L. 1549, DC 37, Palmer-Moses & Frazier-Lee v. Comptroller, 63 OCB 30 (BCB 1999) [Decision No. B-30-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
DISTRICT COUNCIL 37, AFSCME, AFL-CIO, on behalf of Local 1549, Jacqueline Palmer-Moses, and Renae Frazier-Lee,	:	DECISION NO. B-30-1999
Petitioner,	:	DOCKET NO. BCB-1988-98
-and-	:	
THE COMPTROLLER OF THE CITY OF NEW YORK,	:	
Respondent.		

DECISION AND ORDER

On May 27, 1998, District Council 37, AFSCME, AFL-CIO, ("DC 37" or "Union") filed the instant verified improper practice petition on behalf of Local 1549 ("Local"), Jacqueline Palmer-Moses ("Palmer-Moses") and Renae Frazier-Lee ("Frazier-Lee"), clerical employees in the Office of the Comptroller of the City of New York ("Comptroller"). The petition alleges that the Comptroller disciplined Palmer-Moses and Frazier-Lee for engaging in protected activity in violation of the New York City Collective Bargaining Law ("NYCCBL"). The petition also asserts that the Comptroller interfered with, coerced and restrained Palmer-Moses and Frazier-Lee in their exercise of union activity and discouraged them and other unit members from participating in protected union activity.[1]

[1] The petition alleges violation of § 12-306a (1) and (3). Section 12-306a of the NYCCBL provides, in relevant part:

After several requests for an extension of time were granted, the City filed an answer on August 7, 1998, and the Union filed a reply on October 26, 1998.

Background

The New York City Labor-Management/Quality of Worklife ("QWL") Program was established in 1987. Its stated purpose is to create a structure in each participating government agency of the City of New York to improve productivity and quality of work life for employees.

> 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 section 12-305 of this chapter;
> * * *
> (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;
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

Section 12-306c of the NYCCBL provides as follows:

> Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
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> (1) to approach the negotiations with a sincere resolve to reach an agreement;
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;
> (5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

The Comptroller's Office implemented its QWL program in 1990 in cooperation with D.C. 37. Under the program, several committees were established, including the Communications Committee. One function of the committee is to issue a newsletter on quality of work life matters in the Comptroller's Office.

Palmer-Moses and Frazier-Lee were duly designated to represent the Local on the committee. On or about April 8, 1997, they and other employees, including representatives of management in the Comptroller's Office, met in committee. During the meeting, several disagreements ensued about the articles written for publication in the newsletter. The circumstances on which the instant improper practice is based resulted largely from those disagreements.

During the relevant time period herein, Jennifer Leibler ("Leibler") was co-chair of the Communications Committee of the Comptroller's QWL program. She also represented management in the Comptroller's QWL program. One week after the April 8, 1997, meeting, Leibler filed a formal complaint with Dawn Welch Rowley, the Comptroller's Equal Employment Opportunity ("EEO") officer. The complaint alleged, *inter alia*, that Palmer-Moses and Frazier-Lee had made statements during the committee meeting which Leibler construed to be anti-Semitic. She alleged that Palmer-Moses and Frazier-Lee had maligned a proposed article about a Jewish holiday and that they had accused the article's author of fabricating information in the story. She also said that they suggested that the Comptroller's Office generally accorded preferential treatment to its Jewish employees.

Leibler's complaint to the EEO officer accused Palmer-Moses and Frazier-Lee of making

comments of a racial nature as well. Quoting another employee who assertedly asked Frazier-Lee to "stop yelling at her," Leibler said in the EEO complaint that Frazier-Lee responded, "She thinks I'm loud because of my 'ethnicity.' They all think 'those people' are loud." In addition, Leibler said that Palmer-Moses "attempted to 'race bait'" her when Leibler stated that the Sofrim Society for Jewish employees in the Comptroller's Office should not be treated differently from any other group. In the EEO complaint, Leibler quoted Palmer-Moses as saying, "Let's hear you talk about another group. I want to hear 'her' talk about other groups; come on, let's hear 'her.'" Leibler further stated in her EEO complaint that other committee members told her they perceived the comments as "unprovoked racism."

Leibler also alleged that Frazier-Lee threatened physical violence. When an argument broke out about an article written by another member of the committee and edited by Frazier-Lee, Frazier-Lee allegedly said, "You see that space on the floor? We can go at it right now."

On or about August 4, 1997, Frazier-Lee approached Assistant Comptroller Roberta Rubin ("Rubin") to ask about rumors that a charge of discrimination had been filed against her. Rubin referred Frazier-Lee to the Comptroller's EEO officer. On August 5, 1997, the Comptroller's EEO officer served Frazier-Lee with written notice that "[a]llegations of a confidential nature" had been made against her regarding her "conduct." The notice requested that Frazier-Lee meet with the EEO officer and a representative from the Counsel's office in the Comptroller's Office on August 7, 1997, for an "informal interview." It advised her that she had the right to be accompanied by a union representative or counsel but that Palmer-Moses could not represent her because she also would be questioned about the matter.

On August 7, 1997, Frazier-Lee and Palmer-Moses were interviewed separately about the events that took place at the QWL meeting on April 8, 1997. Rene Williams, Grievance Representative for Local 1549, represented them in each interview.

On January 28, 1998, First Deputy Comptroller Steve Newman ("Newman") issued a Letter of Official Warning each to Frazier-Lee and Palmer-Moses. In the letter to Palmer-Moses, Newman concluded that her comments and conduct at the April 8, 1997, QWL Communications Committee meeting were discriminatory and harassing toward Leibler and other Jewish committee members. He stated that the warning letter would be placed in Palmer-Moses' personnel file and would remain there for one year and that, if she were to engage in similar conduct in the future, she would be charged with misconduct. The letter advised that she would be required to attend multi-cultural, sensitivity training sessions. She signed that she had read the letter, disputing its findings and stating that she would appeal its conclusion, which she described as a "political decision from the Comptroller's Office."

The warning letter to Frazier-Lee reiterated the same findings, conclusion, and warning about future conduct. It added that "there is substantial evidence to support the finding that [in addition, she] physically threatened" a fellow QWL committee member. Frazier-Lee signed that she had received the letter but had not read it and that she wished to have the time to read and respond to the allegations.

Positions of the Parties

Union's Position

The Union argues that the Comptroller's Office unlawfully disciplined Frazier-Lee and Palmer-Moses by issuing warning letters to them for their conduct during the QWL committee meeting of April 8, 1997. The Union asserts that the warnings interfered with, coerced, and restrained Frazier-Lee and Palmer-Moses in their participation in the QWL committee meeting, which the Union views as a proper exercise of union activity. In addition, the Union asserts that the warning letters discouraged not only Frazier-Lee and Palmer-Moses but also other unnamed Union members from freely expressing views which may be contrary to those of management and from participating in QWL meetings as well as other union activity. In this case, the Union asserts, the point of disagreement concerned articles under consideration for publication in the QWL newsletter. The Union concludes that the Comptroller's Office violated § 12-306a(1) and (3) as well as § 12-306c of the NYCCBL.

The Union argues that Palmer-Moses and Frazier-Lee were acting as official representatives of Local 1549 in an officially designated QWL Communications Committee meeting on April 8, 1997, and that their statements and conduct during that meeting were "concerted union activity" protected by the NYCCBL. Because the QWL program is a "creature of a Labor-Management agreement," the Union argues that it is a union activity. And because the QWL program is jointly administered by Labor and Management, the Union adds, the Comptroller's Office had no legitimate interest in or obligation to regulate the substance or

content of Frazier-Lee's or Palmer-Moses' speech or conduct in the Committee meeting.[2]

What the dispute amounts to, the Union argues, is a "heated" discussion by Committee members over the "substance, legitimacy and accuracy" of articles proposed for publication in the Committee's newsletter. While the Union asserts that the discussion "may have strayed from a strict discussion of the merits and substance of the articles, and may have become somewhat personalized, these facts do not in any way lessen the legitimate QWL nature of the union activity."[3] Although Frazier-Lee and Palmer-Moses carried out their asserted union activity in an "exuberant" way, it was not so outrageous as to remove their conduct from the protection of the NYCCBL, the Union concludes. It cites PERB case law on this point as well.

The Union says that the Leibler complaint describes a mere "series of disagreements" between representatives of Labor and Management and that it amounts to "nothing more than the complainant's opinion" about what Frazier-Lee and Palmer-Moses were alleged to have said.[4]

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[2] The Union has withdrawn the constitutional, free-speech claim.

[3] The Union does not deny that, in the meeting at issue, Frazier-Lee and Palmer-Moses "expressed their opinions about how different groups of employees — African-Americans and Jews among them — were treated within the comptroller's [*sic*] office." The Union also states, "They also directly criticized the Comptroller's focus on certain issues . . . and expressed a view that civil servants have the same ability as managers and will have a longer tenure than appointed managers." These opinions were expressed in the context of discussing articles to be published, the Union states.

The Union also withdraws allegations that the discipline against Frazier-Lee and Palmer-Moses violated Constitutional rights, recognizing that such claims may lie in another forum.

[4] At one point, the Union argues that Leibler's complaint fails to identify the offending statements. At another point, the Union states that the complaint "contains two allegations of racist speech supported by direct quotes by each of the two Union QWL members." As to one allegation about Frazier-Lee ("She thinks I'm loud because of my 'ethnicity.' They all think 'those people' are loud."), the Union asserts that the "'racist' label does not fit." As to the allegation that Palmer-Moses attempted to "race-bait" Leibler, ("Let's hear you talk about another group. I want to hear 'her' talk about other groups; come on, let's hear 'her.'"), the

The Union also contends that hearsay by five other Committee members formed the basis of the Comptroller's EEO officer's report and that the EEO report was a pretextual rationale for punishing Frazier-Lee and Palmer-Moses for protected activity.[5] Moreover, the Union maintains that the use of the EEO policy to discipline its members "unilaterally broadened, modified, and changed the scope of respondent's EEO policy without bargaining," raising a claim that the employer unilaterally changed a mandatory subject of bargaining without bargaining.

The Union argues that the facts presented herein do not suggest an EEO problem at all, in contrast to what the City asserts. The Union contends that the Comptroller's EEO policy does not even cover the conduct for which Frazier-Lee and Palmer-Moses were warned, because that policy is arguably "limited on its face" to fair employment practices, prohibiting specific acts of discrimination which affect only terms and conditions of employment. The Union states that the

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Union poses the question, "How does that statement 'race bait' the complainant?" Answering the question, the Union maintains the allegations of racist speech reflect the complainant's own perception rather than what Frazier-Lee and Palmer-Moses actually said.

[5] The Union also points out that, in the EEO officer's report of her investigation into the matter, she asserts that Leibler alleged that both Frazier-Lee and Palmer-Moses "maligned the description of a Jewish holiday's history and accused the article's author of making it up" and "suggested the Comptroller gave preferential treatment to Jewish employees in the agency." The Union states that, with respect to the former quote, the Leibler complaint fails to quote a direct statement but instead makes a conclusory characterization only. With respect to the latter quote, the Union argues that it was a "statement by two African-American women of their perception of preferential treatment of white employees. This was not," the Union continues, "a purely personal statement." Nor did they have an obligation, the Union argues, to state that they were speaking on behalf of the Union in order for their statements to be protected activity.

Moreover, the Union contends that "Respondent's investigation did not account for these highly implausible similarities [in the statements allegedly made by Frazier-Lee and Palmer-Moses] when making its credibility judgments. Respondent was eager to punish [Frazier-Lee and Palmer-Moses] for their protected concerted activity," the Union argues.

policy directs all employees to comply with both the letter and spirit of the EEO laws, but that the policy uses only precatory language when it states, "All personnel *should* work to maintain an atmosphere of appreciation of the diversity reflected in our staff, and to promote understanding among our co-workers. . . ." (Emphasis added.)

The Union also observes that, although the Comptroller's EEO officer is authorized to recommend disciplinary action against an employee when that employee has committed a discriminatory act, including harassment, intimidation, ridicule or insult, the act in question must first be found unlawful. To be unlawful, the Union reiterates, the employee's conduct must affect the terms and conditions of employment of other employees. If terms and conditions of employment are not affected, the Union concludes, the EEO officer has no jurisdiction to investigate allegations of discrimination. In the instant case, the Union argues, there was never an allegation or finding that the conduct alleged to have been discriminatory affected the terms and conditions of employment of Leibler or other employees of the Comptroller's Office who were interviewed during the course of the investigation. The Union argues, therefore, that the Comptroller's Office would have faced no liability if it failed to respond to the Leibler complaint; nor did Leibler demand disciplinary action against the petitioners beyond requesting that they be barred from attending future QWL meetings.

Moreover, the Union continues, the four-month delay between the meeting and the decision to discipline Frazier-Lee and Palmer-Moses demonstrates that management lacked a legitimate business reason for its action. The managers who received the complaint failed to ascertain the truth of the statements attributed to Frazier-Lee and Palmer-Moses, and instead

accepted conclusory statements that petitioners engaged in conduct which the complainant considered anti-Semitic and racist, the Union argues.

As for Leibler's allegation that Frazier-Lee threatened to fight another Committee member, the Union asserts that this threat alone could not justify the discipline of Frazier-Lee, because, while only Frazier-Lee was accused of having uttered a threat, discipline was actually meted out to both her and Palmer-Moses. The reason for the discipline is pretextual, the Union asserts, concluding that "protected concerted activity" on the part of both women is the reason for the warning letters. In short, the Union contends, the Comptroller used its EEO policy to discipline Frazier-Lee in a manner that was unlawful under the NYCCBL.

Finally, the Union disputes the City's contention that this is a contractual claim of discipline which cannot be pursued in this proceeding. The Union asserts that this is a statutory claim which can be asserted independently of any contractual claim. Therefore, the Union concludes, the City's arguments for deferral to arbitration of any contractual grievances of wrongful discipline and/or misapplication of an employer's rule, regulations, policy or procedures are inapposite here. The Union cites PERB case law for support.[6] The Union argues that the City has failed to bear its burden, as it must, of demonstrating that an allegedly unilateral change in a term or condition of employment is covered by the applicable collective bargaining agreement.

As a remedy, the Union requests that the Letters of Official Warning to Frazier-Lee and Palmer-Moses be rescinded and that the warnings be expunged from their personnel files. The

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[6] *Board of Education of the City of Buffalo (Buffalo Teachers Association)*, 4 PERB 3090 (1972).

Union also requests that a notice be posted to the effect that employees engaged in QWL meetings shall not be subject to discipline for statements or comments made in QWL "settings" that "offend management's sensibilities." The Union also requests such other and further relief as the Board deems just and proper.

City's Position

The City contends that the comments and conduct of Frazier-Lee and Palmer-Moses during the QWL Committee meeting of April 8, 1997, constituted personal and religious harassment, not protected union activity, and further that the religious and racial tension which resulted violated the mandate of the QWL Committee to improve the quality of work life for City employees. Therefore, the City argues, the Comptroller's Office was not only within its rights to send warning letters to Frazier-Lee and Palmer-Moses but was actually obligated to enforce its EEO policy designed to free the workplace of racial and religious discrimination. Discrimination for collective bargaining purposes assertedly never entered into the picture, the City contends.

Moreover, the City argues that the Union has failed to offer any evidence that the petitioners were acting on behalf of their Union when they assertedly engaged in the conduct at issue here. As for the claim that the issuance of warning letters to Frazier-Lee and Palmer-Moses discouraged them and other union members from freely expressing their views and participating in QWL meetings and other "union" activity, the City argues that no evidence has been presented to support this allegation. Therefore, the City argues, the Union has failed to meet its burden of alleging facts to demonstrate that the alleged union activity at issue was the motivating factor in

the Comptroller's decision to issue the warning letters.

Citing both private sector case law and precedent of this Board, the City also argues that, even where activity is found to be protected, that protection may be forfeited when offending conduct is found to be flagrant, violent or extreme. When disciplinary action is justified "*despite* union affiliation," the City continues, a petitioner cannot shield himself from the consequences of his own improper actions by claiming an improper practice. Here, the City concludes, "Petitioners effectively gave up any rights or protections they had under the NYCCBL when they engaged in religious harassment and discrimination toward a co-worker."

Moreover, the City asserts that a claim of improper motivation cannot be based on recitals of conjecture, speculation or surmise. Such is the case here, the City asserts. For these reasons, the City argues that the Union has failed to state a claim that the Comptroller's Office violated § 12-306a(1) and (3) of the NYCCBL by issuing the warning letters to Frazier-Lee and Palmer-Moses.

With respect to the Union's claim that the Comptroller's Office violated § 12-306c of the NYCCBL, the City also disputes that it failed to engage in "good faith" bargaining over its response to the conduct at issue. The City maintains that the Comptroller's decision to issue the warning letters was, in fact, a proper exercise under § 12-307b of the NYCCBL of its managerial prerogative to impose discipline. The letters were "appropriate first steps toward progressive discipline," the City contends, adding that the action was devoid of anti-union animus.

Moreover, in the instant case, there was no limitation on management's right to discipline under the circumstances, the City argues. Nor was there any obligation to bargain over the

Comptroller's right to investigate a properly filed EEO complaint and to issue warnings meant to prevent any questionable conduct which might violate the Comptroller's EEO policy.

As to the contractual nature of the claim, the City argues, on one hand, that Frazier-Lee and Palmer-Moses were not engaged in any action pursuant to the collective bargaining process or agreement. In fact, the City points out, QWL Committees are required actually to avoid consideration of grievances of a contractual nature. Even if this were a contractual matter, the City continues, this Board assertedly lacks the power to resolve claims alleging contractual violation of disciplinary procedures.

On the other hand, the City contends the Union has mistakenly alleged misapplication of the Comptroller's rules, regulations, policies or procedures in the issuance of warning letters of a disciplinary nature. This, the City argues, is a matter more appropriately addressed, "if at all," through the contractual grievance process.[7]

For all these reasons, the City urges the Board to deny the instant petition.

Discussion

The instant petition alleges that Frazier-Lee and Palmer-Moses were wrongfully disciplined for expressing opinions and for conduct during a meeting on April 8, 1997, of the Communications Committee of the QWL program in the Comptroller's Office where they worked during the time period relevant here. The Union alleges that those oral comments

[7] The City asserts that, pursuant to the contractual grievance procedure, petitioners have filed a grievance relating to alleged improper disciplinary actions against them and misapplication of the Comptroller's rules, regulations, policies and procedures.

constituted activity protected under the NYCCBL. The Union further alleges that, by issuing the warning letters, the Comptroller's Office interfered with, coerced and restrained Frazier-Lee and Palmer-Moses in the exercise of union activity and that their employer discouraged not only them but also other unit members from participating in protected union activity.[8]

As to the claim that Frazier-Lee and Palmer-Moses were disciplined in retaliation for union activity, such a claim is governed by the standard set forth by PERB in *City of Salamanca,*[9] adopted by this Board in *Bowman v. City of New York.*[10] It applies in cases like the instant one in which the employer's motivation is at issue. It provides that, 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; and

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

If the respondent does not refute the petitioner's showing on one or both of these elements, then the respondent must establish that its actions were motivated by another reason which is not violative of the NYCCBL.[11]

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[8] The Union has not specified claimants other than Frazier-Lee and Palmer-Moses nor has it specified protected activity other than participation by Frazier-Lee and Palmer-Moses in the QWL Communications Committee in the Comptroller's Office.

[9] 18 PERB 3012 (1985).

[10] Decision No. B-51-87.

[11] *See, e.g., Velyn Hennings, pro se, v. Administration for Children's Services,* Decision No. B-45-98; *Local 1549, D.C. 37, AFSCME, AFL-CIO, and Desiree Miller, v. City of New York and New York City Department of Transportation*, Decision No. B-2-93 at 15 and cases cited therein.

Of course, a prerequisite to analysis under this standard is a finding that the purported union activity is of the type protected by our law.[12] The mere fact that a union or its members may have engaged in activity of any kind does not guarantee that it is absolutely entitled to protection under the NYCCBL.[13] As we have noted earlier,[14] statutory protection for "concerted" activities in which employees are engaged for the purpose of "mutual aid and protection" are conspicuously absent from § 12-305 of the NYCCBL, which gives public employees in the City of New York the right to form, join and participate in an employee organization of their choosing, or to refrain from doing so. The activity which enjoys protection under the NYCCBL must be related to the employment relationship; it must be engaged in on behalf of an employee organization, and it must not be strictly personal in nature.[15] Absence of evidence of protected activity, as a matter of law, removes a claim of unlawful motivation from the jurisdiction of the NYCCBL.[16]

In the case before us, the Union contends that discipline meted out allegedly under the guise of the Comptroller's EEO policy was actually unlawful retaliation for the disagreements voiced by Frazier-Lee and Palmer-Moses during the QWL committee meeting of April 8, 1997.

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[12] *See, e.g., Emmanuel Archibald, et al., v. Michael Jacobson, Commissioner of Correction, et al.*, Decision No. B-38-96 at 16--17.

[13] *See, e.g., Uniformed Firefighters' Association v. Fire Department of the City of New York*, Decision No. B-4-92 at 11.

[14] *Local 1182, Communications Workers of America, v. New York City Department of Transportation*, Decision No. B-14-95 at 6.

[15] *Emmanuel Archibald, et al.*, Decision No. B-38-96 at 16--17 and cases cited therein.

[16] *Id.* at 16--17.

The merits of the disciplinary matter are not before us. What is before us is the question of whether those comments were protected under our statute.

To aid us in that determination, we look to an earlier decision of this Board for guidance. In that case, the petitioner claimed, *inter alia*, that the employer's unilateral implementation of a work program which had been under discussion in labor-management committee meetings was improper under our law.[17] This Board denied a refusal to bargain claim, reasoning that no duty to bargain arose from negotiations which take place within labor-management committee meetings. The Board explained, "[T]he labor-management committee is intended to seek areas in which cooperation and voluntary courses of joint labor-management action can be fashioned."[18] The Board added that the function of labor-management committees was not primarily the conduct of ordinary collective bargaining but rather as an "adjunct to collective bargaining in a traditionally advisory setting."

The analogy is appropriate here. There is no dispute that the Comptroller's QWL program was established pursuant to the New York City Labor-Management/Quality of Worklife Program. In fact, the Union notes that the QWL program is a "creature of a Labor-Management agreement." However, the mere fact that the Union took part in the implementation of the QWL program within the Comptroller's Office does not transform this "advisory" "adjunct" to collective bargaining into a mechanism whereby labor and management engage in traditional

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[17] *Sergeant's Benevolent Association v. City of New York and New York City Police Department*, Decision No. B-15-92 (concerning the compensibility of productivity gains potentially resulting from the solo supervisory patrol program).

[18] *Id.* at 13.

collective bargaining with the same statutory protections of that process. In the same way, the participation of unionized employees of the Comptroller's Office in the work of its labor-management committee such as the one here does not confer upon them statutory protection for everything they might say in that context. As we stated above,[19] the mere fact that unionized employees may have engaged in activity of any kind does not guarantee that the activity is absolutely entitled to protection under the NYCCBL. Here, the Union attempts to characterize the remarks of Frazier-Lee and Palmer-Moses as reflections of their and of their colleagues' purported observations with regard to race and religion. However, their remarks, which the Union does not dispute were uttered, made no reference to concerns about collective bargaining or traditional collective bargaining issues. The mere fact that Frazier-Lee and Palmer-Moses may have been chosen by their Union to sit on the QWL committee is not enough to bring their words and conduct within the realm of protected activity.

We are also not persuaded by the Union's argument that the discussions were about the "substance, legitimacy and accuracy" of articles proposed for publication in the committee's newsletter. While the committee meeting was called to discuss articles for publication in the newsletter, the discussion digressed from that. The Union acknowledges that the colloquy "may have strayed from a strict discussion of the merits and substance of the articles, and may have become somewhat personalized." The Union argues that "these facts do not in any way lessen the legitimate QWL nature of the union activity." If, by that, the Union means that the personalized nature of the petitioners' comments does not vitiate the protected nature of their

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[19] *See* n. 12 and surrounding text.

participation in the QWL committee discussion, we find this argument unpersuasive as well, for the same reason as we stated above. The mere fact that Frazier-Lee and Palmer-Moses were Union members is not enough to bring their "exuberant" conduct and "personalized" "statement by two African-American women of their perception of preferential treatment of white employees," in the Union's words, within the realm of protected union activity.

For want of the required protected activity, we need not reach the other issues which the *Salamanca* test would require us to address in claims of retaliation and improper motive. Because we find no factual support for such claims, we find no violation of § 12-306a(1) and (3) of the NYCCBL.

With respect to the Union's claim that the Comptroller's Office violated § 12-306c,[20] we are equally unpersuaded by its argument on this point. The Union contends that the Comptroller's Office has used its EEO policy in this case to discipline Frazier-Lee and Palmer-Moses for assertedly protected activity. The gravamen of the Union's claim, then, is wrongful discipline, a contractual matter, rather than a statutory claim of a unilateral change in a mandatory subject of bargaining. A contractual grievance is simultaneously under consideration

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[20] In its reply to the City's answer, the Union belatedly asserted an identical claim, based on the same facts, that § 12-306a(4) was violated. As this claim is identical to the one that § 12-306c was violated, we decline to address the later asserted claim.

Section 12-306a of the NYCCBL provides, in relevant part:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
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> * * *
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> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

on that issue,[21] and that proceeding may resolve the instant dispute in its entirety. As no party in that proceeding has requested intervention by this Board at this time, our inquiry ends here.

For all these reasons, the instant improper practice petition must be dismissed in its entirety.

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[21] *See* n. 7 above.

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 District Council 37, AFSCME, AFL-CIO, in the matter docketed as BCB-1988-98 be, and the same hereby is, denied in its entirety.

Dated: August 31, 1999
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER