war-ranted, even though it was not supervisory. [Tr. 646.]

Weinstein further testified that when Kaufer applied for a vacant APDC position in OPM in June 1985, "[she] provided [him] with a good reference. We

also spoke with him about the possibility of remaining with us and Steve chose to move to the new spot." (Tr. 582.)

Kaufer was provisionally appointed to the APDC position he applied for in late August 1985, and worked in a new program within OPM called the Capital Budget Homeless Housing Program. The Director of the program and Kaufer's immediate supervisor was Tim O'Hanlon. According to O'Hanlon, the Mortgage Analyst title series "has never been used" in his program and "as I'm not familiar with it, I don't know how I would use it." (Tr. 689.) O'Hanlon testified that the first time he had ever heard of the AMA title was when Kaufer asked to be appointed to it after the AMA list (Joint Exhibit "1") came out in 1986. O'Hanlon further testified that he was unaware of any litigation concerning the list, stating that he "could only speculate" as to why it was promulgated. (Tr. 697.)

Like McNabb, Kaufer, who was ranked number two on the list, was invited to an employment interview on August 20, 1986. Of the three persons who interviewed him, Kaufer could recall only the names of Shulman and Slosberg. (Tr. 126.) According to Kaufer, his interview lasted approximately five minutes. The only subject that Kaufer could remember being discussed during the interview was his prior job experience as an AMA, about which he had filed and won the out-of-title grievance. (Tr. 127.)

By a letter dated August 1986, Kaufer was informed that he "was considered and not selected for appointment or promotion to three separate vacancies." Accordingly, the notice continued, "you are ineligible under the rules of the City Personnel Director for further certification from the civil service list specified above." (Union Exhibit "Q".)

Appearing in a space next to Kaufer's name on the AMA list is a handwritten notation that reads: "not good management material." In response to questions concerning the names that appear on the list, Weinstein testified that she was not the author of the handwritten notation, did not recognize the handwriting, and did not discuss Kaufer with the personnel analyst who was interviewing the candidates because she was only concerned with employees who were currently working under her. According to Weinstein, DEC staff who were "picked up" from the list were given "status" in a higher title for work they were already performing. (Tr. 653.) For example, Weinstein testified: Roger Ho (who had ranked number "one" on the list) had been functioning as the supervisor of 8A loan closings and had been performing many of the functions that Steve Kaufer had been performing just before Kaufer transferred to OPM (Tr. 623); Winston Jordan (number "four"), was functioning as the Director of the 8A Program; and Theohari Tesmetges (number "five"), was functioning as an AMA provisionally for several years. (Tr. 591.) Weinstein further testified that Charles Bomstein (number "eight"), who was a DEC employee at the time of the selection process, was not appointed because there were no additional AMA positions in her program. (Tr. 593.)[10] On cross-examination, although unable to recollect whether or not Gwen Nichols held a provisional position, Weinstein agreed that Nichols (who was not on the list) did work as an AMA for DEC after the list had been established, "but not for the 8A Loan Program". (Tr. 657.)

[10] According to McNabb, Bomstein was invited but did not appear for the employment interview held on August 20, 1986 because "he was not interested". (Tr. 53-54.)

Weinstein's opinion on Kaufer's qualifications, which was based on her knowledge of his abilities at the time of his transfer to OPM in 1985, is as follows:

> I thought Steve was very strong in terms of his technical expertise. He worked very hard. I think the areas of weakness were those that would have made him less than a very good supervisor at that time in his professional duties. He was somewhat hesitant to make judgments and recommendations and I think that would have limited his abilities to be a strong supervisor.
>
> On the other hand, we felt that in terms of the training and the more complex loan analysis role, those functions better matched his strengths. [Tr. 656-7.]

Weinstein further testified that she was unaware of Kaufer's involvement in any litigation concerning the AMA list "until an attorney from the Office of Labor Relations ... discussed the possibility of [her] testifying at a hearing in [this] matter" (Tr. 594-5); nor does she recall ever learning that he was an officer of Local 1757. (Tr. 627.)

Beginning in the fall of 1986, Kaufer sought but did not receive a provisional appointment to a vacant position in HPD's Soundview NPP office. According to Steve Trynosky, the Director of the Soundview NPP and whose appearance was obtained through the issuance of a Union subpoena, he "spent the better part of a year [1986-87] trying to hire [Kaufer]" as his Deputy Director. (Tr. 87.) In a memorandum dated April 3, 1987, to Kathleen Dunn, then the Director of the Neighborhood Preservation Program and Trynosky's immediate supervisor, Trynosky reported:

> As per your suggestion, I spoke to Steven Kaufer regarding titles and salary should he come on board as Deputy Director in Soundview. Mr. Kaufer would be willing to accept a Project Development Coordinator line and has given me verbal assurance that he would commit himself to the job for a minimum of two years.

> I have reviewed his resume and spoken to his former supervisors and am confident that he would be an excellent addition to our staff. Besides being highly competent in loan processing, he also has demonstrated experience in ULURP and UDAAP, areas where we are weak since Bob Kelsey left.... [City Exhibit "23".]

Trynosky testified that despite the fact that Kaufer "had been interviewed and seemed qualified for the position," he was unable to hire him. (Tr. 93.) When asked if he was ever given a reason why he could not hire Kaufer, Trynosky replied that he had been told by Dunn that "[Kaufer] had been involved in some type of grievance action and therefore would not be an asset to the Preservation Program." (Tr. 88.) Trynosky stated further that in a subsequent conversation concerning Kaufer, Dunn said that "she had been told by her superiors that [Kaufer] was a 'troublemaker' involved in a grievance action. Therefore he would not, or should not, be hired." (Tr. 92-3.) When asked if Dunn specified which superiors told her this, Trynosky testified that Dunn identified Elliot Yablon, an Assistant Commissioner at HPD, and Alyce Slosberg. (Tr. 93.)

On direct examination, Deputy Commissioner Dunn denied saying that Kaufer could not be hired because of his grievance activities. (Tr. 757.) As for her knowledge of his participation in protected activity, Dunn testified that she only learned that Kaufer was involved in a lawsuit when "he [Kaufer] told me about a year ago [August 1990]." (Tr. 762.)

When asked her reasons for not approving the appointment of Kaufer as the Deputy Director of the Soundview NPP, Dunn testified that Kaufer had neither the breadth of experience nor the supervisory skills required for the job. (Tr. 844.) As for Kaufer's lack of qualifications for a supervisory

position, Dunn, who had worked with him when he was an 8A Loan Coordinator, testified:

> I thought Steve was a nice guy. I thought he was familiar with 8A loans, but I didn't think he had the scope necessary in my opinion to perform the Deputy Director's responsibilities. I did not see him as a supervisor. [Tr. 754.]

When asked if she always had this opinion of Kaufer, Dunn stated that she "had the opinion from the first time Steve Kaufer's name was brought up to me by Steve Trynosky ... The basis for that opinion was, I had worked with Steve Kaufer in 8A and I found him to be a nice person, but very immature." (Tr. 854.) Dunn testified that because she formed this opinion of Kaufer when they were co-workers, she sought the advice of Weinstein, who had been Kaufer's supervisor in DEC. According to Dunn, "Ms. Weinstein told me she did not think that Steve was mature enough ... to have the job. She did not think he had the experience. ... She did not recommend him for the position." (Tr. 865.) Dunn further testified that eventually, even Trynosky did not select Kaufer as the "best candidate" for the Deputy Director position. (Tr. 754.) (City Exhibit "25".) According to Dunn, the person that Trynosky did select, Elaine Garcia, is the same person he recommended to be his successor when he resigned in April 1989. (Tr. 742.) According to his letter of resignation, Trynosky left HPD "to take a position in the private sector working for a General Contractor as a Project Manager." (City Exhibit "22".)

When asked about her working relationship with Trynosky, Dunn explained that "[h]e was generally unfriendly. He mostly did not speak to me." (Tr. 741.) According to Dunn, she was hired by Trynosky in 1978, and then she moved past him in status and rank over the years. (Tr. 734.) Dunn also testified that Trynosky was very unhappy about being transferred, that he

"made it known to many people in the Neighborhood Preservation Office that [Dunn] was the reason for his transfer" (Tr. 740), and that he made derogatory personal comments about her [Dunn] to co-workers (Tr. 824). On cross-examination, Dunn admitted that she neither liked Trynosky nor appreciated that he made the alleged comments about her. (Tr. 869.)

Positions of the Parties

Union's Position

The Union contends that it has established, by a preponderance of the credible evidence, that respondents:

> ... have interfered, restrained, coerced and discriminated against Lamar McNabb and Steven Kaufer, Mortgage Analysts, for the purpose of discouraging participation in union activities in violation of Section 12-306a(1) and (3) of the [NYCCBL], by refusing to promote them to permanent civil servant positions as Associate Mortgage Analysts because of their union activities.

According to the Union, the record clearly establishes that McNabb and Kaufer were engaged in protected union activity, that virtually all of the HPD management officials involved in the decision-making process were aware of that activity and that the reasons offered by the City to justify their non-selection are a pretext, made to cover the employer's union animus. As a remedy, the Union seeks an order from the Board directing respondents to promote McNabb and Kaufer to AMA positions and to make them whole for all lost wages and benefits.

In support of its claim that both McNabb and Kaufer had engaged in protected activity, the Union points out that during their terms in office as Union officials, both McNabb and Kaufer individually and collectively represented the interests of their members on a variety of matters affecting their working conditions. In particular, the Union asserts that McNabb and

Kaufer were primarily responsible for enlisting the participation of other Mortgage Analysts willing to be named as plaintiffs in a lawsuit against the City. According to the Union, as a direct result of their efforts, the City was forced to hold a civil service examination for the AMA title and to consider qualified candidates, including McNabb and Kaufer, for permanent appointment.

The Union asserts that the following circumstances support the conclusion that McNabb and Kaufer were discriminated against: (1) the perfunctory manner in which they were interviewed, proving that the decision to pass them over had already been made; (2) that although there were six AMA vacancies, only four eligible candidates were promoted; (3) that three of the four persons who were appointed were non-members of the Union; and (4) that two AMA positions were held by provisional appointees, despite the existence of the AMA list.

The Union contends that the testimony of Slosberg, which was offered by the City to counter the allegation that McNabb was not promoted because of his union activity, is "riddled with exaggerations, inconsistencies and outright falsehoods." According to the Union, Slosberg's testimony that the decision not to promote McNabb was based on his work history, poor attitude and uncooperative behavior is undermined by the fact that she was openly hostile toward McNabb throughout her testimony, that she took every opportunity to exaggerate the facts, that she failed to acknowledge any of McNabb's positive qualities even when they were based on documentary evidence and that she insisted that McNabb had been demoted when he hadn't. Moreover, the Union argues, inasmuch as Slosberg purportedly functioned as a "central clearing

house" for all Office of Development personnel matters, testimony that she did not learn about the Article 78 proceeding in the normal course of carrying out her job is unworthy of belief.

The Union points out that Slosberg studiously avoided characterizing McNabb as a "troublemaker," apparently conscious of the legal impact of the use of that term. However, the Union submits, she had no problem characterizing McNabb as a "problem employee," which, the Union contends, carries the same connotation as the term "troublemaker."[11] Given the record in this matter, the Union argues, it is virtually impossible to conclude that the City established a non-pretextual, non-discriminatory basis for deciding not to promote McNabb.

In support of its claim that HPD's decision not to promote Kaufer was motivated by anti-union animus, the Union points to the handwritten notation on the AMA eligible list, "not good management material," and Trynosky's testimony that high level HPD managers did not want to promote Kaufer to Deputy Director of the Soundview NPP because he was involved in past grievance action. Moreover, the Union contends, the City has offered no direct evidence as to why Kaufer, an admittedly model employee with an unblemished work record, was not selected for promotion to one of the existing provisional AMA positions.

The Union alleges that since HPD's decision not to promote Kaufer to Deputy Director of the Soundview NPP office clearly was based on his union

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[11] The Union cites U.S. Steel v. Van Swenson, 122 LRRM 1199 (1986), wherein the NLRB held that "it is the context in which the word 'troublemaker' is used and not the use of the word alone that imparts the unlawful connotation."

activity, it is reasonable to infer that this same activity motivated the decision not to promote him to AMA. The Union submits that Dunn's explanation as to why Kaufer was not appointed as the Deputy Director of the Soundview NPP is contradictory and inconsistent with the evidence. In support of this claim, the Union alleges that the April 3, 1987 memorandum from Trynosky to Dunn demonstrates that, at one time, Dunn seriously entertained Trynosky's request to promote Kaufer, which is contrary to her testimony that she never thought Kaufer would be a good candidate for a supervisory position. According to the Union, Dunn gave shifting reasons to justify her decision not to promote Kaufer, which undermines her testimony and demonstrates the pretextual nature of HPD's conduct.

The Union maintains that the City's attempt to impeach Trynosky's testimony by claiming that he harbored personal animosity toward Dunn is rendered suspect by her admission that she harbored personal animosity toward him. In any event, the Union argues, even without Trynosky's testimony, there is more than ample evidence in the record of HPD's knowledge of Kaufer's union activities, i.e., his out-of-title grievance activity and the Article 78 proceeding.

The Union argues 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 (i.e., McNabb).[12] 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 discrimination where the employer was found to be unlawfully motivated against another union activist for the same type of union activity. This is especially true where the union activists are involved in joint activity.[13]

Given the parallels in both timing and circumstance between the two union activists, and the undeniable proof of anti-union hostility as to Kaufer, the Union maintains that there is evidence sufficient to support a conclusion that HPD's decision not to promote both of them was genuinely motivated by reasons violative of the NYCCBL.

The Union argues that the Board should follow the analysis set forth in NLRB v. Great Dane Trailers, Inc., 388 US 26, 65 LRRM 2465, 2469 (1967), to determine the nature of the allegedly discriminatory conduct under review herein, to wit:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is

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[12] 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).

[13] Union's post-hearing brief, at 24.

> on the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him (emphasis in original).

The Union submits that because disparate treatment of union officials is inherently destructive of employee rights, the Board should find that the respondents have committed an improper practice as to McNabb and Kaufer, even if the City offers legitimate and substantial business justification to explain its conduct.

The Union further contends that the City has failed to prove by a preponderance of the evidence that it would have decided not to promote petitioners McNabb and Kaufer without regard to their union activity. According to the Union, pursuant to the Board's second interim decision in this matter (Decision No. B-67-90), the burden is on the City to establish that the decisions not to promote these two union activists were based on sound business reasons and that HPD would have decided not to promote McNabb and Kaufer independent of their protected activity.[14] The Union submits that the City has failed to meet its burden. In support of this claim, the Union points out that the presence of shifting reasons for failing to appoint a union activist is a valid basis for concluding that an employer was motivated by union animus and for concluding that a union activist would have been promoted "but for" his union activities.[15]

City's Position

[14] The Union cites NLRB v. Transportation Management Corp., 462 US 393, 113 LRRM 2857, 2859 (1983) and Decision No. B-17-89.

[15] The Union cites Local 912, AFSCME v. City of Dunkirk, 22 PERB ¶4590 (1989).

The City contends that the instant petition should be dismissed in its entirety because petitioners have failed to establish the first prong of the improper practice test announced in City of Salamanca, 18 PERB ¶3012 (1985). The City maintains that the Union has failed to establish that any members of HPD management who were responsible for the non-selection of McNabb and Kaufer were aware of either petitioners' participation in the Article 78 proceeding that was brought by the Union to compel administration of the AMA civil service examination.[16]

In the case of McNabb, the City submits that Alyce Slosberg, the Director of Operations for the Office of Development, is "the person most responsible for McNabb's non-selection."[17] The City argues that the only logical conclusion that could be drawn from Slosberg's testimony is that she was unaware that McNabb had been a plaintiff in any lawsuit at the time of the alleged discriminatory action. In support of this claim, the City argues that Slosberg consistently testified that she was unaware of any "legal action" involving McNabb until he met with Commissioner Willis in October 1986, when McNabb offered "to put a stop to any litigation being prepared by his union" in exchange for a promotion."[18] Because Slosberg had no knowledge of McNabb's role in the Article 78 proceeding, the City maintains, there can be no doubt

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[16] It should be noted that throughout this proceeding the City has maintained the position that the only protected activity at issue in this case concerned petitioners' participation in the Article 78 proceeding, Matter of Habler.

[17] See City's post-hearing brief, at 28.

[18] The City notes that McNabb could only have been offering to drop the instant improper practice petition, since the Article 78 proceeding had long been concluded by that time.

that her recommendation not to promote McNabb did not involve retaliation and was "clearly and unequivocally based upon a review of [his] work history and [on] her conversations with his various supervisors."

As for Kaufer, the City claims that the Union has failed to establish that any members of HPD's management who are supposed to have been responsible for his non-selection to either an AMA title or the Deputy Director position in the Soundview NPP had knowledge of his participation in Matter of Habler. In this connection, the City focuses on the testimony of Robin Weinstein, Kathleen Dunn and Tim O'Hanlon.

According to the City, Weinstein was unaware of Kaufer's involvement in any litigation concerning the AMA list until an attorney from the Office of Labor Relations discussed the possibility of her testifying at the hearing in this matter; and Dunn first learned that Kaufer was involved in a lawsuit when Kaufer told her in August 1990. As for Tim O'Hanlon, who was Kaufer's immediate supervisor at the time of the non-selection, the City contends that he was unaware of any litigation concerning the AMA list, stating that he could only guess as to why the list was promulgated.

In sum, the City submits that the record is devoid of any indication that "any person at any level within any division of [HPD] having any knowledge of an Article 78 proceeding against the Department of Personnel or [HPD]." Even assuming, arguendo, that their involvement in the Article 78 proceeding was known to those responsible for the complained of acts, the City next argues that the Union has failed to demonstrate that the participation of McNabb and Kaufer in Matter of Habler was a decisive factor in the

respondents' decision not to promote them. In other words, the City contends that HPD had legitimate business reasons for not promoting either of them.

The City asserts that "McNabb was not selected from the eligibility list for AMA for one reason only - his marginal/poor work record." Given the fact that McNabb's work performance in the seven years leading up his non-selection ranged from "Conditional" to "Unsatisfactory" and that supervisor after supervisor had problems with his attitude and his behavior, clearly McNabb was never considered a promotable employee. According to the City, the interview itself has little impact on the appointment of an employee like McNabb, in that the decision not to promote would be made simply on the basis of his work history. Therefore, the City contends, McNabb's assertion that the interview was a mere formality, while an accurate statement, is not probative of anti-union animus.

As for Kaufer, the City denies that any of the complained of acts were motivated by anti-union animus and instead contends that there exist two reasons for his failure to be promoted: the first being Kaufer's own request for a transfer from a unit which utilized the AMA title (DEC) - to a unit which did not (OPM); the second is that Kaufer did not possess the requisite supervisory skills.

In support of the assertion that the employer harbored no animus toward Kaufer, the City points out that Weinstein recommended and supported a merit increase for Kaufer and resolved an out-of-title grievance in his favor. According to Weinstein, when Kaufer responded to a vacancy posting for a new position with OPM, she not only provided him with a good reference but also spoke to him about the possibility of remaining with DEC. The City submits

that Kaufer probably would have been appointed to an AMA position if he had not transferred out of DEC. These facts, the City submits, fail to support an allegation of retaliatory motive.

The City contends that it was Kaufer's own action of removing himself to a unit that had no positions for the AMA title that foreclosed his opportunity for a promotion. The City further contends that "no evidence was presented by ... Kaufer which would indicate that he had attempted to transfer back to his former division which, in fact, utilized the AMA title." In this connection, the City points out that any appointments that were made from the list did not result in any transfers from any other divisions of HPD. According to Weinstein, those who were "picked up" off the list were given "status" in a higher title for work they were already performing. In support of this contention, the City submits that Charles Bomstein (number "eight" on the list), who was on Weinstein's staff at the time of the selection process, was not appointed because there were no additional AMA positions in her program.

In response to the Union's claim that the employer's failure to promote Kaufer to the vacant Deputy Director position in the Soundview NPP office demonstrates a pattern of anti-union animus, the City submits that it has presented testimony and evidence sufficient to rebut the Union's allegations and, further, to prove that Kaufer did not have the necessary supervisory skills for the position. The City argues that the testimony of Steven Trynosky, the Director of the Soundview NPP who claimed that he was not allowed to hire Kaufer as his Deputy Director because Kaufer was a union "troublemaker," is an outright lie. In support of its claim that Trynosky's testimony is unworthy of belief, the City points out that Trynosky made these

allegations only eleven weeks before his retirement from HPD; that after all the applicants for the Deputy Director position had been interviewed, not even Trynosky selected Kaufer as the "Best Candidate"; and that the alleged "troublemaker" remark was attributed to Kathleen Dunn, against whom Trynosky held a grudge. The City further submits that Trynosky, who was on the witness stand for a mere ten minutes, made a less credible witness than Dunn, who had testified for an entire day.

As for Kaufer's lack of qualifications for a supervisory position, the City submits the testimony of Dunn, who worked with Kaufer when he was an 8A Loan Coordinator. Dunn stated she didn't think Kaufer had the "scope" necessary to perform the Deputy Director's responsibilities. When asked if she always held this opinion, Dunn stated that that was her opinion from the moment Kaufer's name was mentioned as a possible candidate by Steve Trynosky. Dunn further testified that because she formed this opinion of Kaufer's abilities based on when they were only co-workers, she sought the advice of Weinstein, who had been Kaufer's immediate supervisor when he worked for DEC. According to Dunn, Weinstein also did not think that Kaufer was "mature enough" for the job.

Finally, the City submits the fact that provisionals held AMA titles during the existence of the AMA list is neither relevant to this proceeding nor probative of anti-union animus. In any event, the City argues, the Union has failed to elicit any testimony or produce any direct evidence that would support the drawing of an inference of illegal motive from the fact that a provisional AMA was employed at the time of the non-selection of McNabb and Kaufer.

Discussion

In the Second Interim Determination and Order in this matter (Decision No. B-67-90), we found "patently untenable" the City's contention that the petitioners' participation in the Article 78 proceeding is the only relevant and material activity upon which the instant improper practice charges are based, noting that "[b]oth the improper practice petition and our first Interim Determination and Order in this matter (Decision No. B-48-88) demonstrate that there is further substantial basis for the charges presented here."[19] We reiterate that this case is not limited to the question of whether a sufficient causal connection between the participation of McNabb and Kaufer in Matter of Habler and the City's decision not to promote them has been demonstrated.[20] Based upon the complete record in this matter, we affirm that determination and proceed to consider whether petitioners have established:

> ... that the denial of promotions to McNabb and Kaufer was motivated by employer animus related to their participation in the Union lawsuit, by their activities as chapter officers of Local 1757, or by other union activity. [Emphasis added.] [Decision No. B-67-90 at 20, quoting Decision No. B-48-88.][21]

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), provides that the petitioner must prove that:

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[19] Decision No. B-67-90, at 19.

[20] See note 16, supra, at 34.

[21] See also, note 3, supra, at 3.

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

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

If the 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.[22] In the instant case, the Union contends that the evidence amply supports a conclusion that McNabb and Kaufer engaged in protected activity, that agents of the employer who were responsible for the decisions to deny them permanent appointment to AMA were aware of their protected activity and, finally, that the failure to appoint them was predicated on their protected activity.

According to the City, the Union has failed to satisfy either element of the Salamanca test with respect to McNabb. The City contends that the evidence does not support a conclusion that Alyce Slosberg either knew of McNabb's role in Matter of Habler or that her decision not to recommend him for promotion involved any retaliation on account of that lawsuit. Therefore, the City argues, it should not be required to come forward with evidence to support the legitimacy of its actions with respect to McNabb. In any event, the City submits, the employer had a legitimate business reason for not promoting McNabb, i.e., a "marginal/poor work record."

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[22] 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)]."

As for Kaufer, the City contends that none of the agents responsible for Kaufer's "non-selection or non-promotion", i.e., Kathleen Dunn, Robin Weinstein, or Tim O'Hanlon, had any knowledge of his involvement in the Article 78 proceeding. Even if the Board finds that the employer was aware of Kaufer's union activity, the City submits that there is no cause and effect relationship between that activity and the fact that Kaufer was not appointed to AMA. The City contends that Kaufer was not promoted for two reasons, neither of which run afoul of the statute: (1) his own request for a transfer to a unit which did not utilize the AMA title; and (2) his lack of supervisory skills.

In the Second Interim Determination and Order in this case (Decision No. B-67-90), we held that for purposes of deciding the City's motion to dismiss with respect to McNabb, the record contained sufficient evidence to impute knowledge of protected conduct to the employer's agent(s) responsible for the challenged decision. On a motion to dismiss, however, the petitioner is entitled to every reasonable inference that could be drawn from the facts alleged.[23] Setting aside all of the inferences that were drawn in Decision No. B-67-90, and based on an examination of all the relevant and material facts surrounding the alleged elements of both petitioners' improper practice claims, we must now determine whether the Union has proved that McNabb and Kaufer "had been engaged in protected activities, and that the respondent had knowledge of and acted because of those activities."[24]

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[23] See Decision No. B-67-90 and the cases cited therein.

[24] Salamanca, 18 PERB at 3027 (1985).

Based on the complete record in this matter, we find that the evidence supports a conclusion that Slosberg, the person whom the City concedes was primarily responsible for McNabb's non-selection, was aware that he was a Union official and that he had engaged in protected activities separate and apart from his role in Matter of Habler. We note Slosberg's conceded function as the "central clearing house" for all Office of Development personnel matters. Given that responsibility, we are convinced that McNabb's letter of complaint concerning the Ewing "incident",[25] which McNabb signed in his official capacity as Vice President and Chapter Chair of Local 1757, is a matter that would cross Slosberg's desk in the normal course of business. Even putting aside the fact that the incident concerns a personnel matter, it strains credulity to believe that a document having so wide a distribution and so inflammatory a nature would escape the attention of the Office's Director of Operations.

As for Kaufer, there is no dispute that he pursued and won an out-of-title grievance in 1985 for work that he performed in the very title to which he was later denied a permanent appointment.[26] No doubt such determination was documented in Kaufer's personnel file and was reviewed during the selection process at issue in this case. Indeed, according to Kaufer's unrebutted testimony, the only subject that he could recall discussing during his interview for the AMA position was the out-of-title grievance.[27] Thus, while we find implausible the City's contention that those responsible for the

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[25] See Union Exhibit "G", summarized, supra, at 11-12.

[26] See Union Exhibit "DD", summarized, supra, at 20.

[27] See testimony of Kaufer, summarized, supra, at 22.

decision to deny Kaufer an appointment to AMA were unaware of his role in the Article 78 proceeding, it is of no consequence here since there is no question that agents of the employer who participated in the AMA interview process had knowledge of Kaufer's involvement in prior grievance activity.

The record demonstrates that McNabb and Kaufer engaged in protected activity and that the employer was aware of that activity. Thus, our next inquiry concerns whether the Union has proved, by a preponderance of all the evidence, that the employer's decisions to deny McNabb and Kaufer appointments to AMA were on account of their protected activity.[28] In other words, an improper employer practice can only be found if the Union demonstrates that the decisions to pass them over were "based in whole or in part on anti-union

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[28] NLRB v. Transportation Management Corp., 462 US 393, 113 LRRM 2857 (1983); Holo-Krome Co. v. NLRB, 139 LRRM 2353 (2d Cir. 1992); NLRB v. Wright Line, 251 NLRB 1083, 105 LRRM 1169, enf'd 662 F2d 899, 108 LRRM 2513 (1st Cir. 1981).

Section 10(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §160(c), provides in pertinent part:

> Prevention of Unfair Labor Practices
>
> ... If upon the preponderance of the testimony taken the [NLRB] shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the [NLRB] shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice.... If upon the preponderance of the testimony taken the [NLRB] shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the [NLRB] shall state its findings of fact and shall issue an order dismissing the said complaint.

See also, CSEA v. Hudson Valley Community College, 25 PERB ¶3039 (1992); PEF v. State of New York (Division of Human Rights), 22 PERB ¶3036 (1989).

animus" and "would not have taken place independently of the protected conduct" of the petitioners.[29] It is well settled that the Union carries the burden of proving that protected activity was a "substantial or motivating factor in the adverse decision."[30]

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[29] Transportation Management Corp., supra, at 2860-61. The Supreme Court explained that:

> ... if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that [the employer] proffers are pretextual, the employer commits an unfair labor practice. [The employer] does not violate the NLRA, however, if any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause [at 2859].

The Supreme Court also held that proof that the adverse action:

> ... would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried the burden of proof by a preponderance of the evidence [at 2860].

It should be noted that we adopted this approach in Decision No. B-17-89, a case which involved a dual or mixed motive discharge.

[30] In Transportation Management Corp., supra, the Supreme Court points out that:

> ... throughout the proceedings, the General Counsel carries the burden of proving the elements of an unfair labor practice [at 2860].

See also, O'Rourke v. Board of Education of the School District of the City of New York, 26 PERB ¶4555 (1993), and the cases cited therein.

In previous decisions, we have recognized that proof of this element of the Salamanca test is difficult to adduce.[31] In Decision No. B-17-89, we stated:

> Examination of whether an employee's union activity was a motivating factor in an employer's decision to act requires that we try to ascertain the employer's state of mind when the challenged decision was made. In the absence of an outright admission of improper motive, proof of this element necessarily must be circumstantial.[32]

We have also considered whether a union's burden of proving improper motive can be advanced by the consolidation of two independent claims in a single improper practice petition. In Decision No. B-1-91, we held that where it is apparent that a union has consolidated the claims of two individual petitioners in an attempt to satisfy its burden of proof as to the first with facts relating only to the second, the charges with respect to the first petitioner will not be sustained. On the other hand, a union may offer facts and evidence relating to two or more individuals to show that an employer has followed a "pattern" of harassment, discrimination and/or retaliation on account of union activity.[33] In addition, we will permit the submission of facts that post-date the filing of a petition when they are offered to

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[31] See also, Decision Nos. B-50-90; B-24-90; B-25-89; B-17-89; B-8-89.

[32] Decision No. B-17-89, at 13. See also, Decision Nos. B-2-93; B-67-90; B-50-90; B-24-90; B-8-89.

[33] E.g., Decision Nos. B-26-93; B-37-92.

demonstrate a continuing pattern and practice arising out of the same cause of action that was set forth in the petition.[34]

Further, we will not attribute a generalized mental state of anti-union animus to agents of an employer in the absence of probative evidence which warrants the drawing of such an inference.[35] Nor will we rely on the premise that an alleged admission against interest as to one union activist vitiates the need to prove specific discriminatory intent towards another.[36] However, we have recognized that certain employer conduct may be so inherently destructive of important rights guaranteed under the NYCCBL to a union and members of a bargaining unit, that an improper employer practice may be found even in the absence of proof of improper motive.[37]

Applying these principles to the instant case, we cannot conclude that the Union has proved, by a preponderance of the evidence, that anti-union animus was the substantial or motivating factor in the decision to bypass McNabb for appointment to AMA. Rather, we find that the employer had legitimate business reasons for its decision, i.e., a history of less than satisfactory performance evaluations, a transfer made under questionable circumstances, and a pending demotion that McNabb avoided by taking an unpaid leave of absence. Moreover, the record is replete with evidence that McNabb adopted a confrontational and uncooperative attitude towards his supervisors that often flared into insubordination.

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[34] Decision Nos. B-37-92; B-2-83; B-27-81.

[35] Decision Nos. B-67-90; B-24-90; B-3-90.

[36] Decision No. B-67-90.

[37] See Decision No. B-26-93, and the cases cited therein.

Against this background is the Union's bald assertion that the employer retaliated against McNabb by not appointing him off a civil service list that he played a part in getting established. The only evidence submitted by the Union that could arguably constitute direct evidence of anti-union hostility is Slosberg's testimony that McNabb was a "problem employee." Under the circumstances of this case, however, we credit Slosberg's explanation that her characterization of McNabb as a "problem employee" was merely a reference to his repeated problems with supervision. The record reveals that the difficulties between Ewing and McNabb, which appear to have stemmed from a dispute over the assignment of certain duties that McNabb did not believe were appropriate for his job title, were not limited to that supervisor. Apparently, McNabb presented a similar problem for another supervisor, Roy Miller, when McNabb also refused to perform an assignment on similar grounds. Given the number of evaluations in which it was noted that McNabb was having difficulty with supervision, it is equally plausible that the characterization of him as a "problem employee" could have been a reference to those instances rather than a reference to his involvement with the Union.[38] Based on the record as a whole, we cannot conclude that McNabb would have been appointed to AMA but for his protected activity.

In contrast, we note that Kaufer's employment history is unblemished. However, the mere fact that Kaufer was not appointed to AMA, even if he was highly qualified, does not establish that he was passed over in retaliation

[38] While it could be argued that McNabb's behavior was in response to orders that he perform what he perceived to be out-of-title work, which is a grievable matter, we note that neither McNabb nor the Union ever filed such a grievance.

for his Union activities. As previously stated, the Union bears the burden of proving that anti-union animus was a substantial or motivating factor in the challenged decision.

Again, the Union relies, in large part, on the theory that the employer retaliated against Kaufer on account of his role in Matter of Habler. While we might be persuaded that, in isolation, this might warrant an inference that the failure to appoint Kaufer to AMA was tainted with anti-union animus, other facts brought out in the presentation of the City's case dissuade us from doing so. Specifically, we credit the testimony of Robin Weinstein, who was the Director of Operations of DEC at the time of the selection process and who had been Kaufer's supervisor when he filed and won an out-of-title grievance for work he performed as an AMA.

With regard to the AMA interview and selection process, we credit Weinstein's explanation that it was her practice to make appointments from civil service lists of only those individuals who were on her staff and who were already performing that level of work. Kaufer was not considered for any AMA positions in DEC, Weinstein stated, because he was no longer part of her staff. Adding further weight to our conclusion that the Agency's refusal to promote Kaufer was not influenced by the consideration of improper factors is that the evidence clearly supports Weinstein's testimony that Kaufer would have been given status in the AMA title when the list was established in 1986 if he had not transferred out of Weinstein's unit in 1985. Although there may be some question under the civil service law of the propriety of this agency's practice, circumvention of the civil service appointment process does not

constitute an improper employer practice under the NYCCBL absent proof that the employer was improperly motivated.[39]

The Union also attempted to establish a pattern and practice of discrimination through the testimony of Steve Trynosky, the Director of the Soundview NPP, who claimed that his request to have Kaufer appointed as his Deputy Director was denied by his superiors because Kaufer had been "involved in some type of grievance action." The testimony of Trynosky on this issue, however, was directly contradicted by the testimony Deputy Commissioner Kathleen Dunn, who was Trynosky's immediate supervisor at the time in question. Furthermore, although both Trynosky and Dunn testified credibly, we find that Dunn was on the stand for an entire day, that she testified in a forthright manner and evidenced a clear, consistent and detailed recall of the facts under vigorous cross-examination.[40] In contrast, Trynosky testified for only a few minutes and was hardly tested under cross-examination.[41]

The record also discloses that Trynosky, who was close to retirement at the time of his testimony, may have harbored resentment for Dunn on account of her ascendance past him in rank and status within the agency. The fact that Trynosky's testimony at the hearing in this matter was compelled under a subpoena issued by the Union is not proof, in and of itself, that he was a

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[39] A similar question was raised with regard to the employer's retention and/or appointment of provisional AMAs during the existence of the civil service list. However, there is virtually no evidence to support the inference that these alleged arguable violations of civil service law were improperly motivated.

[40] See Tr. 732-872.

[41] See Tr. 85-95.

hostile witness or that his testimony was against his own interest. We cannot ignore the possibility that Trynosky's testimony was an attempt to take a "parting shot" at Dunn on account of personal animosity. In any event, for the reasons given the Union has not established the necessary improper motivation for the employer's actions by a preponderance of the evidence.[42]

Based on the totality of the circumstances, we find that there is not sufficient basis to warrant a conclusion that the AMA selection process was tainted by the Agency's consideration of improper factors. Accordingly, the improper practice petition must be dismissed in its entirety.

Exceptions to Trial Examiner's Rulings

Counsel for the parties took exception to several evidentiary rulings made by the Trial Examiner in the course of the hearing in this matter. In each instance, we find as follows:

(1) Several documents (marked for identification as City Exhibit Nos. 7, 10 and 15) were admitted on condition that the declarants be produced in order to establish their authenticity (the business record exception to the hearsay rule did not apply) and to give the Union an opportunity for cross examination. The City took exception to this ruling. Inasmuch as the declarants did not appear, for the reasons given these documents were not considered.

[42] Because we have found that the Union has failed to prove that the employer acted with improper motivation, we need not reach the question whether the employer's reliance on Kaufer's lack of supervisory skills as a reason for his non-selection was a pretext.

(2) A document of questionable probative value (marked for identification as City Exhibit No. 4) was not admitted into evidence on the ground that the potential for prejudice outweighed the purpose for which the City sought to have the document admitted. Accordingly, this document was not considered.

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 submitted by Local 1757, District Council 37, AFSCME, AFL-CIO be, and the same hereby is, dismissed.

DATED: New York, New York
February 28, 1994

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

DENNISON YOUNG, JR.
MEMBER

ANTHONY COLES
MEMBER