



grievance, which was part of the underlying claim in an earlier improper practice proceeding before the Board of Collective Bargaining ("Board").<sup>2</sup> The Commission, through the Office of Labor Relations, filed a verified answer to the petition on October 26, 1995. After requesting an extension of time to which the Commission consented, Petitioner filed a verified reply on December 8, 1995.

### **Background**

Petitioner was hired as a Staff Attorney with the Commission in April, 1990. Petitioner is a member of the bargaining unit represented by the Civil Service Bar Association, an affiliate of Local 237 of the International Brotherhood of Teamsters. On October 20, 1994, a Labor-Management meeting was held to discuss issues concerning working conditions. An understanding was reached on several matters, one of which concerned out-of-title grievances which the Union was preparing on behalf of several unit members.<sup>3</sup> Petitioner herein asserts that she was one of those unit members and that her grievance was filed on November 3, 1994.

On January 27, 1995, the Civil Service Bar Association and Local 237 (collectively, "the Union") filed the verified improper practice petition docketed as BCB-1721-95 on behalf of Staff Attorneys in the bargaining unit who were employed at the Commission.

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<sup>2</sup> Docket No. BCB-1721-95.

<sup>3</sup> Petitioner asserts that, at the October 20, 1994, meeting, the Union informed the Commission that a series of out-of-title grievances was being prepared as a result of what Petitioner described as "management's inability to obtain promotions for its members at the Commission. The problem," she continues, "[was] perceived to be a result of the financial crisis and the various oversight agencies' failure to approve promotions, despite the fact that many of [the Union's] members [were] doing the out-of-title work." She further alleged, "It was agreed at the meeting that these grievances would be perceived by all parties as 'friendly.'"

*See, also, n. 9, infra.*

In that case, the Union complained of an alleged unwillingness of some managers to comply with the understandings that had been reached with the Union at the October, 1994, Labor-Management meeting regarding, *inter alia*, promotional, *i.e.*, out-of-title, issues. Several other issues were raised in the Petition, including alleged discrimination against unit members by members of management because of protected activities.<sup>4</sup>

Petitioner alleges that, after the filing of that improper practice petition, an article appeared about it in the newspaper, *The Chief*. She asserts that a memorandum was circulated in her office protesting the complaint and supporting management. She further alleges that the memorandum was drafted in part by co-worker David Feldman in response to the filing of the petition and in response to the newspaper article.

On May 23, 1995, both Petitioner herein and David Feldman, a co-worker, were interviewed by Randolph Wills, deputy manager of the Law Enforcement Bureau ("Bureau"), for a promotion to a vacant Associate Attorney position. On May 26, both Petitioner and Feldman were informed that Feldman was being promoted. Petitioner alleges that the failure to select her for this promotion was in retaliation for (i) her engaging in activities which assertedly were protected under the NYCCBL, *i.e.*, filing a grievance for the Commission's alleged violation of an understanding reached at the October 20, 1994, labor-management meeting, which Petitioner asserts angered Law Enforcement Bureau Manager Robert Hammel, and for (ii) taking part in the aforementioned improper practice proceeding four months earlier.

On June 21, 1995, the Union and the Commission entered into a stipulation, by which

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<sup>4</sup> See n. 9, *infra*.

they agreed, in pertinent part, as follows:

FIRST: Petitioners hereby withdraw, with prejudice, the instant improper practice petition, docketed with the Office of Collective Bargaining, Board of Collective Bargaining as Case No. BCB-1721-95.

SECOND: Petitioners and respondents agree that, if Nancy Alisberg refiles her out-of-title grievance, alleging that she has been assigned to duties substantially different from those contained in her job specification, Respondents agree to the backdating of any appropriate back pay award that may be granted to the original date of filing.

\* \* \*

SIXTH: Notwithstanding the first paragraph, supra, should petitioners initiate a Verified Improper Practice Petition against the New York City Commission on Human Rights, or its agents, the parties expressly agree that petitioners are *not precluded from introducing into evidence* such facts, circumstances and events upon which the instant Petition was based *for purposes of background information, solely in order to support an allegation of an ongoing pattern or practice*. The parties reiterate that the withdrawal of the Petition as to these facts themselves is unequivocal and binding. [Emphasis supplied.]

SEVENTH: The petitioners, jointly and severally, RELEASE the City of New York and the respondents from any and all claims which they may now have or which they may have had heretofore in connection with their underlying dispute recited in the instant improper practice proceeding, docketed with the Office of Collective Bargaining, Board of Collective Bargaining as Case No. BCB-1721-95, except for Joan Simon Faulkner's pending grievance. This release shall include any and all litigation, whether it be brought at law, in equity or arising by virtue of the Agreement.

EIGHTH: This Stipulation of Settlement shall not be deemed an admission by any of the parties herein that it has violated a condition of employment and/or any provision(s) of the New York City Collective Bargaining Law or the Rules of the Office of Collective Bargaining, nor shall it constitute precedent for the determination of any other dispute between the City of New York and the petitioners. In this respect it is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the City of New York or the Human Rights Commission.

NINTH: This Stipulation of Settlement shall not be offered as evidence, nor introduced for any other purpose, in any other forum, including but not limited to, judicial, administrative, and/or arbitration proceedings EXCEPT for the sole purpose of enforcing the obligations and restrictions as contained herein, and EXCEPT as described in Paragraph 6, *supra*. [Signed.]<sup>5</sup>

The Commission alleges that this stipulation applies to Petitioner herein and to any controversy which is relevant to the circumstances addressed in the withdrawn petition.

### **Positions of the Parties**

#### *Petitioner's Position*

Petitioner argues that the decision by Bureau Manager Hammel to promote Feldman and not her was in retaliation for participating in protected activities as defined by NYCCBL §12-306(a)(3). As evidence of her participation in protected activities, Petitioner points to (i) her participation in the labor-management meeting of October 20, 1994, (ii) the filing of an out-of-title grievance, and (iii) the advancement of her claims in the improper practice petition against the Commission which later was withdrawn pursuant to Stipulation of Settlement. She also asserts that, as between Feldman and her, she was the more experienced practitioner.

Moreover, Petitioner observes that the consideration of applications for the position of Associate Attorney took place *while* settlement discussions regarding petition BCB-1721-95 were being conducted. She concludes, therefore, that she was denied promotion to the position of Associate Attorney (i) in retaliation for her having participated in the Labor-Management meeting of October 20, 1994, (ii) in retaliation for her having filed a grievance on November 3, 1994, and (iii) in retaliation for her having participated in the improper practice proceeding

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<sup>5</sup> The full text of this stipulation is attached to this Decision as an appendix.

docketed as BCB-1721-95. She maintains that Feldman was promoted because of his “pro-management activities,” which, taken *together* with the alleged retaliation, was violative of the NYCCBL.

In response to the Commission's assertion that the Petitioner herein is precluded from presenting evidence of facts, circumstances, and events on which the withdrawn improper practice petition was based, Petitioner argues that the stipulation is not binding on her because, she argues, she was not a signatory to that stipulation.

*Commission's Position*

The Commission asserts that Petitioner cannot base a new claim of improper practice on facts alleged in the petition docketed as BCB-1721-95, due to the preclusionary language included in the stipulation which settled the earlier case.<sup>6</sup> It further asserts that the instant claim of improper practice attempts to state a discreet, *i.e.*, non-continuing, violation, and not an ongoing pattern or practice, and therefore evidence included in the withdrawn petition should not be considered or allowed in the instant petition. Finally, it asserts that Feldman's promotion was made for legitimate business reasons, as it based its decision on perceived inaccuracies, both factual and typographical, on Petitioner's resume as compared to Feldman's allegedly more accurate and applicable work experience history.

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<sup>6</sup> *See, supra*, text at 3 -- 4.

### Discussion

The instant petition requires an examination of three preliminary questions: first, whether the stipulation, which withdrew the petition in the earlier case, applies to the Petitioner; second, whether the allegations on which the instant petition is based are identical or similar to the facts and circumstances on which the prior, withdrawn petition was based to such a degree that the allegations asserted in the instant petition are precluded by the stipulation from consideration herein; and third, whether the allegation of retaliation in the instant proceeding, namely, the Petitioner's failure to be promoted under the facts of this case, would constitute either (i) a new claim of improper practice, or (ii) part of a continuing course of conduct, albeit commenced more than four months prior to the date of filing of the instant petition.<sup>7</sup>

The first issue concerns the applicability of the stipulation to the Petitioner in the instant case. It is well established that labor representatives have the power to enter into legally binding agreements on behalf of unit members regarding issues within the scope of collective bargaining.<sup>8</sup> The stipulation was signed by Carroll E. Haynes, President of Local 237, and Gloria Johnson, Esq., Chair of the Civil Service Bar Association. Petitioner is admittedly a member of this Union and unit, and there is no dispute that these actions were taken on behalf of her and others in the unit. Therefore, we conclude that Petitioner is indeed bound by the terms of the

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<sup>7</sup> In allegations of such a continuing course of conduct, 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. *See* Decision No. B-1-98.

<sup>8</sup> *See, e.g., Antinore v. State of New York et al.*, 49 A.D.2d 6, 371 N.Y.S.2d 213, *aff'd* 40 N.Y.2d 921, 389 N.Y.S.2d 576; *CSBA, Local 237, IBT, v. City of New York*, 472 N.Y.S.2d 925, 99 A.D.2d 264 (1984).

stipulation signed by her collective bargaining representatives.

The second issue is whether the claim asserted in the instant petition is based upon the same facts, circumstances, and events upon which the withdrawn petition in BCB-1721-95 was based. If this is so, then, under the terms of Paragraph 6 of the Stipulation, those facts, circumstances, and events may be considered only as background information in support of an allegation of a continuing course of conduct and not as admissible evidence of any independent claim of improper practice. To sustain a claim of improper practice, the Petitioner must allege **facts that demonstrate that she is pursuing a new and independent claim against the Respondent.**<sup>9</sup>

Petitioner herein alleges that her employer has engaged in what she describes as a “pattern” of violating her rights under the NYCCBL. She refers to the “acts” which are described in the minutes of the Labor-Management meeting of October 20, 1994, in the withdrawn improper practice petition which was based at least in part what transpired at that meeting, and

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<sup>9</sup> The issues raised in the earlier case concerned: (i) alleged out-of-title grievances which the Union intended to file in order to obtain increased wages for unit members, given the agency’s alleged inability to obtain additional funding to support staff promotions, (ii) alleged, anti-union remarks by Robert Hammel, then-Deputy Commissioner, Law Enforcement Bureau of the New York City Human Rights Commission, (iii) alleged interference in internal union affairs by management and alleged coercion of unit members, *viz.*, union representative Norma Davis and supervising attorney Joan Simon Faulkner. and (iv) alleged, threatened retaliation against “any [unit] member who filed a grievance” concerning any unilateral change in working conditions.

The working conditions, about which an understanding was reached on October 20, 1994, concerned one change in work rules which would require a note to be posted on a door when an individual was going to be absent from the office for more than one hour as well as a change in work rules which would require office doors to remain open except when confidentiality was required. The memorandum memorializing the October 20, 1994, meeting quoted Hammel as “stat[ing] that Norma [Davis] and Nancy [Alisberg] are the two worst offenders in keeping their doors closed[.]”



the newspaper article's recapitulation of those facts. As these matters have been settled unequivocally by stipulation, we shall not entertain reconsideration of them as any basis for a new, independent claim of improper practice.

Petitioner, however, also alleges a factual basis for a new claim of improper practice. Her new claim relates to the denial in May, 1995, of her application for the position of Associate Attorney at the Commission. She cites a memorandum circulated among the office staff *after* the earlier improper practice petition was filed, which was signed by several attorneys, including Feldman, and in which, Petitioner alleges, Feldman showed his support of management and his opposition to the earlier improper practice petition. The Petitioner contends that, because of Feldman's actions, he was rewarded by management by being selected over the Petitioner for promotion to the Associate Attorney position.<sup>10</sup> We find that neither the earlier improper practice petition nor the stipulation which settled it addressed the denial in May, 1995, of Alisberg's application for the Associate Attorney position. Furthermore, although management executed the stipulation settling the earlier improper practice petition after Alisberg was denied the Associate Attorney position in May, 1995, the denial of that promotion was neither raised nor disposed of in the stipulation of settlement of the earlier case. Alisberg's name arose in the earlier case only in relation to an out-of-title grievance filed in November, 1994, *i.e.*, six months before the factual predicate of the instant petition, and in relation to a work rule change concerning the agency's "open door" policy. We conclude, therefore, that the instant improper

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<sup>10</sup> While the memorandum was written in response to the earlier improper practice petition, the purpose for which it is relied upon in this case concerns, not the issues raised in the earlier proceeding but, instead, the new issue of the denial of Petitioner's application for a promotion. *See* discussion, *infra*.

practice petition asserts a *new* act of retaliation in response to Petitioner's participation in assertedly protected activities alleged in the earlier petition.

The third question concerns the preclusive effect of the stipulation which settled the earlier case on evidence offered in the instant one. The stipulation expressly provides for the admissibility of evidence presented in the withdrawn petition as background “*solely* in order to support an allegation of an ongoing pattern or practice” in a new improper practice proceeding. Insofar as the instant petition does assert a new, independent claim of improper practice, we conclude that the stipulation does not permit the admissibility of evidence from the withdrawn petition to support the new claim. However, to the extent that the instant petition asserts a claim of continuing retaliation, we shall permit evidence of facts, circumstances and events upon which the earlier, withdrawn petition was based for purposes of background information only, to support any such claim of a continuing course of conduct.

For the above-stated reasons, we determine that: (1) the stipulation which settled the proceeding docketed as BCB-1721-95 applies to the Petitioner herein; (2) the claim presented in the instant petition is not a claim that was presented in the petition withdrawn by stipulation but rather states a new claim of retaliation, and (3) Petitioner herein may offer as evidence such facts, circumstances and events upon which the prior withdrawn petition was based but only for the purpose of background information to support a claim of a continuing course of conduct.

Whether Petitioner will prevail on the ultimate issue will be determined based upon a full record following the presentation of evidence and sworn testimony of witnesses at hearing.<sup>11</sup>

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<sup>11</sup> If it can be demonstrated at a hearing that a petitioner was not considered for promotion or that he was considered and rejected for reasons that violate the NYCCBL, an

Accordingly, we direct that a hearing be held to receive testimony and other evidence on the question of whether the decision not to promote Petitioner herein was improperly motivated in violation of §12-306(a)(3) of the NYCCBL.

**INTERIM ORDER**

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

**DETERMINED**, that the stipulation which settled the proceeding docketed as BCB-1721-95 applies to the Petitioner herein, and it is further

**DETERMINED**, that the claim presented in the instant petition is not identical to that presented in the petition withdrawn by stipulation but rather states a new claim alleging retaliation, and it is further

**DETERMINED**, that Petitioner herein may not offer as evidence of a new claim such facts, circumstances and events upon which the prior withdrawn petition, BCB-1721-95, was based, but may offer such evidence only for the purpose of background information to support a claim of a continuing course of conduct, and it is further

**DIRECTED**, that a hearing be held to hear testimony and to receive evidence of the

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improper practice may be found. (McNabb v. City, Decision No. B-48-88) However, allegations of improper motivation must be based upon statements of probative facts rather than recitals of conjecture, speculation and surmise. The mere allegation of improper motive does not state a violation where a petitioner fails to demonstrate a causal connection between the underlying management act which is the subject of a complaint (such as the denial of a promotion) and activity protected under the NYCCBL. (United Probation Officers Ass'n v. City, Decision No. B-53-90).

question of whether the decision not to promote Petitioner herein was an improper practice under §12-306(a)(3) of the NYCCBL.

Dated: New York, New York  
June 18, 1998

STEVEN C. DeCOSTA  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

GEORGE NICOLAU  
MEMBER

CAROLYN GENTILE  
MEMBER

JEROME E. JOSEPH  
MEMBER

I dissent. RICHARD A. WILSKER  
MEMBER

I dissent. ANTHONY P. COLES  
MEMBER

DECISION NO. B-18-98  
DOCKET NO. BCB-1786-95

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***APPENDIX***