L. 983, DC 37, Lawrence, Llanusa & Chun v. City & Dep't of Parks, 67 OCB 15 (BCB 2001) [Decision No. B-15-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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| In the Matter of the Improper Practice Proceeding | : | |
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| -between- | : | |
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| LOCAL 983, DISTRICT COUNCIL 37, AFSCME, EUGENE LAWRENCE, FRANK LLANUSA and FRED CHUN, | : | Decision No. B-15-2001 |
| | : | Docket No. BCB-2105-99 |
| Petitioners, | : | |
| | : | |
| -and- | : | |
| | : | |
| CITY OF NEW YORK, DEPARTMENT OF PARKS, | : | |
| | : | |
| Respondents. | : | |

## DECISION AND ORDER

On December 6, 1999, Local 983, Eugene Lawrence, Frank Llanusa and Fred Chun ("Petitioners") filed a verified improper practice petition against the New York City Department of Parks ("Department" or "City"). The petition alleges that the Department violated §12-306(a)(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL")[1] when the Department disciplined Lawrence, Llanusa and Chun and removed them from the heavy duty

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[1] Section 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:
(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 the participation in the activities of, any public employee organization;
* * *

work crew. The City filed a verified answer on December 27, 1999. The Union did not submit a reply.[2] The Union seeks that the Department void all disciplinary action against Lawrence, Llanusa and Chun and seeks their reinstatement to the heavy duty work crew with backpay.

## BACKGROUND

Llanusa, Lawrence and Chun are Associate Park Service Workers at the New York City Department of Parks. They are responsible for the performance of general park maintenance and the operation of various types of equipment, including heavy duty motorized equipment. According to the City, the three Petitioners were receiving heavy duty assignment differentials because of their work on a heavy duty crew.

At 7:30 a.m. on August 5, 1999, Park Supervisor Jack Rohan handed out assignments. Llanusa and Lawrence were given a pothole job as a two-man crew. Chun was assigned to work on a compressor job with a jackhammer. According to the City, Llanusa complained to Rohan that he believed the job required three workers and refused to perform the work. According to the City, Rohan then phoned Liam Kavanaugh, Deputy Chief of Operations, telling him that Llanusa refused the work assignment. The City alleges that Llanusa shouted and cursed at Rohan while he was on the phone and then when offered to speak with Kavanaugh, shouted at him as well and told him he would not perform the assignment.

According to the City, the three men left without permission and were considered AWOL. The Union, however, contends that the Petitioners were granted permission to leave

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[2] The Board deems additional facts or new matter alleged in the answer admitted unless denied in the reply. *See* Rules of the City of New York, Title 61, §1-07(i).

work.[3] The City also alleges that none of the Petitioners made safety complaints prior to leaving the work site. The Department then removed all three men from the heavy duty work crew assignment effective August 6, 1999. The Department also served disciplinary charges on the Petitioners. All three men were charged with "insubordination; failure to obey all laws, rules, regulations and orders of a supervisor; neglecting assigned duties; failure to perform duties and assignments in an orderly and efficient manner; conduct prejudicial to good order and discipline; failure to comply with all time, leave and notice of absence procedures and failure to be courteous and considerate of the public and other municipal employees." In addition, Llanusa was charged using obscene or abusive language toward a superior and disorderly or disruptive conduct.

Subsequently, the Petitioners each filed grievances. On October 12, 1999, the grievances alleging unfair removal from heavy duty crew were denied at Step II and on October 25, 1999, all charges against the Petitioners were upheld. Llanusa was given a $500 fine and Lawrence and Chun received $400 fines.

## POSITIONS OF THE PARTIES

### Union's Position

The Union contends that the Petitioners were stepped-up to a heavy duty work crew and were paid an additional $5,000 per year. According to the Union, prior to August 5, 1999, the Petitioners filed working condition grievances and complaints, including a complaint about an

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[3] The City's answer offers specific allegations of the circumstances regarding the way the Petitioners left work. Since the Union did not submit a reply, additional facts are deemed admitted.

improperly constructed scaffold and about the manner in which "cherry-pickers" were being used.

The Union explains that on August 5, 1999, Lawrence and Llanusa were assigned to an asphalt repair job as a two-man crew. The assignment did not provide for someone to flag cars even though they were on a public road and minimal safety rules require a "flagger". On the same date, Chun was assigned to jackhammer work without an assistant. The union maintains that this was unsafe as well.

The Union argues that after receiving their assignments, the Petitioners complained to Park Supervisor Rohan that the assignments were unsafe and asked permission to consult with their Union about whether they had to proceed. The Union contends that the Petitioners were granted permission to leave work and met with Local 983 President Mark Rosenthal.

The Union asserts that the Petitioners were disciplined and removed from heavy duty work crew in order to retaliate against the Petitioners for engaging in Union activities prior to and on August 5, 1999 in violation of 12-306 (a)(1)and (3) of the NYCCBL.

**City's Position**

The City states that the Petitioners never received a step-up to a heavy duty work crew, but received a heavy duty assignment differential at a rate of $5,852 per year. The City also maintains that the Petitioners never filed grievances regarding safety prior to August 5, 1999. The City explains that in February 1999, the Union raised a safety concern and the City complied with the recommendations of the Public Employees Safety and Health Bureau. The City argues that in the instant case, Lawrence and Llanusa's work was not on a roadway, but on a pathway in

a closed parking lot. The pathway work does not require a flagger and there are no "minimal safety rules" requiring such.

The City further denies that the Petitioners asked for permission to speak with the Union. The City also maintains that under Section 4 of the October 31, 1994 Memorandum of Agreement ("MOA") the Department has the right to revoke an assignment from a specialized work crew for just cause. It argues that if an employee is removed, the recourse is to file a grievance under the collective bargaining agreement.

The City argues that the Union has failed to state a *prima facie* improper practice claim in violation of §12-306 (a)(1)and (3) of the NYCCBL. It argues that Petitioners do not meet the second element of the Salamanca test because they do not prove a causal connection between the alleged improper act and the Petitioner's union activity. The City contends that the Union has not demonstrated that the union activity was a motivating factor in management's decision. The City asserts that the Petitioners' reassignment and discipline were unrelated to safety complaints, rather, they were disciplined because they refused to perform their assignments, left work without permission, and acted insubordinately.

The City asserts that assuming *arguendo* that the Union has established a *prima facie* case of improper practice, management actions were motivated by legitimate business reasons that would have occurred in the absence of union activity. Under the MOA, management has the right to revoke an assignment to a specialized work crew position for just cause. Since the three Petitioners refused to perform their assignments without legitimate cause and left without permission, the City argues that it had the right to remove and discipline them. The city argues

that this was unrelated to any Union complaints.

The City finally asserts that this matter should be deferred to arbitration. Petitioners filed grievances concerning reassignment and discipline and both are the subject of grievances. The City asks that the improper practice petition be dismissed.

## DISCUSSION

In cases in which a violation of §12-306(a)(1) and (3) of the NYCCBL is alleged, we apply the test set forth by the New York State Public Employment Relations Board ("PERB") in *City of Salamanca*[4] and adopted by this Board in Decision No. B-51-87. The *Salamanca* test requires that a petitioner demonstrate the following:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
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> 2. The employee's union activity was a motivating factor in the employer's decision.

If the petitioner succeeds in establishing the above, the burden of persuasion shifts to the employer to either attempt to refute the petitioner's showing or to establish that its actions were motivated by legitimate business reasons which do not violate the NYCCBL.[5] The mere assertion of discrimination or retaliation is not sufficient to prove that management committed an improper practice. Rather, a petitioner must establish that the protected union activity was the

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[4] 18 PERB ¶ 3012 (1985).

[5] *Velyn Hennings, pro se v. Administration for Children's Services*, Decision No. B-45-98 at 5; *Ronald Perlmutter v. Uniformed Sanitationmen's Association, Local 831, et al.*, Decision No. B-16-97 at 4.

motivating factor behind the alleged discriminatory act.[6] Allegations of improper motivation must be based on statements of probative facts, rather than conclusory allegations based upon surmise, conjecture or suspicion.[7]

We find that the Petitioners have presented sufficient evidence to establish the first prong of the *Salamanca* test. However, applying the principles of the second prong of the test, we find that the Petitioners' allegations are of insufficient probative value to support a claim of improper motivation. Their allegations are entirely conclusory and do not establish the requisite causal connection between the Petitioners' discipline and any union activity. The mere fact that the Petitioners filed grievances is not a sufficient basis for a finding that the Department has acted with improper motive.[8] Moreover, the unrebutted allegations of the City entirely undermine the contention that the Petitioners' union activity was a cause of their reassignment and discipline. The City alleges that Petitioners' refusal to perform their assignments, insubordination, improper language, and leave of the work site without permission establish a legitimate business reason for their reassignment and discipline. However, we need not decide this matter on the basis of the City's "legitimate business reason" defense since we find that the Union has failed to establish a causal connection between the Petitioners' discipline and protected activity.

Therefore, the instant improper practice petition is dismissed in its entirety.

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[6] *Uniformed Firefighters Ass'n of greater New York, et al. v. City of New York and the New York City Fire Dept.*, B-33-97 at 13.

[7] *Lieutenants Benevolent Ass'n v. City of New York and New York City Police Dept.*, B-49-98 at 6.

[8] *Id.*

**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 be, and the same hereby is, dismissed in its entirety.

Dated: April 30, 2001
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

EUGENE MITTELMAN
MEMBER