Uniformed Fire Officers Ass'n, 61 OCB 1 (BCB 1998) [Decision No. B-1-98 (IP)], aff'd, Knox v. City of New York, No. 103436/98 (Sup. Ct. N.Y. Co. June 10, 1998).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice

between

THE UNIFORMED FIREFIGHTERS ASSOCIATION and JOHN E. KNOX,
Petitioners,

and

THE CITY OF NEW YORK and THE NEW YORK CITY FIRE DEPARTMENT,
Respondents.

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Decision No. B-1-98
Docket No. BCB-1841-96

DECISION AND ORDER

On June 26, 1996, Petitioners John E. Knox ("Petitioner" or "Knox") and the Uniformed Firefighters Association ("Union" or "UFA")(hereinafter collectively referred to as "Petitioners") filed an improper practice petition against Respondents, New York City Fire Department ("FDNY") and the City of New York (hereinafter collectively known as "City"), alleging violations of the New York City Collective Bargaining Law ("NYCCBL") §12-306a.(1), (2) and (3).[1] It is alleged that Knox was retired from the FDNY as a result of his active Union

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[1] NYCCBL §12-306a.(1), (2) and (3) states in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;

(continued...)

participation. The Petition was accompanied by a request that the Board of Collective Bargaining ("Board") "take immediate action and issue an interim remedial order staying the department." A letter was sent to the Union by Deputy Chairperson Patitucci, stating that a request for an interim order must be filed pursuant to the Office of Collective Bargaining's ("OCB")rules governing applications for injunctive relief, which are found in §1-07, Title 61, Rules of the City of New York ("RCNY"). On July 17, 1996, Petitioners submitted a petition for injunctive relief, seeking to enjoin the City from retiring Knox from the FDNY. On July 19, 1996, the City filed its answer and on July 25, 1996, the Union filed its reply. On July 25, 1996, the Board denied the Union's petition for injunctive relief.

On July 26, 1996, the City filed an answer to the original improper practice petition. On September 3, 1996, the Union filed its reply, in which it qualified the instant improper practice petition, limiting its scope to allegations of interference with Knox's union activity by forcing him into retirement. All other allegations were withdrawn and proffered as background to the aforementioned claim.

BACKGROUND

Petitioner Knox is a fire marshal representative for the UFA, having had that position since 1985. As such, Knox is required to attend Union meetings and functions, and, from 1990 - 1994, he was granted a full-time release slot from the FDNY.

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[1](...continued)

(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;

From November, 1993, until the date of his retirement, Knox had been on light duty due to medical reasons. Light duty is a classification for individuals who are not physically capable of performing full firefighting or investigative duties, and are given administrative tasks within the FDNY. In 1994, then Fire Commissioner Safir, in conjunction with the Bureau of Health Services ("BHS"), instituted a policy, to monitor and review individuals on light duty with respect to their physical health and job performance after ninety days. The review is evaluated and a determination is made by the FDNY whether an individual should be processed for involuntary disability retirement.

In 1994, Peter Ganci, Jr. ("Ganci") and Michael Vecchi, ("Vecchi") were appointed to the positions of Chiefs of the Bureau of Fire Investigation. Coincidental with the appointment of Ganci and Vecchi, Knox's full-time release slot was revoked. He was therefore required to use his personal time, or a part-time release slot, to account for any work-time that he spent attending to Union activities. Knox protested having to use his personal time in this manner, and claims that the City responded by requiring him to "Put in writing and spell out all union activities which he performs when seeking Department release time, including where, when, the purpose, and the time needed." The City denies this, and claims that the full-time release for Knox was revoked because it was improperly assigned to him by the individual that preceded Ganci and Vecchi.[2]

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[2] The City asserts that that slot was made available due to the retired status of former UFA president James Boyle who, because he was not an active employee, did not require release time. When Thomas Von Essen was elected UFA president in 1993, that slot was re-assigned to him. During the period of time between the election of Von Essen and the appointment of Ganci and

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For the period of time Knox served under Ganci and Vecchi, he maintained an active role in the Union, questioning orders issued by the Chiefs, as well as speaking out at labor management meetings and filing various grievances and Freedom of Information Act Law ("FOIL") requests, which, he claims, were never answered. The City admits that Knox actively participated in Union activities, but denies that his FOIL requests have gone unanswered.

In January 1996, as a result of a reorganization at the Bureau of Fire Investigation ("Bureau"), Knox was transferred from a field unit based in Brooklyn, to a city-wide investigation unit. This required him to work four days per week as opposed to his previous schedule of 2 (two) seventeen-hour days. The City asserts that Knox's transfer to that unit was done as part of a Bureau-wide reorganization, pursuant to which, other similarly situated personnel were transferred to the city-wide investigation unit and placed on five, eight hour days; Knox was accommodated in that he was permitted to work four, ten hour days. The Union claims that the four, ten hour day assignments are typically worked by volunteers.

On April 3, 1996, Knox was advised by a nurse from the BHS that he was being reviewed for disability retirement. On April 12, 1996, Knox was further advised that papers seeking his retirement for ordinary disability had been prepared in a period of approximately forty-eight hours. The Union alleges that this process was expedited for Knox, the usual length of time for this preparation being two weeks. The City states, however, that practically all other

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[2](...continued)
Vecchi (1993-94), it is asserted that, whether or not aware of the lack of a full-time release slot for Knox, Knox was in fact improperly granted that slot by Ganci's and Vecchi's predecessor.

light duty personnel such as Knox had their retirement papers submitted, regardless of union status, and that Knox's papers were not being processed faster than any others.

On April 18, 1996, Knox was informed that his retirement papers were being put before the New York City Fire Pension Board ("Pension Board"). Knox claims that he stated that he was opposed to retirement and was awarded a postponement, but on June 5, 1996, the Pension Board awarded him an ordinary disability retirement.

POSITIONS OF THE PARTIES

Union's Position

The Union claims that Knox is being singled out as the first Union official to be involuntarily awarded a disability retirement, by the FDNY and Ganci and Vecchi, because of his outspoken Union activism. The Union asserts that this forced retirement constitutes discrimination against Knox in order to discourage his Union activism, as well as retaliation for his past activism, and is therefore an interference with his rights guaranteed by the NYCCBL. The Union claims that the FDNY has acted to keep Knox from working on a daily basis with fellow Union members by removing him as an active member of the FDNY. It is also asserted that, although UFA by-laws permit Knox, as a retiree, to serve as a Union officer, his forced retirement is being negatively perceived by fellow union members, making it appear as if he is out of touch with fellow fire marshals, thereby damaging his chances for reelection as a Union representative. Furthermore, Knox claims that his salary, as well as pension entitlements, have been diminished as a result of the involuntary retirement.

The Union further argues that its claim of discrimination and interference with union activities as a result of Knox's involuntary disability retirement, is an on-going violation, dating back to Knox's transfer in 1996 to the city-wide investigation unit.

City's Position

The City argues that the petition should be dismissed as vague, speculative and conclusory: allegations of unilateral actions by the City precedent to the filing of an improper practice petition do not, *a fortiori,* establish an improper practice. Hence, it is asserted that there is no nexus between the acts complained of and any provision of the NYCCBL.

The City states that, pursuant to City of Salamanca,[3] the Union must show that the employer's agent responsible for any alleged discriminatory act must have knowledge of the employee's union activity and that activity must be a motivating factor in the employer's decision to act discriminatorily. The City argues that the Union has failed to demonstrate any anti-union animus on the part of the employer, nor was it demonstrated or alleged that the City representatives responsible for Knox's involuntary retirement were aware of any union activity on the part of Knox. Furthermore, the City points out that the petition states that Ganci and Vecchi were responsible for the transfer of Knox, but it is has not been established that either of them was aware of any union activity by Knox.

Additionally, the City states that there has been no allegation of facts supporting a claim of interference in the collective bargaining process or with any other rights enjoyed by the Union pursuant to NYCCBL §12-306a. The City maintains that Knox's representative capabilities will

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[3] 18 PERB 3012 (1985).

not be diminished by his retirement, partly because he will have more free time in which to represent his constituents, meeting with them during their lunch hours and after work.

The City states that, assuming, *arguendo,* the petition did establish a *prima facie* case under Salamanca, the actions of the FDNY were predicated on legitimate business reasons: the transfer and schedule change of Knox was enacted pursuant to a light duty policy being implemented at the FDNY; Knox was not singled out in any way. Further, it is asserted that, based on an administratively scheduled evaluation by the BHS, a determination was made to submit Knox's retirement papers to the Pension Board; there was no personal involvement from Ganci and Vecchi.

The City also argues that the petition should be dismissed because the alleged acts are sanctioned by the management rights clause set forth in NYCCBL §12-307b.[4] The City claims that it has the managerial prerogative to determine assignments, duties and hours of work of employees on extended light duty, and that there are no limitations stated or alluded to within the parties' collective bargaining agreement on this matter.

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[4] NYCCBL 12-307b. States, in pertinent part,

> It is the right of the City, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons ...

Lastly, the City states that, as the Petition was filed on June 26, 1996, and more than four months from the denial of release time and the alleged retaliatory transfer of Knox, it should be dismissed as untimely.

DISCUSSION

We note, that in its answer, the City addressed all of the issues raised in the petition. However, the Petitioners withdrew those allegations of improper practices which occurred prior to February 26, 1996, namely, the claims of retaliatory reassignment of Knox to the city-wide investigation unit and his attendant schedule change, and the City's failure to respond to his FOIL requests. Instead, these allegations were submitted as background information. It is true that, when a petition alleges a continuing course of conduct commenced more than four months prior to the date of filing, evidence of wrongful acts may be admissible only for purposes of background information when offered to establish an on-going and continuous course of violative conduct.[5] We find that the Petitioners have alleged facts from which we might infer a continuing course of conduct on the part of the City. Therefore, those matters cited in the instant petition which allegedly occurred before March 26, 1996, are considered only as background information and we will not consider the arguments raised by the City thereto or otherwise decide those issues.

We next consider the City's timeliness argument. RCNY §1-07(d) provides:

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[5] Decision Nos. B-21-93; B-37-92.

> Improper Practices. A petition alleging that a public employer or its agents ... has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf ...

The Petitioners claim that Knox's involuntary retirement from the FDNY was in further retaliation for his aggressive representation of fellow Union members. As the retirement was awarded to Knox on June 5, 1996, we find this to be within the four-month limit set forth in the Rules. We also find that the claim regarding the alleged interference with the UFA and the alleged discouragement of union activities stemming from the involuntary retirement thereby to be timely filed.

Petitioner claims he was involuntarily retired in an unduly expeditious manner as a result of his aggressive representation of union members. The City's response was that the Union had not met the standards of the Salamanca test, and even if it did, the City is within its rights by virtue of this act having a legitimate business reason and by virtue of NYCCBL §12-307b.: management rights.

Where the employer's motivation is at issue, initially, the Petitioner must demonstrate that the action complained of falls within the parameters established by the Salamanca test: 1) that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and 2) that the employee's union activity was a motivating factor in the employer's decision.[6] Once the petitioner has satisfied both elements of this test, then, if the

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[6] *See,* Decision No. B-51-87.

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

Based on Knox's longstanding position as the fire marshal representative for the UFA, and the arrangements that needed to be made so that he could attend to those duties, including the fact that he was placed on release time from 1990 through 1994, there can be no credible dispute that the City was aware of Knox's Union activities, thus the Union has met the first prong of the test. However, we do not find that the Union has alleged facts sufficient to persuade us that protected activity was a motivating factor in the City's decision to retire Knox.

With its answer, the City submitted a number of exhibits, one of which was a document dated May 6, 1996, listing all of the fire marshals on light duty, totaling ten. Of these, four are designated as having been retired before Knox, all of whom were placed on light duty after Knox. The City also submitted an affidavit from Kerry Kelly, M.D., Chief Medical Officer of the BHS, which states that, without any consultation with Chiefs Ganci and Vecchi, it was her recommendation to perform an evaluation on Knox, to determine whether he would, at some point, be able to return to full duty, or would not and, therefore, should be involuntarily retired. Dr. Kelly states that the decision was made pursuant to "longstanding medical procedures for the evaluation of light-duty personnel." Moreover, she asserts that the expediency with which Knox's retirement was scheduled was due to a revamping and streamlining of the review process, initiated at the beginning of 1995, and that this may also be affected by the time taken to receive minutes of these evaluation hearings from the transcribing service. A second affidavit was

submitted by Stephen Rush, Assistant Commissioner of Budget and Finance of the FDNY, which states that the decision to involuntarily retire an individual is an independent process, not initiated by or subject to control by bureau managers, including Ganci and Vecchi. His affidavit further states that such a decision is based on an individual's length of time on light duty, medical evaluations and the needs of the Department.

In response to the abovementioned affidavits, Knox stated:

> I also respectfully dispute the allegations that Chief Ganci and Chief Vecchi did not harbor anti-union animus against me and were not responsible for the scheduling of my boarding. Whether they were or not, Assistant Commissioner Stephen Rush, clearly had knowledge of my activities and admitted in his affidavit submitted with the respondent's answer that the Bureau was directed to reduce the number of investigative titles on light duty. Since, as indicated above, all light duty titles were not eliminated, who made the decision to eliminate mine? ..... I respectfully submit that I have been engaged in protected activity and the respondent's have answered the petition with pretextual arguments, patently tailored to meet the specific objective of defeating this petition.

We find that this response, in light of the specificity of the City's submission, fails to establish anti-union animus as a motivating factor in Knox's involuntary retirement. The evidence submitted by the City, *i.e.,* the affidavits and the list of fire marshals retired from light duty, establish a persuasive argument that the City acted pursuant to the management rights provision of the NYCCBL. Personnel decisions concerning the involuntary disability retirement of employees because of economic or other legitimate reasons are within management's statutory

right to direct its employees and maintain the efficiency of its operations.[7] Moreover, the City has demonstrated that the process of retiring Knox was a multi faceted one, beginning with standard medical reviews and culminating in the decision to issue a Commissioner's letter, and that neither of these acts were initiated or influenced by Chiefs Ganci and Vecchi, or were otherwise the result of anti-union animus. Since the City has established that Knox's involuntary retirement was scheduled by the BHS acting pursuant to pre-established FDNY guidelines, we find that the City has rebutted the Union's allegation that anti-union animus was a motivating factor in the decision to retire him.

We acknowledge that the Union raised the claim that the City's actions in this regard were a pretext for its underlying anti-Union animus; however, we find that argument unpersuasive. The evidence presented by the City stands unrefuted in that Knox was not retired "out of turn," *i.e.,* retired before any similarly situated fire marshal placed on light duty after him. Nor was there any link shown between the alleged anti-Union animus on the part of Chiefs Ganci and Vecchi and the retirement of Knox. The mere fact that the Petitioner was an active member in the Union does not insulate him from an otherwise valid exercise of the Department's right to relieve its employees from duty because of lack of work or for other legitimate reasons. In the instant case, a finding that the Department acted with improper motivation, within the meaning of the NYCCBL, would therefore be purely speculative.[8]

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[7] *See, e.g.,* Decision No. B-2-93.

[8] *See, e.g.,* Decision Nos. B-52-96; B-43-82; B-35-80.

The Board also takes note of the Petitioners' desire to have a hearing on this matter. Whereas it is not our position that all matters be decided solely on the pleadings submitted, we will not hold a hearing where the pleadings contain enough uncontroverted data to enable the Board to effectively examine and determine the merits of a claim without going to a hearing.[9] Not only did the City deny the allegations in the petition, but in its answer and supporting affidavits, it produced detailed and thorough evidence with respect to the business reasons underlying its actions, thereby overcoming subsequent assertions by the Petitioners that these acts were a pretext in order to retire Knox. We therefore deny the Petitioners' request for a hearing.

As for Knox's claim that he will suffer decreased standing in the eyes of his fellow Union members as well as be ineffective in his representation of them due to his involuntary retirement, we disagree. Such a claim by Petitioner at this point is pure conjecture and devoid of any factual base. We find that these allegations fail to constitute any violation of the NYCCBL and we therefore dismiss the claim.

Accordingly, the instant improper practice Petition is dismissed in its entirety.

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[9] Decision No. B-23-81. "In view of the City's denial of the allegations on the petitions, it was incumbent upon the [Union] to allege facts with sufficient particularity to enable this Board to determine whether a factual dispute exists which might warrant a hearing." *Id* at 8. *See also,* Decision No.B-59-88. While petitioner need not plead irrefutable evidence of discrimination, there must be specific allegations of fact at least sufficient to demonstrate the need for a hearing. *Id* at 12.

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 petition docketed as BCB-1841-96 be, and the same hereby is, dismissed.

DATED: January 27, 1998
New York, N.Y.

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER