COBA v. DOC, 67 OCB 34 (BCB 2001) [Decision No. B-34-2001, (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
-------------------------------------------------------------X
In the Matter of the Improper Practice Proceeding
- Between -
CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,
Petitioner,
--and--

NEW YORK CITY DEPARTMENT OF CORRECTION,
Respondent.
-------------------------------------------------------------X

DECISION NO. B-34-2001
DOCKET NO. BCB-2073-99

**DECISION AND ORDER**

The instant case arises from circumstances surrounding disciplinary charges filed against Correction Officer Darryl Letsome after he reported for training at the Correction Academy without proper attire for the type of class he was assigned to take. The Correction Officers' Benevolent Association ("COBA" or "Union") contends that Letsome was notified too late that he would be required to attend the training program in order for him to be properly attired and that the disciplinary proceeding which agents of the New York City Department of Correction ("Department" or "City") conducted against him for being improperly attired was retaliatory and discriminatory because of his conduct as a Union delegate. The City disputes Letsome's claim that he had inadequate notice or that Department supervisors retaliated against him because of union activity. For the reasons stated below, we find that the Union has not proven that the Department discriminated against Letsome because of his union activity or that the Department committed an improper practice within the meaning of the New York City Collective Bargaining

Law ("NYCCBL").[1]

**BACKGROUND**

Darryl Letsome has been a Correction Officer with the New York City Department of Correction since October 25, 1982. For several years, he served as a Union delegate representing about five hundred unit members at the Manhattan Detention Complex ("MDC"). He participated in monthly labor-management meetings about work-related issues.

At one such meeting on January 29, 1999, Letsome raised several issues which had been a continuing source of disagreement between labor and management for several months. These issues concerned decisions by Kenneth Limbach, Deputy Warden for Operations at MDC, involving staffing and post assignments.

With regard to the question about assignments, MDC Warden Albert Thompson had earlier asked John Kiernan, Deputy Warden for Administration, to investigate the matter. Kiernan's initial investigation concluded that the Union's complaint in this regard had no merit, but subsequent investigation directed by Thompson revealed that Letsome's allegation did have merit, and Kiernan took corrective action against Limbach.

Letsome was not satisfied with the completeness of a written report of the January meeting, and brought the matter to the attention of COBA President Norman Seabrook. Before the next labor-management meeting, Seabrook, Letsome, and a third Union member met with Warden Thompson and George Young, Deputy Warden for Security/Programs, to discuss the

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[1]On July 12, 1999, COBA filed the instant petition alleging violation of NYCCBL §§ 12-306a(1) and (3). A hearing was held on June 9, July 7, and July 28, 2000, and after post-hearing briefs were received, the record was closed on September 15, 2000.

matter.

At that meeting, Letsome also claimed that his immediate supervisor had told him that morning of Kiernan's order that Letsome not be permitted to leave his post except for meal periods. Seabrook cautioned Young against preventing Letsome from conducting Union business.

On February 9, 1999, William Fraser, Acting Chief of the Department, transmitted Teletype Order No. 0646-0 ("Union Delegates - Disciplinary Action") to Commanding Officers in all facilities and divisions. The message directs "all facilities" to notify the Departmental Director of Labor Relations of pending disciplinary actions against union delegates and to obtain approval from that official before instituting any action of that nature.

On Wednesday, February 17, 1999, Personnel Captain John Viso posted the work schedule for the following week. It was customary for him to post work schedules after Letsome's Wednesday tour ended at 3:30 p.m. Viso also prepared Notices of Scheduled Training for Correction Officers pursuant to Operations Order No. 08/98 ("Scheduling of In-House Service Training").[2] The next day, Thursday, Letsome did not check the posted work schedule

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[2]Effective June 22, 1998, Operations Order No. 08/98 describes policy and procedures for providing training to members of the Department. According to Section III (Procedures), Subsection "C," the Academy must transmit information about date, time, location and a description of required clothing by teletype to a member's command at least ten days in advance.

Under Subsection "K," the Personnel Captain or designee at each command must complete a Notice of Scheduled Training (Form CA-02) directing the member to appear for training at the required time and place and in "appropriate attire" as described in the Notice. Although Operations Order No. 08/98 does not require the Notice to be delivered to an employee within a designated number of hours in advance of scheduled training, it does provide that the Personnel Captain or designee "will ensure that the Notice of Scheduled Training is signed by the staff member and placed in the member's personnel file."

(continued...)

nor did supervisory personnel deliver a Notice of Scheduled Training to him. He was excused from duty the following day, Friday, as well as the following weekend.

When Captain Viso reported for work on Monday, February 22, he noticed that Letsome's Notice of Scheduled Training was still in a box where he had placed it the previous week for distribution by supervisory personnel. No training notices for other Correction Officers were in the box.

When Letsome reported for duty at 7:00 a.m. on February 22, Viso informed him that he was scheduled for training that morning and handed him the Notice of Scheduled Training at that time. Letsome responded that this was the first he was aware of it. He also told Viso that the Integrity Control Officer, Captain James Eng, had notified him earlier that a command discipline hearing on behalf of another unit member was scheduled for that morning, and Letsome was to represent the Union on behalf of that individual.

Letsome immediately went to Eng's office, where he learned that Kiernan was out of town and would not be available for the scheduled command discipline hearing; therefore, the hearing would be postponed. Eng ordered Letsome to the Academy for the scheduled training at the direction of Deputy Warden Young. Letsome complied with the order.

At approximately 9 a.m., Letsome reported for class at the Academy wearing civilian

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[2](...continued)

Subsection "K" also requires each employee to consult the weekly schedule posted at his or her facility to determine whether he or she has been scheduled for training.

Subsection "M" requires staff members scheduled for training to report for duty dressed as directed by the teletype order announcing the training. Appropriate attire for the Security Skills course consists of sweat suits, loose-fitting clothing, and sneakers.

clothing rather than loose-fitting, athletic-type clothing required for the Security Skills Training class. Addressing Scheduling Officer Cynthia Green, Letsome said that he had received written notice of the class only that morning. She checked his training record and determined that since he was not able to take the scheduled class inappropriately attired as he was, he might be eligible for another class for which he was dressed appropriately and which he could take to avoid discipline. She identified a class on infectious disease exposure control but noted that he had taken it only a couple of months earlier. Officer Green called Captain Ralph Greenberg, administrative personnel supervisor at the Academy. A CPR/First Aid class also required loosely fitting clothes, which Letsome did not have at the time. Letsome was eligible and appropriately attired for a course entitled "EEO/Use-of-Force," but Letsome told Greenberg that that course would not be the best use of his time, given Union related duties that awaited him back at MDC. After they determined that Letsome would be eligible and properly attired for actually only one of the classes they discussed, Greenberg then told Letsome to return to MDC. An investigation ensued into the Letsome matter, but it is not clear who conducted the investigation - whether the scheduling unit at the Academy or Deputy Warden Kiernan. Following the investigation, Greenberg signed a command discipline complaint against Letsome on March 17, 1999.

On April 13, 1999, Letsome's command discipline hearing was held in Kiernan's office. Kiernan read the charges, namely, that Letsome was "scheduled for Security Skills" in-service training at the specified hour and that he "reported in inappropriate attire for this training." The charge stated that he violated Subsection "H," Section III ("Procedure - Academy

Responsibilities") of Operations Order No. 08/98.[3] Letsome told Kiernan that he believed Kiernan had "orchestrated" the charge and refused the command discipline penalty offered by Kiernan in favor of having the charge heard formally at the Office of Administrative Trials and Hearings. The charge was filed administratively by the Department and ultimately dismissed after a year. No discipline was imposed on Letsome.

Relevant departmental rules are as follows:

Rule 3.05.050 of the Rules and Regulations of the Department of Correction requires all Department employees to be "responsible for complete knowledge of all orders and directives." Teletype Order No. 2967-0 ("Proper Attire for Attending Training Sessions"), dated July 10, 1998, prohibits the wearing of blue jeans at Correction Academy training sessions and warns that any violation of the clothing requirements for Academy training "will be subject to disciplinary action." Directive No. 4257 ("Command Discipline"), dated May 5, 1988, prescribes an informal punishment for minor infractions, including a schedule of penalties for improper uniform, and authorizes a modified penalty if mitigating factors warrant.

## EVIDENCE

### Officer Letsome's Testimony

At the hearing in the instant proceeding, Darryl Letsome testified about the conduct of Deputy Warden Limbach. According to Letsome, he had told Kiernan that if the Department wanted more details of the unit members' complaints about Limbach, he would offer them at the

[3]This section requires the facility to post training schedules.

January 1999 labor-management meeting and would also refer the matter to COBA President Seabrook. Letsome said Kiernan told him that he would destroy Letsome's credibility if he did so. [Tr. 30-31][4]

Letsome did talk with Seabrook about the Limbach matter and Seabrook subsequently spoke with Thompson about it. Seabrook also told Thompson that Letsome should be allowed to conduct Union business and not be kept at his post except for a meal period. Thompson said Letsome could conduct his work as a Union delegate without interruption. [34-38]

Letsome also testified that, on February 22, 1999, when Greenberg told him to return from the Academy to MDC, he did not suggest that discipline would ensue. [49] It was three weeks - an unusual length of time - that Letsome learned of the command discipline complaint filed against him. [51] Letsome suspected that Kiernan had orchestrated the events. [54, 58] Letsome had represented two other Correction Officers in command discipline hearings held by Kiernan on the same charges of being inappropriately attired for training, but Kiernan had offered them lighter penalties. One who, like Letsome, had no previous command discipline complaint, was offered a one-day penalty. The other who did have another complaint within the previous year received a two-day penalty. In those cases, lack of notice was not an issue. [60-62]

**Captain Viso's Testimony**

Captain John Viso's duty as Personnel Captain was to prepare weekly work and training schedules as well as the Notices of Scheduled Training. He often posted them Wednesday after 5:00 p.m. or Thursday. [130] He confirmed that Letsome was notified only an hour before his

[4]References to record testimony are indicated by "Tr." and the transcript page number and, subsequently, by page number only.

scheduled training was to comment on February 22, 1999. [154]

Viso testified that, routinely, if staff members do not work during the weekend, they should be served with any Notice of Training before the weekend. [156] Phone notification is done on occasion, "when they didn't look at the schedule or they were unaware of it, if they were on vacation, numerous reasons." [157, 162] Viso stated that, although he was under no obligation to inform an officer by phone, had he known Letsome would not be in over the weekend, he would have instructed a subordinate to notify Letsome at home. [157-58]

**Captain Eng's Testimony**

Captain James Eng's function as MDC Integrity Control Officer included monitoring staff violations for which command discipline complaints are issued. [368] He had scheduled the disciplinary hearing on February 22, 1999, which Letsome was to attend but canceled it that morning when he and Letsome learned that Kiernan would not be in and that no other Deputy Warden would be available to conduct the interview. [375-377] Deputy Warden Young, covering for Kiernan, directed Eng to order Letsome to the Academy for scheduled training that day. [379-380] On April 13, 1999, Eng attended Letsome's command discipline hearing. When Kiernan started to explain the penalty, Letsome left the room before Kiernan had finished. [370-71]

**Officer Green's Testimony**

Cynthia Green testified about efforts to find Letsome a class for which he was eligible and appropriately dressed on the day in question.

**Captain Greenberg's Testimony**

On February 22, 1999, Greenberg, as administrative personnel supervisor at the Correction Academy, told Letsome that "it's possible" a charge could be proffered against him for not being properly attired for training. Greenberg then "had to order him" back to MDC. [178-80, 185, 221]

The scheduling unit of the Academy routinely prepares a command discipline complaint when a staff member commits an infraction related to training and Greenberg signs it. [187] Where notification is an issue, the Academy checks with the Officer's command to verify whether notification was made. [188] It is customary for Greenberg to sign a complaint the day an infraction occurs but on February 22, 1999, Greenberg held off until the Letsome matter was investigated further. [187]

In Greenberg's view, proper notification of training included having the staff member sign the Notice or receive phone notification. [216-17] Greenberg said notification on the same day as training would be "unique." [217] In addition to the weekly posting of schedules in an Officer's command and "direct," written notification, Officers "may make an announcement personally at home," Greenberg said. [224] Letsome, he said, was "properly called." [224] Greenberg did not know who at the Academy investigated the Letsome matter or when it was investigated but he acknowledged that the Academy had contact with "an" administrative Deputy Warden from MDC and at another point that Deputy Warden Kiernan had called the Academy to "follow up." [189, 218] Greenberg signed the complaint "know[ing]" the notice issue was resolved since Letsome was "properly" notified. [216, 223-24]

**Deputy Warden Kiernan's Testimony**

Kiernan, as MDC Deputy Warden for Administration, testified that one of the issues discussed at a December labor-management meeting which Letsome brought up for discussion had at its roots Letsome's "personal" disregard for Assistant Deputy Warden Limbach, about whom Letsome was "always complaining." [280-81 ] That matter concerned a shift reduction and the awarding of posts at MDC. [281 ] Kiernan said that Letsome believed that Limbach was "trying to get people who he was friendly with into desirable posts." [281 ] Limbach, a ten-year veteran at MDC, recommended personnel for assignments. [280-81 ]

Kiernan testified that he and Limbach are members of the Assistant Deputy Wardens Association, with Kiernan, a Union officer. [247, 316] He said, however, that when Letsome raised issues about Limbach, Limbach "would be in [Kiernan's office] five minutes later answering for it and explaining it." [319] In fact, Kiernan and Limbach spoke "[a]bout 20" times a day. [295]

In December 1998, Kiernan investigated Limbach's personnel decisions, specifically, the closing of a tenth-floor post and the awarding of job assignments, and concluded the complaints were unfounded. [257, 262, Joint Exhibit No. 1] But before the next month's labor-management meeting, Warden Thompson asked Kiernan to investigate further. [250, 256-57] Although Kiernan admitted that he had reported to Warden Thompson in January 1999 that Letsome's complaints about Limbach had "some merit," Kiernan denied on the stand that he thought Letsome's allegations had merit. [304] Asked whether the minutes of the January 1999 labor-management meeting accurately reflected the MDC Administration's response to Letsome's complaints, Kiernan said, "I'd have to say so. This is my commanding officer who wrote them."

[305]

Labor issues were serious matters in Kiernan's view. [319]

> [A]11 day all you get is complaints, people in and out of the office a hundred times. They don't come in to tell me they're having a nice day; they complain. The delegate has ten of his own to give you every day, and you're continuously calling your captains in, [saying] "Check this out, check that out, check this out." And if something stinks, you hold onto it and you go further and you do something about it, but you're continually investigating every little thing. And Letsome every day has a million things he's complaining about which we're continually looking at. [293]

Kiernan often thought Letsome was "misleading" his constituents. [249] Although he denied he had told Letsome he would destroy Letsome's credibility if Letsome complained to Seabrook, Kiernan testified:

> I told him on a number of occasions, and that was part of me trying to help him out as a union representative, telling him that the most important thing you have as a representative is your credibility with those you represent and also people from other unions and the Administration. I told him time and time again. [302]

According to Kiernan, verbatim inclusion of the Union's draft agenda into minutes of labor-management meetings was a "unique" accommodation to Letsome. [302] Kiernan admitted that Young mentioned the possibility of ordering Letsome not to leave his post except for a meal period. [326]

Asked if it was Viso's responsibility as Personnel Captain, under Operations Order No. 08/98, to serve the Notice of Scheduled Training on Letsome, Kiernan responded, "That's what it seems to say." [349] But Kiernan testified that "[n]o one is ever called" at home about training. "It's not Depeartment policy. It's not the facility policy." [344]

Kiernan could not recall whether he communicated with anyone at the Correction

Academy before the filing of the charge against Letsome on March 17, 1999. He said the Letsome matter “wasn't an important thing in our life” but he did speak with Captains Eng and Viso “at great lengths” about the face that Letsome was the only Officer to have received the Notice of Scheduled Training on the same day of the class. [340, 343]

Kiernan testified that the charge against Letsome was “violation of an order,” considered to be a Schedule “D” infraction, punishable by having four days deducted from the member's annual leave bank. [337] Kiernan then testified that he “broke it down” to a charge of AWOL which ranks as a Schedule “B” infraction, punishable by having two days deducted from the member's annual leave bank. [337] Kiernan said that the charge against Letsome was not that he was improperly attired for the class on February 22 but that it was Letsome’s improper attire that caused him to miss the training. [268, 337]

Kiernan said he had no discretion with respect to how a charge was written up but that because of Letsome’s good attendance record Kiernan would lower the penalty from two vacation days deducted to one. [268] In fact, Kiernan testified that he did not offer Letsome a two-day penalty from the start but rather only one day. [346] Since Letsome refused the offered, reduced penalty, Kiernan said it was not reflected on the command discipline log. [347]

On April 13, 1999, when Kiernan was Acting Warden in Warden Thompson’s stead, he was authorized to sign the memorandum of complaint which would send the disciplinary matter on to Departmental trial rather than await Thompson’s review. [350] Kiernan said that Letsome's receipt of the Notice of Scheduled Training one hour before class “had no bearing” on the outcome of the proceeding. [349]

## POSITIONS OF THE PARTIES

**Petitioner's Position**

The Union contends that the Department violated § 12-306a(3) of the NYCCBL by retaliating and discriminating against Darryl Letsome for his involvement in activity protected under the NYCCBL and violated § 12-306a(1) derivatively by interfering with his exercise of collective bargaining rights under § 12-305.[5]

The Union notes that Letsome often addressed Union related issues to Kiernan, including actions by Kiernan's fellow Union member Limbach. Letsome's complaints irritated Kiernan, who repeatedly had to investigate them and address Limbach directly. When, in December 1998, Letsome was not satisfied with the administration's response to his complaints, he sought to involve COBA President Seabrook. At that point, Kiernan admittedly set out to undermine Letsome's credibility in the eyes of everyone with whom he worked at MDC. Kiernan was hostile toward Letsome's Union activity.

The investigation of the circumstances giving rise to the disciplinary complaint against Letsome was suspect, in the Union's view. Department supervisors could not agree on whether Letsome had been given proper notice of his scheduled training. Greenberg refrained from

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[5]Section 12-306a of the NYCCBL provides:

> It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> ***
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> (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. . . .

signing the complaint for the unusually long time of three weeks because he had questions about whether discipline was warranted. Although he said his questions were ultimately resolved, he could not say how. He was clear that it was Kiernan who called the Academy to investigate the Letsome matter. The Union finds it odd that Kiernan - not Personnel Captain Viso - would personally involve himself in the matter, given Kiernan's comparatively high rank and given his own testimony that the matter “wasn't an important thing in our life.”

Kiernan’s handling of Letsome’s disciplinary interview evinced discriminatory motives, the Union argues. Kiernan said that the complaint against Letsome was for inappropriate attire but at another point that it was for being absent without authorization. Those two charges require different penalties. The Union contends Kiernan tailored his testimony to justify that he had offered Letsome a greater penalty than that warranted for the improper attire charge and a penalty in excess of what had been offered to two other, similarly situated Officers.

Kiernan could not cite written authority for his contention that being out of proper classroom attire was equivalent to an AWOL charge. He gave conflicting testimony by stating, on the one hand, that he had no discretion with the charge and, on the other hand, that he took it upon himself to reduce the charge from violation of an order to AWOL. The Union contends that Kiernan used his discretion in a discriminatory manner and that Kiernan unreasonably withheld consideration of mitigating factors other than Letsome’s good attendance record.

Furthermore, Kiernan failed to comply with Teletype Order No. 0646, which requires that, before “any disciplinary action” is instituted against a Union delegate, the facility must first obtain approval from the DOC Director of Labor Relations. Captain Eng served Letsome with

the complaint before obtaining prior approval, evidence of bias against Letsome in the conduct of his Union duties.

Kiernan's handling of the paperwork after the hearing, a departure from the usual procedure, also shows anti-union animus. Whereas customarily Kiernan would give Eng the completed paperwork to deliver to Warden Thompson's review and signature, Kiernan signed for the Warden because on that particular day he was standing in as Acting Warden. There was no testimony that time was of the essence in this matter and that it could not have waited until the Warden returned to review the paperwork himself. There was no plausible explanation for Kiernan to complete the paperwork himself instead of giving it to Eng to prepare. The only plausible explanation in this matter is that Kiernan was in a hurry to exact retribution, in the Union's view.

The Union also infers that the disciplinary charge against Letsome lacked merit altogether since the Department declined to pursue the charge in a Departmental trial. No hearing was held and no charge was filed beyond the command discipline stage.

**Respondents' Position**

The City contends that the Union has not proven that Delegate Letsome was engaged in protected activity under the NYCCBL. His status as a Union delegate alone neither qualifies as union activity nor establishes de facto retaliation or discrimination.

The Union has failed to prove that the Department interfered with Officer Letsome's Union duties in representing any Correction Officers when it scheduled him to attend training on the day he was also scheduled to attend a disciplinary hearing for another unit member. The

Union has failed to prove that the Department and Deputy Warden Kiernan in particular discriminated against Letsome by serving him with disciplinary charges after he complained about Assistant Deputy Warden Limbach.

Both Letsome himself and Captain Viso established that the command discipline hearing which Letsome was scheduled to attend on behalf of a fellow Union member was cancelled. Because Letsome would not be attending that hearing, he was not engaged in protected activity when Viso served him that day with the Notice of Scheduled Training. Kiernan had nothing to do with scheduling training or disciplinary hearings. Other supervisors scheduled Letsome to be in two places on the same day, and neither conferred with Kiernan or each other before making their respective schedules. Even if hearings were scheduled when Letsome was scheduled for training, the Department routinely permitted the hearing to be rescheduled.

Letsome himself testified that he had an obligation to check his work schedule to determine if her were scheduled for training. Yet, Letsome failed to check his work schedule on those days. The Department followed the notice procedure which does not require notice to be served within any specific time period before training.

There is no substantiation for the Union's contention that Kiernan discriminated against Letsome by serving him with disciplinary charges because he complained about Limbach. Greenberg, not Kiernan, filed the complaint against Letsome and was satisfied that Letsome was given actual notice of training. Greenberg filed the charges against Letsome because he violated Operations Order No. 08/98, not because of anything Letsome may have said at a labor--management meeting, which Greenberg did not attend.

Further, Letsome himself testified that he was well aware of the type of clothing required for the scheduled class. He had represented other Correction Officers in disciplinary hearings for improper attire and was aware of Teletype Order No. 2967-0. Letsome refused alternative classes and he deserved to be disciplined for violating a Departmental Operations Order.

Eng corroborated Kiernan's testimony that he offered Letsome one day rather than two but that Letsome refused to accept it, got angry at the interview, and left the room before Kiernan was finished.

Even if Letsome's contention - that Kiernan threatened to destroy Letsome's credibility if he brought the Union president into the Limbach matter - were true, Letsome's ability to function as a Union delegate or otherwise to represent his members has not been impaired. In fact, Kiernan actually elevated Letsome's credibility by dutifully investigating all of his complaints put forth at the various labor-management meetings and by taking corrective action. Moreover, personal animosity itself does not constitute improper motivation even when a supervisor allows his personal feelings to affect his treatment of the subordinate.

The Union has failed to establish a causal connection between the decision to discipline Letsome and his duties as a Union delegate. For MDC administration not to discipline Letsome for violation of Operations Order No. 08/98 would have been an improper practice because Letsome would have been treated differently from other Correction Officers simply because of his position in the Union.

Assuming that the Union provided the relevant knowledge and motive requirement under the NYCCBL, the management actions were motivated by legitimate business reasons. The

management rights provision of the NYCCBL endows the Department with the right to direct its employees and take disciplinary action against them unless that right has been limited by the parties to the applicable collective bargaining agreement. Correction Officers cannot be allowed to miss mandated training sessions at their whim or by purposefully wearing inappropriate attire. For Letsome's blatant disregard of the training order, he was properly cited for discipline in order to put him on notice that being inappropriately dressed for training would not be tolerated.

## DISCUSSION

The petition asserts that disciplinary charges were brought by agents of the Department to retaliate and discriminate against Letsome because of his involvement in union activity, in violation of subdivisions (1) and (3) of § 12-306a of the NYCCBL. Because we find that Petitioner has not satisfied its burden of proving the claimed violations, we deny the instant petition.

In cases in which a violation of § 12-306a(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,*[6] adopted by this Board in *Bowman v. City of New York.*[7] The test requires that a petitioner demonstrate the following:

> l. the employer's agent responsible for the allegedly 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.

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[6]18 PERB 3012 (1985).

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

If the petitioner meets its burden under this test, the burden of persuasion shifts to the employer either to refute the petitioner's showing or to establish that its actions were motivated for reasons which are not unlawful under the NYCCBL.[8]

We have also held that the purported union activity at issue must not be strictly personal but must be related to employment relationship.[9] The mere assertion of discrimination or retaliation is not sufficient to prove an improper practice. Allegations of improper motivation must be based on statements of probative facts rather than conclusory allegations based upon surmise, conjecture or suspicion.[10]

Here, we disagree with the City's contention that the supervisors involved in Letsome's discipline had no knowledge that he was engaged in protected activity. Kiernan expressed annoyance with the "million" questions Letsome raised in his capacity as a Union delegate and with the issues Letsome doggedly pursued at labor-management meetings.

Letsome told Greenberg at the Academy that there were matters at MDC that he preferred to tend to in his capacity as a delegate, rather than taking the one course for which he was both eligible and properly attired. Other superior officers under whom he worked also knew that Letsome was routinely involved in representing Union members at command discipline

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[8]*'Hennings v. Admin. for Children's Serv.,* Decision No. B-45-98 at 5; *Perlmutter v. Unif. Sanitationmen's Ass'n, Local 831,* Decision No. B-16-97 at 4.

[9]*See Kane v. Dep't of Housing Pres. and Dev., Civil Serv. Bar Assn, and Social Serv. Employees Union,* Decision No. B-59-88, *aff'd sub nom. Kane v. MacDonald,* 24115 N.Y. Co. S.Ct., 6/27/89, *aff'd* 161 A.D.2d 305, 555 N.Y.S.2d 81 (1st Dep't 1990).

[10]*Lieutenants Benevolent Ass'n v. City of New York and New York City Police Dep't,* Decision No. B-49-98 at 6.

proceedings.

The Union, however, fails to support its contention that agents of the Department took action against Letsome because of his Union activity. Letsome himself declined to take an alternate class for which he was eligible and properly attired. We credit Greenberg's testimony that he told Letsome that failure to take an available course when assigned for training could have disciplinary consequences. We also credit his testimony that the command discipline complaint against Letsome was prepared as routinely as are other such complaints for failure to comply with training requirements, *i.e.*, the complaint was prepared by Greenberg's staff at the Academy for his signature as administrator in charge of handling training issues that arise there. We find no anti-union animus on Greenberg's part in the decision to issue the command discipline complaint.

The Union has failed to support its assertions with respect to any role Kiernan may have played in the initiation of the command discipline complaint against Letsome. Although Greenberg testified that Kiernan called the Academy to follow up on the complaint against Letsome, and although Kiernan testified that it was possible that he could have spoken with Greenberg about Letsome but that he could not specifically recall such a conversation, we credit Kiernan's testimony that he had nothing to do with the initiation or drafting of the complaint and we find he bore no unlawful animus in its preparation. Therefore, we accept the City's explanation that the complaint against Letsome was issued not by Kiernan but by Greenberg who is not a named party to the instant improper practice proceeding. Thus, any failure by Kiernan to follow Teletype Order No. 0646 requiring approval before instituting disciplinary action against a

Union delegate was of no consequences here.

We also find no anti-union animus in the manner of the prosecution of the command discipline complaint against Letsome. Despite some inconsistencies in Kiernan's testimony, we find his explanation credible: although the complaint itself describes the offense both as a violation of an order and as reporting for training in "inappropriate attire," Letsome's attire prevented him from being at his appointed class, or AWOL.[11] We accept Kiernan's explanation that because of Letsome's good attendance record, Kiernan offered Letsome the two-day penalty which an AWOL infraction calls for rather than the four-day penalty which violation of an order requires. Kiernan's offer was actually to Letsome's advantage.

The Union contends that the processing of the paperwork was not handled in the customary fashion. Eng testified that he normally prepared command discipline paperwork for Thompson's review. Thompson's review of that paperwork was not customarily time-sensitive and could wait until Thompson's return if he were out of the facility. The Union contends that, in Letsome's case, Kiernan processed the paperwork himself without waiting for Thompson to make it a *fait accomplis*. But Kiernan testified credibly that he had been handling command discipline proceedings this way for several years. We find no unlawful animus in that conduct.

We also find that, throughout the time period in question here, Delegate Letsome was never impaired in his ability to represent members of his bargaining unit. The command discipline which he was scheduled to attend on behalf of a fellow unit member the day he was

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[11]We find of no consequences that the complaint cites "Section III, Paragraph H of the Operations Order #8/98" as the provision violated, which would appear unrelated to the subject at issue. *See* n. 3 at 6 above.

sent to the Academy for training was rescheduled. There was no evidence that Letsome was prevented from representing that person at the rescheduled date or any other unit member in his capacity as a Union delegate. Moreover, Letsome himself suffered no demonstrable consequences inasmuch as the charges were eventually dropped without further prosecution.

The record fails to support the conclusion that agents of the Department were improperly motivated toward Letsome in other ways as well. We find that personal animosity alone motivated Kiernan to give Letsome advice about his conduct as a Union delegate - telling Letsome on occasion that he was "misleading" his constituents and that he was not conducting himself properly as a Union delegate.

Kiernan described only personal frustration when he testified that in his role as Deputy Warden for Administration, "all day all you get is complaints, people in and out of the office a hundred times a day. . . . The delegate has ten of his own to give you every day, and you're continuously calling your captains in. . . . And Letsome every day has a million things he's complaining about which we're continually looking at."

Letsome's repeated complaints about Limbach also raised Kiernan's ire since he had to question a member of his own Union. But the petitioning Union has failed to show that Kiernan's irritation was anything more than personal.

For these reasons, we hold that the Union has failed to establish that the Department discriminated and retaliated against Darryl Letsome in the conduct of his duties as a COBA Delegate in violation of subdivision (3) of § 12-306a of the NYCCBL and failed to establish any derivative interference under subdivision (1) thereunder. Accordingly, the instant petition is

denied in its entirety.

**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-2073-99 be, and the same hereby is, denied in its entirety.

Dated: New York, N.Y.
July 19, 2001

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

EUGENE MITTELMAN
MEMBER

I dissent. GABRIELLE SEMEL
MEMBER

I dissent. VINCENT BOLLON
MEMBER