OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
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-between-	:	
	:	
LIEUTENANTS BENEVOLENT ASSOCIATION and Lt. WILLIAM JOHNSON,	:	
	:	Decision No. B-49-98
Petitioner,	:	Docket No. BCB-1934-97
	:	
-and-	:	
	:	
CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On September 24, 1997, Petitioners William Johnson (hereinafter referred to as "Petitioner" or "Johnson") and the Lieutenants Benevolent Association ("Union" or "LBA") (hereinafter collectively referred to as "Petitioners"), filed an improper practice petition against Respondents, New York City Police Department ("NYPD") and the City of New York (hereinafter collectively referred to as "City"), alleging violations of the New York City Collective Bargaining Law ("NYCCBL") §12-306a.(1), (2) and (3).[1] It is alleged that Johnson was transferred as "the result of

[1] Section 12-306 of the NYCCBL provides, in part:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in § 12-305 of this chapter;

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

the efforts of Lt. Johnson to exercise his right to join the LBA as a delegate elected by his fellow Lieutenants" and as a result of his active Union participation. On October 24, 1997, the City filed an answer to the improper practice petition, and on November 21, 1997, the Union filed its reply.

BACKGROUND

Lt. William Johnson was assigned to the Command of Patrol Borough Manhattan South ("PBMS") as a Sergeant until January 15, 1993 and as a Lieutenant at that Command until July 1, 1997. He was a delegate for the LBA from December, 1996 through June, 1997. During this time, Lt. Johnson processed a grievance on behalf of another Lieutenant in PBMS. On July 1, 1997, Lt. Johnson was transferred out of PBMS by his superior, Chief Allan Hoehl.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that Respondents have threatened to, attempted to, and did transfer Johnson to another command and have ostracized and sought to isolate Johnson in his former command solely as a result of the efforts of Johnson to exercise his right to join the LBA as a delegate. Also, it contends that Johnson was discriminated against for assisting the LBA in processing grievances and complaints arising under the parties' collective bargaining agreement.

The Union alleges that Hoehl and his immediate subordinates were aware from December, 1996 through June 1997 that Johnson was a delegate for the Petitioner. It supports that contention

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(3) to discriminate against any employee for the purpose of (continued . . .) encouraging or discouraging membership in, or participation in the activities of, any public organization.

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by attaching the form used by the LBA to designate all LBA delegates. It states that the form is forwarded to the Office of Labor Relations ("OLR"), which in turn notifies the NYPD's bookkeeper and forwards a copy of same to the individual delegate's command. The Union also refers to form UF28, which the delegate must fill out to obtain excusal to attend the monthly delegate's meeting. It contends that this form was approved by his superiors in the Patrol Borough Manhattan South and its operations unit from December 1996 through June 1997. The Union also states that Hoehl and his immediate subordinates were aware of Johnson's union activities because Johnson brought two grievances on behalf of another Lieutenant and himself in June 1997. Thus, the Union argues, Chief Hoehl has been demonstrated to have the requisite knowledge of Johnson's status as an LBA delegate prior to effecting Johnson's "retaliatory" transfer.

In order to rebut the City's assertions that Lt. Johnson's performance was substandard, the Union attaches performance reviews, completed in January of each year, from 1993 through 1996. The most recent, 1996 performance review, states his overall evaluation as "Above Standards," and recommends that Johnson continue in his present assignment. The rest all rate his overall evaluation as "Well Above Standards."

The Union states that it can make a connection between the improper transfer and his union activity. It states that "when the LBA learned about the lack of equalization of Lt. Johnson's overtime in June, 1997, Lt. Culbert, a former LBA delegate also assigned to PBMS's Operations Unit, was observed running into Chief Hoehl's office after hanging up on a phone call from the LBA's First Vice President inquiring about petitioner Johnson's claim of lack of overtime equalization."

City's Position

The City asserts that the Union has not fulfilled the minimum initial pleading requirements as set forth in *City of Salamanca*,[2] and adopted by us in Decision No. B-51-87: that the petitioner show initially that the employer's agent responsible for the alleged discriminatory acts 1) had knowledge of the employee's union activity and 2) that the union activity was the motivating factor in the employer's decision. If the petitioner proves both of these elements, then the employer must establish that its actions were motivated by a legitimate business reason.[3] It asserts that Petitioner has not alleged any facts to fulfill either requirement of the *Salamanca* test. It states that, as no evidence was presented in the petition that the officials responsible for the transfer had any knowledge of Johnson's role within the LBA, the first prong of the *Salamanca* test has not been satisfied. It also states that petitioner has not stated any facts nor given any indication that there is any causal connection between the transfer and any union activity. Thus, the Petitioner has also failed to prove the second element of the *Salamanca* test.

The City argues that even if the Union can satisfy the *Salamanca* test, the management action complained of was motivated by legitimate business reasons, and therefore, the transfer of Johnson was reasonable and proper.[4] It states that §12-307 of the NYCCBL guarantees the City the unilateral

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[2] 18 PERB ¶ 3012 (1985).

[3] The City cites Decision Nos. B-16-92, B-36-91; B-4-91; B-24-90.

[4] Section 12-307(b) of the NYCCBL endows the employer with the right:
. . . to determine the standards of service to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . and exercise complete control and discretion over its organization and the technology of performing its work.

right to determine the methods, means and personnel by which governmental operations are to be conducted, unless the right has been limited by the parties in their collective bargaining agreement.[5] The City contends that the petition contains no allegation that any limitations exist in the agreement between the parties which curtail the City's right to determine the methods, means, and personnel by which its operations are to be conducted.

Further, the City alleges that prior to such transfer, Chief Hoehl had spoken to Johnson on several occasions to explain that he was not performing his job duties at an acceptable level. It also states that when Johnson failed to bring the level of his job performance to what was expected, he was transferred.

DISCUSSION

It is well settled that when a violation of §12-306a of the NYCCBL has been alleged, initially a petitioner must sufficiently show that 1) the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity;[6] and 2) the employee's union activity was a motivating factor in the employer's decision.[7]

In order to satisfy this burden, the petitioner must set forth specific allegations of fact that demonstrate at least an arguable basis for an improper practice claim.[8] The petitioner's case will not

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[5] The City cites Decision Nos. B-37-87; B-23-87.

[6] The first prong is broken into two requirements: 1) that the employee engage in protected activity; and 2) that the employer's agent responsible for the alleged discriminatory action had knowledge of that protected activity.

[7] Decision Nos. B-41-91; B-1-91; B-67-90; B-61-89.

[8] Decision Nos. B-41-91; B-38-88.

be advanced by unsubstantiated and controverted hearsay statements.[9] Allegations of improper motivation must be based on statements of probative facts, rather than recitals of conjecture, speculation and surmise.[10] If a petitioner fails to establish either element, the burden will not shift to the employer to demonstrate that its actions were motivated by a reason not prohibited under the NYCCBL.[11]

At the outset, we find that petitioner presented sufficient evidence to fulfill the first prong of the *Salamanca* test. However, applying the principles of the second prong of the test to the instant matter, we find that petitioner's allegations are of insufficient probative value to support a claim of improper motivation. In order to prove a causal link between Johnson's union activity and his transfer, the Union relates an incident where a former delegate ran into Hoehl's office, ostensibly to tell Hoehl about a phone call the delegate received about Johnson's grievance. This story, at most, proves that Hoehl knew about Johnson's grievance. Notwithstanding the wholly conclusory and speculative nature of petitioner's assumption, even if petitioner could prove knowledge of the grievance, that fact alone would not provide the necessary causal link between petitioner's protected activity and the actions of the respondent. The mere fact that an employee has filed a grievance, by itself, is not a sufficient basis for a finding that an employer has acted with improper motive.[12]

While the City alleges a decline in performance for purposes of demonstrating a legitimate

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9 Decision Nos. B-41-91; B-24-90.

10 Decision Nos. B-41-91; B-24-90; B-28-89; B-2-87; B-28-86; B-18-86.

11 Decision Nos. B-41-91; B-68-90; B-53-90; B-28-89.

12 Decision Nos. B-41-91; B-24-90; B-28-89; B-2-87; B-28-86; B-18-86.

business reason for Johnson's transfer, the argument concerns the merit of the City's"legitimate business reason" defense, which we need not reach inasmuch as the Union has not established a causal connection between protected activity and the action complained of as required by the second prong of the Salamanca test.

The Board notes that the grievance was filed only one month prior to Johnson's transfer. However, it is well established that mere proximity in time between two events, without other supporting evidence, is insufficient to support a conclusion that the Department harbored anti-union animus.[13] In the absence of any evidence other than the conclusory allegations of petitioner, demonstrating a nexus between the act complained of and protected activity, a finding that respondent acted with improper motivation would be purely speculative. Accordingly, the improper practice petition is dismissed in its entirety.

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[13] Decision Nos. B-2-93; B-41-91; B-53-90; B-38-88.

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 filed by Lt. William Johnson, and docketed as BCB-1934-97 be, and the same hereby is, dismissed.

DATED: New York, New York
November 24, 1998

STEVEN C. DeCOSTA
CHAIRMAN

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