OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
MICHELLE BYRNE and SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,	:	
Petitioners,	:	Decision No. B-40-2000
	:	Docket No. BCB-2079-99
-and-	:	
CITY OF NEW YORK, ADMINISTRATION FOR CHILDREN'S SERVICES,	:	
Respondents.	:	

DECISION AND ORDER

On August 5, 1999, the Social Service Employees Union, Local 371 ("Union" or "SSEU") filed a verified improper practice petition, on behalf of Michelle Byrne ("Byrne" or "Petitioner") against the New York City Administration for Children's Services ("ACS"). On August 9, 1999, the Union submitted an amended petition alleging that ACS violated §§ 12-306(a)(3) of the New York City Collective Bargaining Law ("NYCCBL") by demoting Petitioner because of statements she made concerning the discharge of Union represented employees.[1] The City filed an answer to

[1] §12-306(a) of the NYCCBL provides in relevant part:
Improper practices; good faith bargaining. a. Improper public employer practices. It shall be an improper practice for a public employer or its agents: (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or the participation in the activities of, any public employee organization;

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the amended petition on November 23, 1999 and the Union filed a reply on July 13, 2000.

BACKGROUND

On August 11, 1986, Petitioner was employed by the City's Child Welfare Administration ("CWA") in the civil service position of provisional Caseworker assigned to its Staten Island Field Office. In 1988, Petitioner was permanently appointed as Caseworker. In Petitioner's first written performance evaluation, which covered the year 1988 to 1989, she received the second highest overall rating. From the outset, it was noted that "Ms. Byrne's major weakness had been caseload management...[but she] exhibited a notable change in her ability to organize and control her caseload." From 1989 to 1990, Petitioner received the same rating and again it was noted that case record entries "had been a major deficit with Ms. Byrne, however, each year she showed a marked improvement." The evaluation also stated that Petitioner's "previous problems with caseload control and management have been resolved."

On June 26, 1995, Petitioner was permanently appointed to the promotional title of Supervisor I and was assigned to the City's Human Resources Administration ("HRA"), Homeless Division Unit. In January and February 1997, due to a "functional transfer of responsibility," employees were transferred from HRA to ACS. By memo dated January 6, 1997 to the ACS Assistant Commissioner for Personnel Services, Petitioner was transferred to ACS's Staten Island Field Office. Petitioner's transfer was effective February 3, 1997.

The City and the Union disagree as to the precise date when Petitioner began working as a provisional Supervisor II of the Protective/Diagnostic Training Unit ("Training Unit"). According to the City, Petitioner began working in the Training Unit on November 25, 1997. Because it was

a training unit, the City contends that Petitioner had only three or four caseworkers to oversee and that these caseworkers had been assigned a low volume of cases. Even so, the City asserts that Petitioner did not provide adequate supervision over her subordinates and failed to comply with paperwork and recording requirements. The Union denies the City's claims and asserts that Petitioner began working in the Training Unit on January 12, 1998.[2] The Union claims Petitioner was in charge of supervising five caseworkers in her unit, all of whom were inexperienced and demanded more supervision than a regular unit of experienced workers would require.

It is undisputed that in the provisional Supervisor II position, Petitioner received an overall rating of "Conditional" on her performance evaluation dated April 1, 1998 to March 31, 1999, which she appealed. On appeal, the overall rating was changed to "Good," but the individual task ratings and comments included in the evaluation remained the same. The comments indicated that Petitioner exhibited a renewed inability to manage her time effectively and review and process the paperwork of the new trainees in her unit in a timely manner so as to identify and correct their errors. The evaluator wrote that "Ms. Byrne failed to comply with all measurable items of complaint and procedures. . . . The statistics for her unit were the worst in my area." Throughout October and November of 1998, the record reveals several inter-office memos and e-mails sent to and from Petitioner, her supervisor See-Yuen Kuet ("Kuet"), and a Caseworker under Petitioner's supervision. These messages concerned a backlog of cases in Petitioner's basket, warnings to Petitioner regarding overdue reports, problems with meeting deadlines, and a warning from Supervisor Kuet to Petitioner

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[2] The Union refers to a memo distributed to the staff dated January 6, 1998 regarding the re-assignment of staff, from Mary Rosenberg, Borough Director, stating that effective January 12, 1998 "Michelle Byrne will replace Ms. Dummett as the Supervisor II of the P/D Training Unit 151."

that she may be subject to disciplinary action if she failed to improve.

Early 1998 marked the beginning of a series of meetings between ACS and the Union to discuss plans for developing four new titles in a new Child Protective title series.[3] Petitioner served as a Union Delegate and attended two meetings between the City and the Union on May 7, 1998 and June 6, 1998 at which time both parties discussed the new titles and what was to become of employees not accepted into the new titles. A press release regarding the new title series was issued by the Office of the Mayor on November 10, 1998 and on November 23, 1998, ACS distributed an informational booklet to its employees. ACS began reviewing employees in December 1998 to determine who would qualify for the new title series. Those that were deemed to be appropriate candidates received a recommendation. Pursuant to the plan, provisional employees with an underlying permanent appointment, who were not recommended, would be demoted to their permanent civil service title and then be redeployed within ACS or HRA. Petitioner, who was a provisional Supervisor Level II when the new title series went into effect, applied for the new position on December 10, 1998. By memorandum dated December 18, 1998, Petitioner's immediate supervisor did not recommend her for the appointment.

An e-mail dated March 24, 1999 from Myles Driscoll ("Driscoll"), an ACS Personnel Officer, to another ACS administrator, listed employees that had not been recommended for the new title series and stated that they would either be terminated or demoted; Petitioner was listed as one of the provisional employees to be demoted. On April 2, 1999, an inter-office memo was sent to

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[3] The four titles in the Child Protective title series are as follows: Child Protective Specialist; Child Protective Specialist Supervisor; Child Welfare Specialist; and Child Welfare Specialist Supervisor.

Nicholas Scoppetta, Commissioner of ACS, stating 330 employees in total had not been recommended for the new title series. Petitioner was among the 330 employees who had not been recommended. Another e-mail dated April 7, 1999 between Driscoll and Zeinab Chahine Srour ("Srour"), Associate Deputy Commissioner, indicates that Petitioner and four other employees were to be informed of their impending demotions "as soon as possible" before April 13, 1999. A copy of this e-mail message was also sent to Acting Director of the ACS Staten Island Field Office, Dan Leydan ("Leydan"). Leydan, who had been out of the office, responded to Driscoll's message when he returned on April 12, 1999 and asked that Petitioner not be informed of her demotion until April 16, 1999 or until the title series rejections had been mailed out. By the time Leydan's April 12 message was sent, Petitioner had already been informed of her demotion on April 9.[4]

On April 9, 1999, at a graduation ceremony held to recognize supervisory employees who participated in a supervisory training program, Petitioner delivered a speech criticizing ACS for its poor management of union-represented employees. Upon returning to her office after the ceremony, Petitioner was told by her Supervisor that the ACS personnel office in Manhattan wanted her to report there. Petitioner telephoned ACS Personnel Officer Driscoll in his Manhattan office and he instructed Petitioner to report to his office immediately. Upon arriving in Manhattan, Driscoll told Petitioner that she had been demoted to her permanent civil service position of Supervisor I and gave Petitioner a letter to that effect.

POSITIONS OF THE PARTIES

[4] The facts allege that the decision to demote Petitioner and four other employees was made prior to April 9, 1999. Although it is clear that Petitioner was informed of her demotion on April 9, 1999, it is unclear precisely when the other four employees were demoted.

Union's Position

The Union contends that Petitioner performed her duties in a highly professional manner at all times. Prior to her demotion, the Union asserts that Petitioner "enjoyed a steady and continuous upward career in HRA and ACS" and emphasizes that she received favorable written evaluations and promotions.

Petitioner was one of fifteen individuals selected by her class to deliver a three minute speech at the graduation ceremony of April 9, 1999. In her speech, Petitioner stated that the union-represented employees of ACS were demoralized because so many employees were being discharged at that time. Petitioner said that the fact that so many workers were being discharged made it difficult for others to focus on their work. Describing the work environment as "hostile," Petitioner said that ACS employees needed more support from management. Petitioner concluded her speech by saying that she was proud to serve as a Union Delegate and that she would continue with the help of the Union to raise awareness about problems such as large caseloads and insufficient staffing. That same day, Petitioner was told to report to the personnel office and was informed of her demotion.

The Union argues that Petitioner was demoted from Supervisor II to Supervisor I immediately following her speech because she engaged in protected, concerted activity by speaking out in support of the Union and against ACS. Petitioner also urges the Board to hold an evidentiary hearing on the petition.

City's Position

The City claims that the Union's relies on highly speculative assumptions when it alleges that Petitioner was demoted because of her speech at the graduation ceremony on April 9, 1999. The City argues that Petitioner was merely one of over three hundred employees who were not recommended for the new title series. Her supervisor's recommendation against her appointment was submitted on December 18, 1998, four months before Petitioner's graduation speech, and was based on her performance as a Supervisor II. Specifically, while in that position, Petitioner demonstrated a continued inability to effectively manage her time, review and process paperwork, as well as supervise the employees in her unit. The City states, "With these difficulties, [Petitioner] was not an appropriate candidate for the new title series which required improved professional responsibility and accountability." To that end, in keeping with Petitioner's provisional/probationary status as a Supervisor II, and the plan for employees to return to HRA if they do not get recommended for the new title series, Petitioner was demoted to her permanent civil service title.

The City contends that when a violation of 12-306(a)(3) of the NYCCBL is alleged, the Board applies the test laid out in *City of Salamanca,*[5] which provides that the petitioner must show that: 1) the employer's agent responsible for the alleged discriminatory act had knowledge of the employee's union activity and 2) the employee's union activity was the motivating factor in the employer's decision.

The City argues that Petitioner has failed the first part of the *Salamanca* test because she did not offer any evidence to suggest that respondent had any knowledge of Petitioner's April 9, 1999 speech when the recommendation was made or when implementation of the demotion procedure was

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[5] 18 PERB ¶ 3012 (1985).

underway. Specifically, the City argues that "the recommendation to not accept [Petitioner] into the new title series was made four months before the demotion and the actions necessary to effectuate that recommendation continued throughout that four month period." Thus, the statements Petitioner made at the graduation ceremony could not be a factor in the agency's decision to demote her. In support of its position, the City cites Board Decision B-41-99 in which the Board dismissed a claim of retaliatory termination upon finding that a recommendation to terminate made three days before Petitioner sought union intervention failed to show that the City knew of Petitioner's union activity or that such activity motivated the City to terminate the Petitioner.[6]

The City also argues that Petitioner has failed to allege facts that establish a causal connection between the speech and Petitioner's demotion and has therefore failed the second part of the test. The City cites Decision B-5-82 in which the Board dismissed an improper practice charge alleging retaliatory demotion because Petitioner failed to demonstrate a causal connection between the union activity and the decision to demote. It further argues that proximity in time by itself is not enough to support a conclusion of anti-union animus.[7]

The City maintains that the decision to demote Petitioner was a proper exercise of its managerial prerogative to select employees pursuant to § 12-307(b) of the NYCCBL.[8] Furthermore,

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[6] Decision No. B-41-99.

[7] The City cites Decision No. B-49-98.

[8] §12-307(b) of the NYCCBL provides, in relevant part:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other
(continued...)

the City notes that it is not able to demote or terminate an employee's employment in as rapid a manner as Petitioner suggests (i.e., in the time between the speech Petitioner gave at the graduation ceremony and her return to her office immediately after the ceremony) due to the checks and balances that exist to protect the employer and its employees.

DISCUSSION

The City correctly identifies the test set forth in *City of Salamanca*[9] as the appropriate test to be used when an employer is alleged to have committed an improper practice within the meaning of § 12-306(a)(3) of the NYCCBL. Under this two-tiered test, the petitioner must show 1) that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity, and 2) that the employee's union activity was a motivating factor in the employer's decision. 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 [10] or to demonstrate that the same action would

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[8](...continued)

> legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . 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. . . .

[9] The test outlined in *City of Salamanca*, 18 PERB ¶ 3012 (1985), was originally established by the Public Employment Relations Board ("PERB") and was adopted by the Board of Collective Bargaining in *Bowman v. City of New York*, Decision No. B-51-87.

[10] *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.

have taken place even in the absence of the protected conduct.[11]

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. In the instant case, Petitioner has failed to fulfill the first prong of the *Salamanca* test. She makes the conclusory assumption that ACS knew of her speech at the graduation ceremony when it determined to demote her. We find that the City could not have had any knowledge of Petitioner's April 9, 1999 speech when the decision to demote Petitioner was made. The recommendation opposing her appointment was formally submitted on December 18, 1998, approximately four months before Petitioner's speech. Furthermore, the actions necessary to effectuate that recommendation continued throughout that four month period.[12] Thus, the allegation of knowledge is without merit.

Applying the second element of the test to the instant case, we find Petitioner did not show that the City's actions were improperly motivated. A finding of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, or surmise.[13] 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

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[11] *NLRB v. Wright Line*, 251 N.L.R.B. 1083, 105 LRRM 1169; *enforced* 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981). This standard was approved by the U.S. Supreme Court in *NLRB v. Transportation Management Corp*., 103 S. Ct. 2469, 113 LRRM 2857 (1983).

[12] Although the timing of the notification to Petitioner that she would be demoted (i.e., immediately after she made the speech on April 9) is unfortunate, it does not change the fact that the decision had been made prior to that time, and that on April 7, an e-mail directed her supervisor to inform the Petitioner of that decision "as soon as possible."

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

activity.[14] Petitioner has not produced any probative facts other than the mere coincidence in timing to support its claims of improper motivation. The Board has long held that proximity in time is not, without more, sufficient to support a conclusion that the employer was improperly motivated.[15]

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 docketed as BCB-2079-99 be, and the same hereby is, dismissed in its entirety.

Dated: November 28, 2000
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

EUGENE MITTELMAN
MEMBER

RICHARD A. WILSKER
MEMBER

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

[15] B-53-90; B-24-90; B-38-88; B-6-83.

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER