L. 237, CEU v. NYCHA, 67 OCB 13 (BCB 2001) [Decision No. B-13-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

CITY EMPLOYEES UNION, LOCAL 237, I.B.T.,

Petitioner,

-and-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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Decision No. B-13-2001
Docket No. BCB-2154-00

DECISION AND ORDER

On October 19, 2000, Local 237, I.B.T. ("Petitioner" or "Union") filed a verified improper practice petition on behalf of George Contoveros against the New York City Housing Authority ("Respondent" or "Authority"), alleging that Respondent interfered with and discriminated against Contoveros because of his union activity as shop steward.[1] Respondent asserts that since Contoveros took unauthorized breaks and falsified work tickets, management had no alternative but to file disciplinary actions against him. Because Petitioner has failed to show that Respondent interfered with or discriminated against Contoveros because of union activities, this Board dismisses the improper practice petition.

[1] Petitioner claims that the Authority's actions violated section 12-306a(1), (2), and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

BACKGROUND

George Contoveros started working for the Authority in 1991 as a Maintenance Worker. In the fall of 1999, Contoveros lost an election for Union president but on March 1, 2000, he was elected shop steward in the Baruch Houses. On March 23, 2000, Supervisor Luis Cuadrado sent Contoveros a disciplinary memorandum stating that on March 20, Contoveros was in the Supervisor of Caretaker's office from 3:40 p.m. until 3:55 p.m. conducting union business even though his work ticket indicated that he was making repairs in an apartment during that period and even though supervisors had instructed him to work on union business only during breaks, lunch, and after work. (Petition, Exhibit A.)[2]

Supervisors Efrain Diaz and Charles Alogna sent Contoveros a disciplinary memorandum on June 20. (Pet. Ex. B.) The memo, which Contoveros signed, reads:

> June 16, 2000 at 9:23AM you were sited by Mr. Diaz the Manager and I the Superintendent in the front of building #7, 72 Baruch Drive taking an unauthorized break, having a conversation with a plasterer's helper assigned to Baruch Houses. Mr. Diaz and I proceeded into building # 7 to conduct a building inspection. At 9:40AM upon our return to the exterior of the building you were still in the same place talking to the same person. When Mr. Diaz and I questioned you [as] to why you were taking an unauthorized break you stated that you lost track of time. Mr. Contoveros this is a poor example to be setting as a Shop Steward and will not be tolerated here at Baruch Houses.

On September 18, Ruben Nieves, Assistant Superintendent, issued a disciplinary memorandum stating that on September 7 Diaz and Alogna found Contoveros taking an unauthorized break on a roof landing. Contoveros said he was not feeling well and needed air.

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[2] The abbreviation in this decision for "Exhibit" is "Ex.,""Petition" is "Pet.," "Answer" is "Ans.," "Reply" is "Rep.," "Surreply" is "Sur."

The memo did not mention Contoveros's position as shop steward. Contoveros signed the memo "under protest." (Pet. Ex. C.)

Nieves sent another memo on September 28 and declared that Alogna saw Contoveros using a public telephone and thus taking an unauthorized break, at 1:55 p.m. on September 25. Furthermore, Contoveros submitted two work tickets noting that he was in an apartment working at that time and was accused of falsification of a Housing Authority document. The memo continues:

> Despite the memos you received on September 18, 2000, June 20, 2000, March 23, 2000 you still fail to follow New York City Housing Authority procedure in reference to taking unauthorized breaks.
>
> Mr. Contoveros this is a poor example to be setting as a Shop Steward and will not be tolerated here at Baruch Houses.

Again Contoveros signed the memo "under protest." (Pet. Ex. D.)

On October 2, Diaz served Contoveros with a Notice of Disciplinary Charges concerning the incidents noted above. (Pet. Ex. E.) On October 31, Housing Authority Trial Officer Damaris Muniz found Contoveros guilty of, among other charges, taking unauthorized breaks, falsifying housing documents, and absenting himself from his assigned work area without approval. (Ans. ¶ 59; Ex. S.) The Trial Officer also found Contoveros guilty of being A.W.O.L. on September 26, when Contoveros called the Authority at about 9:00 a.m. asking for a day off since a tree had fallen on his property during a storm. Because the incident was not considered an emergency, and rules required a 48 hour notice before a non-emergency leave, the Trial Officer upheld a supervisor's decision to disapprove the leave slip Contoveros had brought in the following day. The Trial Officer recommended a 10 day suspension. (Ans. Ex. S.)

Contoveros had received other disciplinary charges before those at issue in this case. He received warning letters that in August 1993 he failed to follow rules concerning work tickets at least 17 times, and one time in 1996 he signed out without authorization. On May 30, 1997, a trial officer found Contoveros guilty of two counts of falsification of housing documents and two counts of unsatisfactorily performing work during March of that year. The seven day suspension imposed for those offenses was upheld on appeal. (Ans. ¶¶ 49-51; Exs. G-K.)

Contoveros also received letters of commendation. In June 1998, Alogna recommended Contoveros for a desired transfer to a technical unit. In January 1999, Alogna praised Contoveros for his fine and strenuous work during that month and in April recommended him for a promotion to Assistant Superintendent.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that Respondent's references to Contoveros's union activities in the March 23, June 20, and September 28 disciplinary memoranda manifest that these were intended to have a chilling effect on Contoveros's activities as shop steward and were a pretext for the unlawful interference with his rights under the NYCCBL. Respondent provides no proper explanation for mentioning Contoveros's position with the Union. Declaring that he should be a model for other employees shows that Respondent discriminated against him and made him an example to chill others from union activities. The memos reveal an anti-union animus.

According to Petitioner, Contoveros was known throughout the Housing Authority as

being a strong union activist. The 1997 disciplinary action was a result of Contoveros's complaining to Abby Pabon, a Local 237 Business Agent, that Alogna was harassing Contoveros in front of other employees. When Pabon confronted Alogna with the allegations, Authority supervisors retaliated with continued harassment. Also at some point in 1997 Contoveros was a "potential candidate" for shop steward, but Alogna interfered with a possible election. (Rep. ¶¶ 2, 5.)

Petitioner requests that the Board order Respondent to cease and desist from restraining, interfering, and discriminating against Contoveros in the exercise of his lawful union activities; to rescind the memoranda and disciplinary charges of June 20, September 18, and September 28, and October 2, 2000; and to allow Contoveros to conduct union activities without interference.

Respondent's Position

Respondent urges the Board to dismiss the charges pertaining to the memoranda of March 23 and June 20 because these occurred more than four months prior to the filing of the petition, which Respondent claims was on October 30, 2000, and are thus untimely under § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").

Respondent notes that to determine cases in which a petitioner alleges that a public employer has committed an improper practice under NYCCBL § 12-306a(1) and (3), the Board employs a test enunciated in *City of Salamanca and D.P.W. Employees, Council 66, Local 1304C.*[3] If a petitioner establishes a *prima facie* case by showing both that the employer's agent

[3] 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman and City of New York*, Decision No. B-51-87.

had knowledge of the employee's union activity and that such activity was a motivating factor in the employer's action, then the employer may present evidence either to refute the petitioner's showing or to demonstrate legitimate motives that would have caused the employer to take the action complained of even in the absence of the protected activity.

Respondent theorizes that since Petitioner did not show that Contoveros was conducting union activity during the incidents for which Respondent issued disciplinary memoranda, Petitioner did not establish the Authority's knowledge of Contoveros's union activity. (Ans. ¶ 72.)

Furthermore, Petitioner failed to prove that any supervisors were motivated by animosity because of Contoveros's union position. The references to his setting a poor example as shop steward, Respondent asserts, "were intended to point out that a Shop Steward should be a model of proper conduct for other employees." (Ans. ¶ 81.) The Authority must discipline a shop steward for misconduct so that "ordinary employees" do not view that misconduct as a license to commit the same offenses. (*Id.*) The Authority acted appropriately under NYCCBL's management's rights clause, § 12-307b, in disciplining Contoveros for taking unauthorized breaks and falsifying work tickets. Indeed, the Authority has similarly disciplined at least 17 other employees at Baruch Houses in the last 10 years. (Ans. ¶ 77; Ex. L.) As to Petitioner's allegations that in 1997 Alogna harassed and retaliated against Contoveros for speaking with Business Agent Pabon or interfered with Contoveros as a "potential candidate," neither Petitioner nor Contoveros ever filed a claim or grievance for such actions, and Petitioner's Reply is the first time the allegations appear. (Sur. ¶¶ 12, 17.)

If the Board finds that Petitioner did make out a *prima facie* case, Respondent contends that it has met its burden of proof that the Authority would have taken the same actions for business reasons, even in the absence of the protected conduct. Contoveros's status as shop steward does not confer upon him an immunity from otherwise appropriate disciplinary action.

DISCUSSION

The question before this Board is whether the disciplinary actions and, in particular, the references to Contoveros's position as shop steward demonstrate that the Authority interfered with union activities and discriminated against Contoveros in violation of the NYCCBL. This Board finds that while the Authority should not have made references to Contoveros as shop steward, the memoranda are based on legitimate business conduct.

We determine first the issue of timeliness. This Board may consider alleged improper practices that occur within four months prior to the filing of a petition.[4] In this case, the alleged violations occurred between March 23 and October 2, 2000. Petitioner filed the charge on October 19, 2000. Thus, this Board will consider all actions that occurred after June 19, 2000.[5]

Under § 12-305 of the NYCCBL, public employees have the right to self-organization and to form, join or assist public employee organizations. It is an improper practice under

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[4] NYCCBL § 12-306(e); OCB Rule § 1-07(d); *see Stepan and Local 300, SEIU & NYC Dep't of Citywide Admin. Serv.*, Decision No. B-11-2000 at 4-5.

[5] By requesting this Board to rescind the disciplinary memoranda and charges from June 20 to October 2, Petitioner acknowledges that the March 23 memo is not actionable. This Board will consider the March 23 memo as background information only. *See Unif. Firefighters Ass'n and City of New York,* Decision No. B-1-98 at 8. Respondent's assertion that Petitioner filed on October 30 is refuted by the Affidavit of Personal Service and by the OCB filing date.

NYCCBL § 306a 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;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;
>
> (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. . . .

To determine whether alleged discrimination or retaliation violates § 12-306a(3), this Board, as Respondent noted, uses the standard articulated in *Salamanca*. That test requires a petitioner to demonstrate 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 a petitioner establishes this *prima facie* case, the burden of persuasion shifts to the employer either to refute the petitioner's showing on one or both elements of the *Salamanca* standard or to show that it would have taken the same action even in the absence of the protected conduct.[6] An employer might demonstrate legitimate business reasons under NYCCBL § 12-307b to refute an improper practice claim.[7]

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[6] *Bowman,* B-51-87 at 18-19; *Salamanca,* 18 PERB ¶ 3012, at 3027; *see also Unif. Firefighters Ass'n,* Decision No. B-1-98 at 9-10.

[7] NYCCBL §12-307b reads, in pertinent part:

> It is the right of the city . . . , acting through its agencies, to . . . direct its employees; take disciplinary action . . .; maintain the efficiency of governmental operations; determine the methods,

In *Cotov and Bellevue Hosp. Ctr.* and *Johnson and New York City Dep't of Sanitation,* this Board found that the management's knowledge of the employee's status as shop steward was sufficient to satisfy the first prong of the *Salamanca* test.[8] A petitioner need not demonstrate that an employer had knowledge of an employee's specific words or actions while conducting union activity. Here, Petitioner has presented ample evidence that Contoveros's supervisors knew that he was shop steward, and, indeed, they mentioned his status in the disciplinary memos. Whether, as Respondent argues, the Authority's agents had no knowledge that Contoveros was engaged in union activity during the breaks for which he was disciplined is irrelevant. Thus, Petitioner has satisfied the first element of the *Salamanca* test.

Proof of the second element – whether Contoveros's protected activity was a motivating factor in his employer's challenged actions – must necessarily be circumstantial absent an outright admission.[9] This proof must include more than speculative or conclusory allegations.[10]

Petitioner suggests that when Contoveros became a shop steward at the beginning of March 2000, the Authority singled him out for discipline. The two references, on June 20 and on

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> means and personnel by which governmental operations are to be conducted . . . ; and exercise complete control and discretion over its organization and the technology of performing its work.

[8] Decision Nos. B-16-94 at 19; B-21-91 at 17; *see also Corr. Officers' Benevolent Ass'n and Dep't of Corr.*, Decision No. B-19-2000 at 8; *McNabb & Assessors, Appraisers & Mortgage Analysts, D.C. 37 and City of New York*, Decision No. B-1-94 at 44-46.

[9] *Communications Workers of America, Local 1180 and New York City Dep't of Fin.*, Decision No. B-17-89 at 13; *see also Local 1087, D.C.37 and New York City Fire Dep't,* Decision No. B-50-90 at 24.

[10] *See Corr. Officers' Benevolent Ass'n,* B-19-2000 at 9.

September 28, 2000, to Contoveros's position as shop steward are the sole support to show anti-union animus. In *Cotov,* the employer and ad hoc shop stewards disagreed on the enforcement of release time for union representation. The employer wrote in one shop steward's performance evaluation that "she must properly execute the union release time policy as needed."[11] This Board wrote that since the petitioner had not been adhering to policy, the admonition was not unwarranted. At the same time, this Board stated that although the union arguably showed that the union activity was a motiving factor in the employer's decision to include the comment, respondents then established that they would have taken the same action even in the absence of the protected conduct.[12] In *District Council 37 & Lindsay and New York City Human Resources Administration*, HRA referred in petitioner's performance evaluation to her authorized absences because of union activities.[13] While ordering that the violative language be removed, this Board nevertheless determined that the ratings petitioner received were legitimately motivated and refused to alter them. Finally, this Board did find an improper practice when a supervisor wrote a disciplinary letter to an employee, Cynthia Peele – who in 20 years had never received a warning – and added that Peele had recently filed a grievance.[14] The mention of the grievance was one of several managerial actions demonstrating retaliatory motive.

The facts in this case are more similar to those in *Cotov* and *Lindsay* than to those in

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[11] Decision No. B-16-94 at 27.

[12] *Id.* at 28-29.

[13] Decision No. B-8-89 at 12-14.

[14] *Communications Workers of America, Local 1180 (Cynthia Peele) and New York City Human Resources Administration,* Decision No. B-58-87 at 18.

Peele. While the statements that Contoveros was setting a poor example as shop steward would have been better left unsaid, petitioner has made no showing that the disciplinary actions themselves were retaliatory. Petitioner has not denied that Contoveros took the unauthorized breaks or falsified the work tickets as his supervisors charged. We take administrative notice that a Housing Authority Trial Officer found Contoveros guilty of these charges in October 2000. (Ans. Ex. S.)[15] Furthermore, unlike the *Peele* case, Contoveros had received disciplinary memoranda before he was a shop steward, including 1997 charges, upheld on appeal, of falsification of work tickets. Petitioner's assertions that the 1997 charges were based on anti-union animus are conjectural. Finally, supervisors at Baruch Houses also filed charges against similarly situated employees. Contoveros's position as shop steward did not immunize him from discipline.[16]

This Board does not condone Respondent's use of Contoveros's union status in the disciplinary memos. (Pet. Exs. B, D.) Respondent points to no authority indicating that a shop steward "should be a model of proper conduct for other employees." (Ans. ¶ 81.) Contoveros's position in his union is irrelevant to his performance, which supervisors should evaluate as they do all employees'. In addition, the March 23 memo for falsifying housing documents (which we use as background evidence), improperly underscores Contoveros's union activity, even though Respondent insists that the supervisor did not know what Contoveros said during the

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[15] *See Patrolmen's Benevolent Ass'n and City of New York*, Decision No. B-33-2000 at 8-9 n.12 (administrative notice).

[16] *See Echevarria and New York City Health & Hosp. Corp.*, Decision No. B-28-89 at 10-11.

unauthorized break. (Pet. Ex. A; Ans. ¶72.) These references to union activity may appear to be sincere admonitions, flip responses to improper work, or anti-union animus. In the context and circumstances of this case, the language concerning Contoveros's position as shop steward does not evince an anti-union animus necessary to establish a *prima facie* case.

However, even assuming Contoveros's union activity was a motivation for the references to his being a shop steward, Respondent has refuted the showing by establishing that the Authority had legitimate business reasons for issuing the disciplinary charges. Under NYCCBL § 12-307b, the Authority had the right to discipline Contoveros for the falsification of work documents and for unauthorized breaks.[17] Therefore, since Petitioner has failed to satisfy the *Salamanca* test, has not sufficiently shown disputed issues of fact to warrant a hearing,[18] and has not demonstrated how Respondent interfered with the administration of the Union under NYCCBL § 12-306a(2), this Board dismisses the instant improper practice petition in its entirety.

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[17] *See Johnson,* Decision No. B-21-91 at 19.

[18] *Id.* at 20; *see also Unif. Firefighters Ass'n,* Decision No. B-1-98 at 12.

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 submitted by Local 237, I.B.T. be, and the same hereby is, dismissed.

Dated: March 28, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

CHARLES G. MOERDLER
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER