OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding
Between

SOCIAL SERVICE EMPLOYEES UNION, Local 371,
And GEORGE SILBERMAN,

Petitioners,

DECISION NO. B-38-2000

--and--

DOCKET NO. BCB-2111-00

NEW YORK CITY DEPARTMENT OF
HOMELESS SERVICES,

Respondent.
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**DECISION AND ORDER**

On January 7, 2000, the Social Service Employees Union ("SSEU" and "Union"), Local 371, and George Silberman("Silberman") filed a verified improper practice petition against the New York City Department of Homeless Services ("Department" and "City") alleging violation of § 12-306a(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL").[1] Petitioners allege, *inter alia*, that Respondents retaliated against Silberman in his attempt to be promoted as a result of his filing contractual grievances on various matters.

After requests for extension of time, the City's answer was filed on March 30, 2000, and

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[1] Section 12-306a of the NYCCBL provides, in pertinent part, as follows:
**Improper practices; good faith bargaining.**
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. . . .

the Petitioners' reply was filed on July 20, 2000.

***Background***

At all times relevant herein, Petitioner George Silberman was employed by the City of New York, first, by the New York City Human Resources Administration, and later by the Department of Homeless Services ("Department"). Hired in 1964 as a Case Worker, Silberman was a member of the bargaining unit covered by various collective bargaining agreements between the Petitioner Union and the City in effect during the period of his employment by the City.[2] Having passed a number of competitive Civil Service examinations throughout his career, he was promoted to the position of Supervisor III in 1993.

Upon taking the examination for the position of Administrative Director, Social Services, Silberman ranked 16th on the eligibility list for that position. He was not appointed to that position, however, and, on December 16, 1998, Silberman filed a complaint with the New York City Commission on Human Rights ("NYCCHR") alleging the Department wrongfully denied him that appointment on account of his age, race and religion.[3] Silberman's complaint to the NYCCHR also alleged that LeRoy Allen, the Department's Deputy General Counsel, "engaged in racist and anti-semitic behaviour" and that his complaints about Allen's purported conduct further prevented Silberman from being considered for the Administrative Director position.

Silberman contends his work evaluations were not considered in making the appointment.

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[2] There is no allegation that Silberman's employment was terminated as a result of any action related to the instant petition.

[3] The NYCCHR complaint asserted that Silberman was 59 years of age, white and Jewish.

He asserted those evaluations had been positive throughout his career with the City. He complained to NYCCHR that "more than fifty provisional employees less qualified" than he served in "the title for which complainant applied." He contended a majority of those individuals had not taken or passed the qualifying exam for the job. Silberman further contended that the majority of those provisionals were "not Jewish and are non-White and younger" than he.

The Department's response to the NYCCHR complaint asserted that Silberman "never applied" for the Administrative Director's position. It also asserted that Silberman "has had a history of inappropriate behavior" and it refers to "various documentation annexed hereto collectively as Exhibit 'D.'" By letter dated September 1, 1999, the NYCCHR investigator sent Silberman a copy of the Department's response to the human rights complaint but the Department's attachments were not included. Two days later, Silberman requested that the investigator send copies of the attachments to him so that he could prepare his rebuttal. On September 11, 1999, Silberman received those attachments from the investigator. Among the attachments were various grievances filed by Silberman from 1979 to 1995 and the employer's responses and determinations with respect to those grievances.[4]

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[4] For example, a Step II determination dated April 14, 1995, denied grievances concerning an alleged violation of a provision in the October 6, 1994, collective bargaining agreement about reporting patterns. Handwritten on the determination is a notation, dated April 18, 1995, to "[p]ut in your application/resume for Dept. Director (Programs) 30th St. ASAP."

A Step II determination dated March 14, 1995, and a Step III determination dated June 13, 1995, denied a grievance seeking a right to appeal from personnel evaluations. The Step III hearing officer noted that Silberman had not indicated in his grievance that he personally was aggrieved by any particular personnel evaluations but rather that, "'in the past when a member'" appealed a personnel evaluation, "'no response of any kind was received.' (Step III grievance, dated 3/22/95)." The Step III hearing officer determined , "Due to the absence of a specific grievance having been experienced by Mr. Silberman, the matter is dismissed."

An internal, departmental memorandum dated September 26, 1994, and a Step III determination dated November 29, 1994, addressed a grievance filed September 23, 1994, concerning the Department's purported failure to pay Silberman premium pay and compensatory

*Positions of the Parties*

*Petitioners' Position*

Petitioners contend the Department denied Silberman appointment to the Administrative Director's post "at least in part" because of what the Department alleged was "inappropriate behavior." Petitioners also contend that, in using the phrase "inappropriate behavior," the Department included the filing of contractual grievances. Petitioners argue that the filing of claims in the contractually provided grievance procedure is a right protected by the NYCCBL. By denying Silberman the appointment he sought, the Union argues, Respondents have interfered with, restrained and coerced Petitioner Silberman in the exercise of rights granted under NYCCBL § 12-305 in violation of NYCCBL § 12-306a(1), specifically, the filing of contractual grievances.

Petitioners further contend that Respondents' submission of copies of grievances and of responses thereto in the proceeding before the NYCCHR discriminated against Silberman in order to discourage him from filing contractual grievances in violation of NYCCBL § 12-306a(3). The Union contends that none of the documents contained in the Department's response to Silberman's NYCCHR complaint were in his personnel folder when he inspected it before the Department's response was filed.[5]

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time credits for work performed on a holiday. The documents indicate the payment issue was resolved.

A Step I grievance dated February 9, 1979, alleged that Silberman's supervisor, the Deputy Director (Programs), set "impossible requirements" that "can't be met without additional staff." Responding to that grievance, the Director of Adult Services at Silberman's work site directed Silberman to "supervise your unit" and stated that she would be reassigning personnel "to ensure that all case records are in compliance."

[5] Specifically, Exhibits C and D of the Department's response to the NYCCHR complaint are referenced here. Exhibit D included grievance documents. Exhibit C included

Addressing the City's characterization of letters and memoranda written by Silberman to fellow employees, supervisors and public officials, which the City described as derogatory, degrading, inflammatory and accusatory, the Union asserts that Silberman was justified in writing them for a variety of reasons. The reasons include, for example, his objection to managerial decisions to promote individuals other than Silberman and his attempts to obtain information about terms and conditions of employment of those individuals through the Freedom of Information Act.

Responding to the City's contention that Silberman was not considered for the Administrative Director's position in part because he failed to apply for it, the Union argues that, since Silberman had taken and passed the Civil Service examination and was certified as eligible for appointment to the post, there was no requirement that he "apply" for it. The Union asserts that he should have been considered by virtue of his position on the eligible list.

The Union further contends "skulduggery and bad faith" played a part at least with respect to the April 14, 1995, Step II determination of the grievance concerning reporting patterns. It asserts that, on the copy of Respondent's Step II determination Silberman received from the NYCCHR, "which of course was not on the copy Silberman received from Respondents in April 1995," it adds, "was a note reflecting that a copy of the Step II decision was sent by Respondent to Patricia Martinez, the person then holding the position on an 'acting' basis, and who was later appointed permanently. That note states:

> 4/8/95
> cc: Patricia Martinez

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correspondence and documents related to a complaint Silberman filed with the New York State Division of Human Rights Division and correspondence to Department supervisors regarding managerial decisions to appoint individuals other than Silberman.

> Put in your application/resume for Dep. Director (Programs) 30th St. ASAP.

As relief, Petitioners seek an order directing the Department to cease and desist from interfering with, restraining, or coercing Silberman in the filing and processing of claims under the contractually provided grievance procedure. Petitioners also seek an order directing the Department to cease and desist from alleging before the NYCCHR that the filing of contractual grievances by Silberman constituted inappropriate behavior on his part justifying his "non-appointment" to the position of Administrative Director, Social Services.

*Respondent's Position*

The City argues that the instant petition should be denied on the grounds that it is untimely and outside the jurisdiction of this Board. Whether the limitations period accrued in 1997 when Silberman claims he was denied the promotion to the Administrative Director's position or it accrued May 25, 1999, when the City filed its response to Silberman's NYCCHR claim, the City contends the instant petition is at least four months too late. Even assuming that accrual should be measured from September 11, 1999, when Silberman received the earlier-omitted exhibits to the City's NYCCHR filing, the City contends the instant petition was filed more than four months later, on January 24, 2000.

As to the jurisdictional defense, the City maintains Silberman's claims that the Department violated the Administrative Code of the City of New York or Title VII of the Civil Rights Act of 1964, as amended, with regard to race, religion or age constitute claims outside the aegis of this Board of Collective Bargaining. As such, they must be denied, the City argues.

With regard to the substance of the claims in the matter before us, the City denies the

Union's allegations that it retaliated against Silberman in violation of NYCCBL §§ 12-306a(1) and (3). Specifically, the City denies that Silberman's "grievance activity" played a role in the Department's decision to select someone else for the Administrative Director's position. Silberman failed to submit an application and resume for the position, the City contends, and he exhibited "inappropriate behavior" as "demonstrated" through "numerous derogatory, degrading, inflammatory and accusatory" letters he wrote about fellow employees and supervisors.[6] The grievances which were attached to the Department's response to the NYCCHR complaint were submitted "for purposes of clarity," the City further argues, insisting that Silberman was not denied the appointment because of the fact that he filed contractual grievances.

While the City does not deny employer knowledge that Silberman filed the grievances, it argues the instant petition fails to allege facts sufficient to demonstrate a causal connection between the filing of those grievances and the denial of Silberman's appointment to the job he claims he sought. No anti-union statements were made and no anti-union animus has been shown, in the City's view.

The City further argues its managerial right to determine the methods, means and personnel by which its operations are to be conducted absent an agreement with a union, as here,

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[6] The City attaches to its answer letters and memoranda which it asserts were submitted with the Department's response to the NYCCHR complaint. Those documents include letters from Silberman to various Department supervisors, New York City and New York State human rights investigators, and elected officials. The letters allege, *inter alia*, violation of rules and regulations of the Department of Personnel, as well as unethical conduct and moral terpitude on the part of City employees appointed to positions Silberman sought.

to limit that right,[7] including the right to make personnel decisions about promotions.[8] In light of the fact that Silberman did not apply for the position he sought, as well as the fact that his personnel file contained "disparaging and accusatory letters" evincing a "long history of behavior that the Department deemed inappropriate," the City maintains that it had a legitimate business reason for not promoting him to that position regardless of the grievances he filed over the years.

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[7] **NYCCBL §12-307** provides, in relevant part:

**Scope of collective bargaining, management rights.**

**a.** Subject to the provisions of subdivision b of this section . . . , public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) working conditions...

* * *

**b.** 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; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

The City cites *United Probation Officers Association v. James Payne, Commissioner, New York City Department of Probation*, Decision No. B-37-87, and *City Employees Union Local 237, IBT, v. New York City Housing Authority*, Decision No. B-23-87.

[8] The City cites *Joseph Bowman and District Council37, AFSCME, AFL-CIO v. City of New York and Judith Levitt as Personnel Director of the City of New York,* Decision No. B-51-87.

***Discussion***

With respect to the timeliness challenge, we agree with the Union that the accrual date is September 11, 1999, the day on which Petitioner Silberman received the Department's exhibits in its response to his NYCCHR complaint. The instant petition was filed in this Office on January 7, 2000, *i.e.*, within the applicable limitations period.[9] The petition was thus timely filed.

With respect to the jurisdictional challenge to claims outside the purview of this agency, we have long held that only claims pertaining to rights granted in NYCCBL § 12-305 will be considered by this Board of Collective Bargaining.[10] Only the claims alleging interference with rights granted under the NYCCBL as well as claims alleging retaliation and coercion for filing grievances pertaining to the applicable collective bargaining agreement are at issue herein. Therefore, any other claims which may be implied in the instant petition are denied.

With respect to the retaliation and coercion claims, we find Petitioners' allegations unpersuasive. When such violations are alleged, we have applied the test set forth by the New York State Public Employment Relations Board ("PERB") in *City of Salamanca*[11] which we adopted in *Joseph Bowman and District Council37, AFSCME, AFL-CIO, City of New York,*

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[9] Affidavits of service submitted with the instant petition indicate that a copy was served by mail on January 6, 2000, to the Department and on January 7, 2000, to the New York City Office of Labor Relations. No explanation is offered by the City as to why it asserts the petition was filed January 24, 2000.

[10] *See*, *e.g.*, *James Parker v. New York City Emergency Medical Service of the Health and Hospitals Corporation, District Council 37, AFSCME, AFL-CIO, and its Affiliated Locals 2507 and 3621*, Decision No. B-15-97 (affirming Determination of Executive Secretary [Decision No. B-51-96(ES), Dec. 9, 1996] with respect to claims outside the jurisdiction of the NYCCBL).

[11] 18 PERB ¶ 3012 (1985).

*Judith Levitt,as Personnel Director of the City of New York.* [12] Under this test, a petitioner must show (1) that an employer's agent responsible for allegedly discriminatory action had knowledge of an employee's union activity, and (2) that the employee's union activity was a motivating factor in the employer's decision. If the petitioner makes a *prima facie* showing of both elements, then the burden shifts to the employer either to refute the petitioner's showing or to demonstrate that it would have taken the actions which are the subject of the complaint in the absence of protected activity. The employer is permitted to show that it had a legitimate business reason for acting as it did.[13]

In order to satisfy its burden, a petitioner must set forth specific allegations that demonstrate at least an arguable basis for an improper practice claim. Allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, and surmise.[14] Merely alleging improper motive does not state a violation where the union has failed to prove the requisite causal link between the underlying management act complained of and the grievant's union activity.[15]

There is no dispute here that Silberman filed numerous grievances through the contractually provided procedure. Nor is there a dispute that he wished to be appointed to the Administrative Director's position. There is no dispute also that he did not submit a resume or

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

[13] *Patrolmen's Benevolent Association v. City of New York and New York Police Department*, Decision No. B-16-99 at 6; *Ronald Perlmutter v. Uniformed Sanitationmen's Association, Local 831, et al*., Decision No. B-16-97 at 4.

[14] *Communications Workers of America, Local 1180 v. City of New York and Health and Hospitals Corporation*, Decision No. B-19-99 at 12.

[15] *Charles Procida v. Commissioner of the Human Resources Administration, Department of Social Services*, Decision No. B-2-87 at 13.

formal application to be considered. The Union argues that formal application was not required by virtue of his position on the Civil Service list. There is no dispute that Silberman wrote the letters and memoranda which the City points to as a basis for its decision not to promote him.

The gravamen of the dispute in the instant improper practice petition relates to the second prong of the legal test we use in such cases, the issue of improper motivation. The question here is whether the allegations of the petition show that the Department considered Silberman's filing of contractual grievances as "inappropriate behavior" and, on that basis, decided not to promote him.

We are persuaded upon review of the record that the Union has failed to allege facts that would establish that any anti-union motive was involved in either the conduct characterization or the Department's action in denying Silberman the promotion he sought. The documents submitted to the NYCCHR show that Silberman repeatedly took issue with various fellow employees and supervisors at his work location. We find that in the context in which they were submitted to the NYCCHR, the documents show that what the Department considered to be "inappropriate behavior" was not Silberman's use of the grievance procedure but rather what he had to say about his fellow workers and the way he addressed supervisors as well as elected officials. The record supports the City's contention that Silberman's own writings could be construed as "derogatory, degrading, inflammatory and accusatory." Based on this record, we also accept the City's explanation that since many of Silberman's "inappropriate" writings were in response to denials of his grievances, the City attached copies of the grievances to its submission to the NYCCHR "for purposes of clarity" and not because it believed that the filing of those grievances was "inappropriate."

It is not our purpose to decide whether his grievances were meritorious or not.

Contractual grievances do not fall within the purview of this Board to determine,[16] nor, as we said above,[17] do claims that fall outside the reach of the NYCCBL. The pleadings in the instant matter are devoid of any facts from which we could infer that the employer's decision not to promote Silberman to the Administrative Director's position was directly related to Silberman's filing of any contractual grievances.[18]

As it is the employer's right pursuant to the management rights clause of the NYCCBL to hire whom it pleases for any given job, in the absence of any improper motive as here, no claimed violation of our statute will lie. As the City has prevailed on the second prong of the legal test which we have long used to decide issues of this kind, our inquiry need proceed no further.

Accordingly, for all the reasons stated above, the instant improper practice petition is denied in its entirety.

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[16] Section 205.5(d), Civil Service Law (Public Employees' Fair Employment Act), which is applicable to this agency, provides that "the board shall not have authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice. . . ."

[17] *See* n. 10 above.

[18] Moreover, we are not persuaded by the Union's assertion with respect to the submission to NYCCHR by the employer of a copy of Silberman's April 14, 1995, grievance. That submission contained a handwritten notation of which the Union asserts Silberman was not aware. It is not determinative of any issue in the instant proceeding, inasmuch as the City has offered persuasive evidence of a legitimate business reason for not promoting Silberman.

**ORDER**

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

ORDERED, that the improper practice petition docketed as BCB-2111-00 be, and the same hereby is, dismissed in its entirety.

Dated: New York, NY
November 28, 2000

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
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