L.1182, CWA v. DOT, 57 OCB 26 (BCB 1996) [Decision No. B-26-96 (IP)]

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

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA

DECISION NO. B-26-96
DOCKET NO. BCB-1644-94

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Respondent.

----------X

DECISION AND ORDER

On April 13, 1994, Local 1182, Communications Workers of America ("Union") filed a verified improper practice petition against the New York City Department of Transportation ("Department" or "City"). The petition alleges that the City violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL") when it placed Leon Tankard ("Petitioner"), a Traffic Enforcement Agent ("TEA"), on a leave of absence in retaliation for his having provided representation to a fellow employee. The City, by its Office of Labor Relations, filed a verified answer on June 9, 1994 and the Union filed a verified reply on September 30, 1994.

A pre-hearing conference was held at the Office of Collective Bargaining ("OCB") on November 17, 1994 and a hearing was scheduled to commence on January 24, 1995. At the pre-

hearing conference the City's attorney indicated that it had come to his attention that the Petitioner had executed a settlement agreement and that, as a result, he wished to make a motion to dismiss the petition. The Trial Examiner assigned to the case stated that such a motion would have to be made in writing within a reasonable time prior to the commencement of the hearing.

By letter dated January 17, 1995 the City's attorney requested an adjournment of the scheduled hearing dates because he was leaving the employ of the City. The City attorney stated that "as soon as the case is reassigned, the new attorney will contact you to reschedule." The Union's attorney agreed to an adjournment.

By letter dated April 21, 1995 the City informed the OCB that the case had been reassigned. On the same date, the City filed a motion to amend its verified answer wherein it requested that the petition be dismissed. On June 9, 1995 the Union filed a reply to the amended answer and motion to dismiss.

On July 18, 1995, the Board issued Interim Decision No. B-15-95, which addressed the question of whether, by signing an "Agreement of Penalty and Waiver of Rights" ("Agreement"), the Petitioner had waived his right to pursue the instant improper practice charge. The Board found that in order to interpret the Agreement, a hearing would be necessary to ascertain the intent of the parties. Accordingly, the motion to dismiss was denied, and hearings were held on August 29, August 30 and September 27,

1995. After several requests for extension of time, the submission of post-hearing briefs was completed on March 1, 1996, whereon the record in this matter was closed.

Background

The Petitioner in the instant case, a TEA II assigned to Department District Office 109 in Manhattan ("T-109"), serves as a Union delegate. On March 30, 1994, the Petitioner reported to work for the 12 to 8 tour. On his way to the locker room, the Petitioner was informed by Captain Touissant and Chief Culler that a problem had arisen with another TEA, Adonis Baugh, and that his assistance was needed.

Baugh was suspended on March 14, 1994. At the time of his suspension, Baugh was given a letter by the Office of Integrity and Internal Control ("OIIC") which indicated that he was to report to OIIC on March 28, 1994 for further instructions. The letter further stated that during the period of suspension Baugh was prohibited from entering and remaining in any Department facility and that violation of this prohibition could result in arrest for criminal trespass.

Baugh did not report to OIIC on March 28th. However, on March 30, 1994, he appeared at T-109. He was carrying a shopping bag which contained a uniform and claimed that he wanted to

remove something from his locker.[1] Touissant did not allow Baugh to go to his locker; instead, he instructed Baugh to proceed to the fourth floor of T-109 where the supervisory offices are located. Touissant then called Patricia Brown at OIIC to notify her that Baugh was on the premises.

Brown, in turn, informed two of her supervisors at OIIC, Chief Investigator Brooks and Deputy Director Aida Horatio-Ramos, that Baugh was on City property. Brooks determined that Baugh should be arrested by the New York City Police Department ("NYPD") for criminal trespass. Accordingly, the NYPD was contacted by OIIC.

Horatio-Ramos then dispatched two OIIC investigators, Investigator Walker and Investigator Brewster, to T-109. They were instructed to report back to OIIC on the status of the situation. According to Walker, they were also instructed to search Baugh's locker for his badge and summons book and, in the event that Baugh was still on the premises, to file a criminal complaint and meet the police for an arrest.

At the time that the Petitioner's assistance was requested,

---

[1] On at least one occasion prior to March 30, 1994, at the direction of OIIC, Baugh's locker had been checked by Inspector Gogins, another Department employee. The Petitioner was present during this search. According to Patricia Brown, a Supervising Investigator at OIIC, daily locker inspections had been ordered because there were allegations that Baugh had been taking bribes and because OIIC had received notice that Baugh had been "stopped by the [New York City Police Department] while in his uniform" during the period of his suspension.

Walker and Brewster had already arrived at T-109 and Baugh was in an office on the fourth floor. Chief Culler informed Walker and Brewster that the Petitioner was a Union delegate. The Petitioner asked Walker what the problem was and Walker indicated that OIIC had reason to believe that Baugh had taken his badge and summons book home while on suspension. The Petitioner asked to speak to Baugh privately and was permitted to do so for approximately 30 minutes. During this meeting Baugh told the Petitioner that his badge and summons book were in his "unauthorized" locker and that he was on suspension and had failed to report to OIIC as directed.[2]

By the time the Petitioner had finished speaking to Baugh, the NYPD had arrived. The Petitioner asked Walker, Touissant, and Gogins, what actions they intended to take with respect to Baugh. The testimony of the witnesses present at this encounter indicates that the Petitioner also stated, in a loud voice, that the police had no business being at T-109 and that OIIC was harassing TEAs. According to the witnesses, while the Petitioner made these remarks he was blocking a doorway on the third floor of T-109. However, the witnesses testified, the Petitioner removed himself from the doorway when asked to do so.

The NYPD was initially reluctant to arrest Baugh because

[2] According to the Petitioner, many of the TEAs had two lockers; they had an official locker that had been assigned to them by the Department and a second, unofficial locker that they used to store their old brown uniforms.

they believed that it was more appropriate for the OIIC investigators to do it. However, after Brooks discussed the matter with the NYPD, the NYPD told Baugh that he was under arrest. At this point, Walker and Brewster indicated that they wanted to search Baugh's locker before he was arrested. Walker, Brewster, Gogins, Culler, Baugh, the Petitioner, and five police officers proceeded to the locker room. Outside the locker room the Petitioner suggested that it was not necessary for all of the police officers to be present for the search. As a result, three of the police officers stayed outside. Once inside the locker room the Petitioner indicated that Baugh had been using an unauthorized locker. The unauthorized locker was searched and the badge and summons book were found.

After the locker search Walker stated that he still wanted Baugh arrested for criminal trespass. The Petitioner was critical of this decision given the fact that Baugh was sent to the fourth floor when he arrived on the premises and was never asked to leave. The police officers began to cuff Baugh. By this time an audience had gathered; approximately one-half of the employees on the 12 to 8 tour were looking on. The Petitioner requested that Baugh not be cuffed in front of his colleagues. This request was granted. The Petitioner again stated that OIIC was harassing officers; according to Walker, the Petitioner's statements were made in an "unprofessional manner" and included profanity.

After Baugh was arrested and taken to the precinct, Touissant, Walker, Brewster, Gogins and the Petitioner convened in Touissant's office. The shopping bag that Baugh had brought into the premises was now in Touissant's office and Walker removed the uniform from the bag and began to search the pockets. The Petitioner strenuously objected to this search. He stated, in a loud voice, that Walker had no right to go through Baugh's personal belongings and, essentially, that OIIC had gone far enough with this incident when it had Baugh arrested. At about this time, in response to an earlier call from the Petitioner, Robert Cassar and James Huntley, the President and Executive Vice President of the Union, respectively, arrived. Cassar reiterated the Petitioner's objection to the search of the pockets of Baugh's uniform. At some point, Walker called Brooks about the pocket search and was instructed not to proceed with it.

Several times during the course of these events, Walker called Horatio-Ramos and/or Brown at OIIC to give them updates. While the testimony adduced at the hearing concerning the substance of these conversations varies somewhat, it is clear that, at the very least, Walker reported that the Petitioner was loud and abusive, was interfering with the function of OIIC, and was "performing". According to the City's witnesses, however, Walker never mentioned that the Petitioner was a Union delegate.

In response to these reports someone at OIIC, most likely Horatio-Ramos, ordered a computer check be done on Petitioner's

license. Pursuant to Traffic Control Division Order No. 86/36 ("TCD 86/36"), TEAs must have a valid driver's license at all times; Department of Transportation Code of Conduct, Section 20.5 requires TEAs to report an invalid license to the Department. According to Brown, when OIIC receives a report from a work location that an employee is causing "a commotion or disturbance", it is standard procedure to run a license check on that employee. Brown testified that in her opinion the incident involving the Petitioner was of a serious nature insofar as he "acted up" and "performed" with investigators and interfered with an arrest. By contrast, Horatio-Ramos testified that the incident was not serious, as encounters of this nature take place regularly at the work locations. The Petitioner was never questioned by OIIC or anyone else about his behavior at T-109 on March 30, 1994. She also testified that the license check was run because, when Walker called regarding the Petitioner's behavior, she recognized the Petitioner's name and recalled that he had a history of license suspensions.[3]

The license check was run at approximately 2:15 p.m.; it disclosed that the Petitioner's license was suspended.[4]

---

[3] The Petitioner had 12 prior license suspensions. In July of 1989 he was served with formal disciplinary charges for four separate license suspensions.

[4] In late January 1994, the Petitioner returned to work after having been out on disability compensation. His license was checked at that time and he was cleared for duty.

According to Horatio-Ramos and Brown, OIIC did not know that the Petitioner was a Union delegate at the time that the license check was ordered. Upon discovering the suspended license, OIIC ordered the Petitioner to report to OIIC. The Petitioner did so at 5:00 p.m. and, at some point, was joined by Cassar and Huntley. OIIC Investigator Miller met with the Petitioner and told him that his license had been suspended on account of an unpaid summons. In response, the Petitioner produced a receipt to show that the summons was paid.[5] However, because the computer run did not indicate payment of the summons, Miller did not accept it. Miller indicated that, in accordance with TCD 86/36, the Petitioner would not be permitted to return to duty until his license was revalidated. He would be allowed to use a maximum of five days of annual leave or compensatory time in order to get the license revalidated. After that five day period, he would be placed on an unpaid leave. This procedure is applied in every case where an employee's license is suspended.[6]

The Petitioner returned to work on April 13, 1994 after

---

[5] The Petitioner had received more than one summons in the recent past. He had paid the fine on at least one of them with a personal check, which was apparently returned for insufficient funds.

[6] Pursuant to an agreement, the Department of Motor Vehicles periodically sends OIIC a list of Department employees who have suspended licenses. When OIIC receives this list, it runs a computer check on the employees' licenses. If OIIC finds that any of the licenses are indeed suspended, it contacts the employee and applies the procedure outlined in Traffic Control Division Order No. 86/36.

having revalidated his license. Because he had no accrued annual leave or compensatory time, he lost seven or eight days of pay. According to the Petitioner, during that time period he looked for the cancelled check and made several trips to his bank and the Department of Motor Vehicles. However, on cross-examination he admitted that he could have paid the fine on March 31, 1994.

On April 28, 1994, the Petitioner was told to report to OIIC for a conference regarding possible disciplinary action stemming from his invalid license. Present at this conference was Brown, Walker, the Petitioner, and Charlesetta Horton, the Union's delegate-at-large for Manhattan. Horton served as the Petitioner's Union representative. Brown indicated that the Department was prepared to bring disciplinary charges against the Petitioner for having an invalid license and failing to report it. She offered the Petitioner the option of accepting a $50 fine and signing an "Agreement of Penalty and Waiver of Rights" in lieu of being served with charges. While the Petitioner and Horton stated that the fine was too high, they ultimately agreed to accept Brown's offer. Brown testified that a $50 fine for this type of infraction was typical.

The Agreement was a standard form used in disciplinary conferences. It was signed by Horatio-Ramos, the Petitioner, and Horton.[7] Horton signed as a witness. The Agreement provides as

[7] While Horatio-Ramos did not attend the April 28, 1994 (continued...)

follows:

> I, Leon Tankard [Social Security Number] TEA-II of the Bureau of Enforcement, acknowledge certain charges relating to:
>
> Suspended driver's license
>
> I hereby agree to accept a penalty of:
>
> fifty dollar fine to be paid in one installment of fifty dollars ($50.00) to commence on May 20, 1994.
>
> In full satisfaction of these charges. I understand that by doing so I am waiving any and all rights that I have pursuant to the Civil Service Law and any other applicable statute, regulation, or agreement which pertains to disciplinary action against New York City employees.
>
> I execute this Agreement of Penalty and Waiver of Rights in consideration of the City of New York's resolving this matter without placement of formal charges towards me.

There was no discussion of the pending improper practice petition during the conference. Horton, Brown and the Petitioner testified that, at the time of the conference, they did not know that an improper practice had been filed.

The Petitioner had been a Union delegate for several years prior to the March 30, 1994 incident. He testified that, in this capacity, he had dealt with virtually all of the superior officers at T-109. According to Gogins, the Petitioner was known for taking strong positions as a Union representative and had a

---

[7](...continued)
meeting, she signed-off on the settlement negotiated by Brown.

reputation for being loud and outspoken. The testimony of Brewster concurred with Gogins on this point.

Positions of the Parties

Union's Position

As an initial matter, the Union contends that the Agreement signed by the Petitioner does not apply to the instant improper practice petition for several reasons. First, the Union maintains that the Petitioner is not a party to this proceeding; rather, it is the Union that is a party. When the Petitioner signed the Agreement, the Union argues, he was acting in his capacity as an individual employee and, therefore, could not have waived the Union's right to pursue its improper practice charge. Second, the Union argues that the waiver, on its face, concerns disciplinary charges related to the suspended license. According to the Union, the issue settled by the Agreement, i.e., whether the Petitioner was guilty of violating Departmental rules, is completely different from the issue in the improper practice, i.e., whether the Department violated the NYCCBL when it "investigated" the Petitioner and placed him on a leave of absence. Finally, the Union asserts that because the signatories to the Agreement did not know that an improper practice petition was pending, they could not have intended the Agreement to settle the improper practice charge in addition to the disciplinary charges. Moreover, the Union argues, to the extent that the

language of the Agreement is ambiguous, it must be strictly construed against the drafter.

Turning to the merits of the improper practice charge, the Union argues that the Department violated Sections 12-306a(1) and (3) of the NYCCBL when ran the check on the Petitioner's license and placed him on a leave of absence. Applying the City of Salamanca[8] test, the improper practice test adopted by the Board, the Union argues that the City had knowledge of the Petitioner's protected union activity (his representation of Baugh) and that the protected activity was a motivating factor in the City's decision to run the license check.

On the issue of the City's knowledge of the protected activity, the Union argues that Walker was acting as an agent for OIIC when he went to T-109 on March 30, 1994; his actions were "authorized and ratified" by OIIC. There is no doubt, the Union argues, that Walker, as OIIC's agent, knew that the Petitioner was representing Baugh in his capacity as a Union delegate. In any event, the Union contends, the testimony of Brown and Horatio-Ramos that they did not know that the Petitioner was a Union delegate and that Walker did not inform them of that fact, is not credible. The Union argues, essentially, that if OIIC was truly ignorant of the Petitioner's Union status they surely would have done more than simply check his license; they would have

[8] 18 PERB ¶3012 (1985).

questioned him regarding his "performing" and "interfering" with an arrest.

As for the issue of whether the Petitioner's protected activity was a motivating factor in the City's decision to check the Petitioner's license, the Union maintains that the facts speak for themselves. According to the Union, there can be no doubt that Walker reported to OIIC that the Petitioner was "performing" and interfering with the arrest and that, because of that report, OIIC checked the Petitioner's license. The Union contends that the City has not shown that its actions were motivated by another reason which is not violative of the NYCCBL. Moreover, the Union argues, Walker's actions demonstrate blatant anti-union animus on the part of OIIC; because Walker believed that the Petitioner, in representing Baugh, was behaving in an "unprofessional manner," he "set in motion the events that resulted in [the Petitioner] being investigated and removed from duty" and "did nothing to stop the retaliatory conduct by OIIC."[9]

In any event, the Union contends, the City's actions in this case were "inherently destructive" of the employees' right to

---

[9] As further evidence of anti-union animus on the part of OIIC, the Union relies on two statements made by Brown during the hearing. In describing the events that took place at OIIC when the Petitioner reported there on March 30, 1994, Brown stated that "not only did [the Petitioner] perform but all high-and-mighty Mr. Robert Cassar came into the office and he showed his you know what and he was put out ... Yes, he was asked to leave." At another point Brown testified that when she found out that the Petitioner was a Union delegate she "laughed."

union representation. The Union argues that "if employers are allowed to use internal investigations divisions as mechanisms to retaliate against union delegates for their union activity, the fear of retaliation would clearly serve to diminish the union's capacity to represent its members in the workplace."

Finally, the Union argues that the City's action against the Petitioner constituted interference with the administration of the Union in violation §12-306a(2) of the NYCCBL. According to the Union, by retaliating against the Petitioner for providing Union representation to a member, the City interfered with the Union's attempt to administer its representational rights.

As a remedy, the Union requests that "the Board make [the Petitioner] whole for any loss of pay and/or benefits as a result of the conduct, that a cease and desist order be issued, and that there be a posting of a notice communicating the provisions of the order."

City's Position

In the City's view, the instant petition should be dismissed in its entirety because the Union failed to satisfy either prong of the Salamanca test. As to the first prong, the City argues, the decision to run a check on the Petitioner's license was made at OIIC and neither Brown nor Horatio-Ramos, who most likely ordered the license check, had knowledge of the Petitioner's union activity at the time that the decision was made. Brown and

Horatio-Ramos knew only that the Petitioner was being loud and interfering with the arrest. Walker and Brewster, the City argues, did not order the license check.

Addressing the second prong of the Salamanca test, the City argues that in Decision No. B-1-94 the Board "elaborated on" this prong by requiring that a union demonstrate that the employer's decision was based upon anti-union animus. The City maintains that in the instant case, "the Petitioner has not only failed to establish that Horatio-Ramos knew of [his] representation of Baugh, but has also failed to establish that Horatio-Ramos or any agent of the employer harbored any anti-union animus based upon that representation." The City argues that the Petitioner "presented no evidence that there were any statements made by any OIIC employee or supervisor disapproving of [the Petitioner's] representation of Baugh, no evidence of any threat to [the Petitioner] suggesting that he should desist from trying to represent Baugh," and "no evidence of any more general anti-union animus expressed by any supervisor or manager involved." To the contrary, the City contends, Walker and Brewster gave the Petitioner "full rein to act as Baugh's representative" and even accommodated the Petitioner by following several of his suggestions.

The City next argues that even assuming, arguendo, that the Petitioner satisfied both prongs of the Salamanca test, the City established that it checked the Petitioner's license for

legitimate business reasons. Upon receipt of a report of possible misbehavior or wrongdoing on the part of an employee, the City contends, the "first step" is to perform a background check; if the check discloses an invalid license the procedure set forth in TCD 86/36 is invoked. The City argues that the action taken with respect to the Petitioner on March 30, 1994 was the same action that would have been taken concerning any other employee who "was reported to be creating a disturbance." According to the City, it was the report that the Petitioner was being "loud and abusive at T-109" that set into motion the TCD 86/36. And in any event, the City argues, Horatio-Ramos had ample justification to check the status of the Petitioner's license given his history of license suspensions.

As for the make whole remedy requested by the Union, the City argues that the Petitioner failed to establish that the City's actions caused the Petitioner to lose any pay or benefits. The City points out that the Department of Motor Vehicles offices open at 9:00 a.m. and that the Petitioner's tour did not begin until noon; he could have paid the fine on the morning of March 31, 1994, reported for his noon shift, and suffered no loss of pay. The City contends that it is not responsible for the fact that the Petitioner "unaccountably waited" until April 13, 1994 to clear up the suspension.

Discussion

As a threshold matter, we must determine whether, by signing

the Agreement, the Petitioner had waived his right to pursue the instant improper practice charge.[10] We find that he did not. In Decision No. B-15-95, the Board found that in order to interpret the Agreement, a hearing would be necessary to ascertain and give effect to the mutual intent of the parties. The evidence presented at the hearing does not support the contention that the mutual intent of the parties was the waiver of the Petitioner's right to pursue the improper practice. Neither OIIC nor the Union knew that the improper practice petition was pending and there was no discussion of the possibility that a petition would be filed; nor was the City's motive for bringing charges at issue. Furthermore, the waiver does not expressly waive any statutory rights other than those which pertain to disciplinary action.

In this case, the Petitioner alleges that the Department violated Section 12-306a(3) of the NYCCBL when it ran the check on his driver's license on March 30, 1994, and placed him on an unpaid leave, in retaliation for his having represented a union member.

It is within management's statutory rights to require that employees be licensed by the State and keep those licenses

[10] We note that the City's post-hearing brief in this case contains no arguments on this issue.

valid.[11] The acquisition of a license, and requirement that it be kept current, constitutes a qualification for employment which management may impose unilaterally on its employees.[12] Decisions made within management's statutory rights are not normally reviewable in the improper practice forum.[13] It is well-settled, however, that acts properly within the scope of managerial prerogative may constitute improper practices if the charging party can establish that such acts were motivated by reasons prohibited by the NYCCBL.[14]

The mere assertion of discrimination or retaliation is not sufficient to establish that a management action constitutes an improper practice.[15] A petitioner must satisfy the test set forth by the New York State Public Employment Relations Board ("PERB") in City of Salamanca[16] and adopted by this Board in Decision No. B-51-87. The Salamanca test requires that a petitioner demonstrate the following:

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

---

[11] Cf. Decision No. B-4-89 (It is management's right to require that employees be licensed by the State).

[12] Id.

[13] Decision Nos. B-2-93; B-1-91; B-25-89.

[14] Decision Nos. B-2-93; B-1-91; B-50-90; B-16-90.

[15] Decision Nos. B-8-95; B-61-89.

[16] 18 PERB ¶ 3012 (1985).

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 burden of persuasion shifts to the respondent to establish that its actions were motivated by another reason which is not violative of the NYCCBL.[17]

Applying these principles in the present case, we find that the Petitioner has satisfied the first prong of the Salamanca test. Walker's testimony that during his conversations with Brown and Horatio-Ramos he never mentioned the fact that the Petitioner was acting in his capacity as a Union delegate strains credulity. It is undisputed that Walker knew that the Petitioner was providing union representation to Baugh on March 30, 1994. Moreover, the nature and extent of the Petitioner's involvement in the events that took place on that day can only be explained by his status as a Union delegate; the Petitioner was summoned by management to represent Baugh, he was permitted to speak to Baugh privately for an extended period of time, he was present at the locker search, and he made several suggestions which were followed by management. Management would not have permitted an ordinary employee, who was not a Union delegate, to be involved in this manner. Under these circumstances it is highly improbable that Walker simply reported that the Petitioner was

[17] Decision Nos. B-8-95; B-1-94; B-20-93; B-2-93; B-21-92.

"performing" and "interfering" with an arrest with no further explanation. Furthermore, as the Union argues, had an ordinary employee interjected himself or herself into the events to the same extent, it is likely that OIIC would have, at the very least, questioned the employee about the conduct.

As for the second prong of the Salamanca test, we recognize that it is difficult to prove that an employee's activity was a motivating factor in the employer's decision to act; it requires that the Board ascertain the employer's state of mind. In the absence of an outright admission of improper motive, proof of this element must be circumstantial.[18] If a petitioner demonstrates a sufficient causal connection between the act complained of and the protected activity, improper motive may be inferred.[19]

Based upon our review of the record in this matter, we are convinced that the Union has met its burden of showing that the Petitioner's representation of Baugh was the motivating factor in OIIC's decision to run the license check. The facts presented lead to no other conclusion. On March 30, 1996, the Petitioner was representing Baugh in his capacity as a Union delegate, during the course of this representation the Petitioner was critical of Walker's decisions and actions, Walker reported to

---

[18] Decision Nos. B-2-93; B-24-90; B-17-89.

[19] Decision No. B-2-93; B-61-89.

OIIC that the Petitioner was "performing", and OIIC decided to run a check on the Petitioner's license. Clearly, OIIC's decision to run the license was the direct consequence of the Petitioner's union activity and would not have occurred otherwise. The Department's characterization of the Petitioner's union activity as a performance does not alter the fact that it was union activity.

We are not persuaded by the City's argument that Horatio-Ramos' decision to run the check was motivated by her knowledge of the Petitioner's history of license suspensions. While it is certainly possible that Horatio-Ramos recognized the Petitioner's name and recalled his history, the record establishes that it was Walker's accounts of the Petitioner's "performance" that caused the license check. This conclusion is supported by Brown's testimony that "performing" always triggers a license check. It is also supported by the timing of the events in this case; the Petitioner's representation of Baugh and Walker's report of this representation were followed immediately by the decision to run the check. Although proximity in time, without more, is insufficient to support an inference of improper motivation, it may be considered in conjunction with other relevant evidence.[20]

In light of all of these circumstances, we find that the Union made a prima facie showing that the Petitioner's union

[20] Decision Nos. B-2-93; B-41-91; B-53-90.

activity was a motivating factor in OIIC's decision to run the license check. Accordingly, the Union satisfied its burden under the Salamanca test and the burden of persuasion shifted to the Department to establish that its action was motivated by legitimate business reasons and would have been taken even in the absence of protected union activity.

We find that OIIC would not have done the license check on March 30, 1994 at 2:15 p.m. in the absence of the Petitioner's union activity. The City has not established that the decision to check the license was motivated by any reason other than the Petitioner's "performance." For the reasons stated above, we are not persuaded by the City's argument that the decision was motivated by Horatio-Ramos' knowledge of the Petitioner's history of license suspensions. Although Horatio-Ramos might have remembered the Petitioner's name, her memory was not the proximate cause of the license check; rather, it was precipitated by Walker's report of the Petitioner's "performance."

Nor are we persuaded by the City's argument that the decision was motivated by the Petitioner's inappropriate behavior on March 30, 1994. The record does not support this argument. While Brown testified that the Petitioner's behavior constituted a "serious" incident, her supervisor, Horatio-Ramos, testified that it was not serious, and it is undisputed that the Petitioner was never questioned about the behavior by OIIC or anyone else.

Finally, the Union argues that the City's actions in this

case constitute a violation of §12-306a(2) of the NYCCBL. This section makes it unlawful for a public employer to "dominate or interfere with the formation or administration of any public employee organization." A labor organization may be considered "dominated" within the meaning of this section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination may be found where an employer tries to help a union that it favors by various kinds of conduct, such as giving a favored union improper privileges.[21] The Union has presented no evidence whatsoever of conduct on the part of the City in this case that would rise to the level of interference. The Union simply argues that by retaliating against the Petitioner, the City has interfered with the Union's representational rights. This argument blurs the distinction between a §12-306a(3) violation and a §12-306a(2) violation. Following the Union's argument to its logical conclusion, in almost every case where the Board found retaliatory conduct on the part of the employer in violation of §12-306a(3), it would also have to find a violation of §12-306a(2). We do not accept this argument.

---

[21] Decision Nos. B-7-95; B-36-93; B-47-88.

For all of the reasons stated above, we grant Petitioner's improper practice petition to the extent that it alleges a violation of Section 12-306a(1) and (3) of the NYCCBL. Accordingly, we must address the Union's argument that the Petitioner is entitled to 7 or 8 days of lost pay as a remedy. The City argues, and the Petitioner admitted, that had the fine been paid on the morning of March 31, 1994, the Petitioner could have returned to work immediately and would not have suffered any loss of pay.[22] Since the Petitioner could have avoided any loss of pay, he is not entitled to a monetary remedy in this case.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining it is hereby,

ORDERED, that the improper practice petition filed by Local 1182, Communications Workers of America be, and the same hereby is, granted to the extent that it alleges a violation of Sections 12-306a(1) and (3) of the NYCCBL; and it is further,

ORDERED, that the improper practice petition filed by Local 1182, Communications Workers of America be, and the same hereby is, dismissed in all other respects; and it is further,

ORDERED, that the City cease and desist from violating the

[22] There is no evidence in the record that the Petitioner lost any pay on March 30, 1994 when he was forced to leave his tour early.

New York City Collective Bargaining Law in the manner described herein.

Dated: New York, New York
July 31, 1996

Steven C. DeCosta
CHAIR

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Richard A. Wilsker
MEMBER

Saul G. Kramer
MEMBER