OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
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-between-	:	
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SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, and LACHAUNE HACKETT,	:	
	:	
Petitioners,	:	Decision No. B-4-2001
	:	Docket No. BCB-2088-99
-and-	:	
	:	
NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
	:	
Respondent.	:	

DECISION AND ORDER

On August 27, 1999, the Social Service Employees Union, Local 371 ("Union" or "SSEU") filed a verified improper practice petition, on behalf of Lachaune Hackett ("Hackett" or "Petitioner") against the New York City Department of Environmental Protection ("DEP"). The petition alleged that DEP violated §§ 12-306(a)(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL") by retaliating against Petitioner because she complained about DEP's promotional practices and filed a grievance.[1] The City filed an answer on February 11, 2000 and the Union filed

[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:
(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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(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or the participation in the activities of, any public
(continued...)

a reply on March 17, 2000. As a remedy, the Union demands that the City cease and desist from retaliating against Petitioner and any other relief the Board deems proper.

BACKGROUND

On August 7, 1989, Petitioner was appointed by the DEP in the civil service title Clerical (Office) Associate. On June 30, 1996, Petitioner was appointed as a provisional Senior Community Liaison Worker. As a precondition of her provisional employment, Petitioner was required to reside within New York City.[2] By memorandum dated February 22, 1999, Petitioner wrote to DEP Commissioner Joel Miele ("Commissioner Miele") alleging that DEP engaged in discriminatory promotional practices by approving only those promotional packages submitted on behalf of "favored" employees. She stated that her Supervisor, Gregory Gass ("Gass"), had told her that a promotional package, submitted on her behalf, had been declared "dead" and that he had been given

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[1](...continued)
employee organization;

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§12-305 **Rights of public employees and certified employee organizations.** Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

[2] The residency requirement set forth in §12-120 of the New York City Administrative Code requires that employees entering city service on or after September 1, 1986 must either be residents at the time of appointment or within ninety days of appointment. Failure to establish or maintain city residency will constitute a forfeiture of employment, but before an employee may be dismissed, he must be given notice of and an opportunity to contest the charge.

no explanation for it.[3] Petitioner alleged that she was being punished because she was a union representative and urged Commissioner Miele to investigate the matter. On February 24, 1999, Petitioner filed a Step I grievance alleging that she was "doing work inappropriate for her title" of provisional Senior Community Liaison Worker. She alleged that she was performing the duties of a Principal Administrative Associate Level II ("PAA II"). The record reflects that the grievance was pending at Step III at the time the improper practice petition was filed.

By memorandum dated March 5, 1999, John A. Milioti ("Milioti"), Bureau Administrator, responded to Petitioner's earlier memo to Commissioner Miele. Milioti stated that it had been determined, after the papers had been submitted, that the vacancy for the promotion no longer existed. In addition, Milioti stated that he had been advised by Supervisor Gass and Petitioner's Manager, Arlene Derevjanik ("Derevjanik") that a meeting was held in January,1999 informing Petitioner of this problem. Milioti mentioned a subsequent meeting that occurred in January at which Petitioner was told that due to a reorganization, she would be reassigned to another position commensurate with her current title and salary no later than March 15, 1999. Milioti wrote, "It is unfortunate that you chose not to speak with Mohamed Hafeez, Mark Ritze, Deputy Commisioner Larry Schatt or myself. There is a chain of command to which you are expected to adhere." Noting that Petitioner's grievance was being processed, Milioti reminded Petitioner that the grievance procedure "is the accepted methodology for resolution of labor/management issues."

On April 13, 1999, DEP's Disciplinary Unit received a copy of an anonymous letter addressed to the City's Department of Investigations, dated March 24, 1999, alleging that Petitioner

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[3] Petitioner sought a provisional promotion to the position of Principal Administrative Associate Level II ("PAA II") in the Batch Processing Unit.

maintained her residence outside New York City. By letter dated April 29, 1999, Marsha Rotheim ("Rotheim"), DEP's Acting Disciplinary Counsel, informed Petitioner that the DEP was investigating the possibility that she was in violation of the residency requirement. A residency affidavit for Petitioner to fill out was affixed to the letter. By letter dated May 18, 1999, Petitioner's attorney wrote to Rotheim requesting that Petitioner's time to submit the affidavit be extended to June 11, 1999. On June 18, 1999, Petitioner's attorney again wrote to Rotheim and admitted that Petitioner did not reside within New York City but stated that he intended on filing a request for an exemption from the residency requirements.

On July 22, 1999, Rotheim sent Petitioner a letter informing her that DEP had concluded that she did not reside within New York City and directed her to attend a meeting scheduled for August 3, 1999 at which time she could contest DEP's findings. Petitioner attended the August 3 meeting with her attorney and chose not to contest the residency issue. Instead, Petitioner resigned from her provisional title of Senior Community Liaison Worker and returned to her permanent civil service title of Clerical (Office) Associate.[4]

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the DEP commenced a residency investigation because of Petitioner's status as a union representative, her complaint about discriminatory promotional practices at the agency and because she filed an out-of-title grievance. The Union argues that DEP's decision to

[4] Petitioner is exempted from the residency requirement in her civil service title of Clerical (Office) Associate because she was a City employee (in a different title) prior to September 1, 1986 and does not have to comply with New York City Administrative Code §12-120.

conduct a residency investigation was the direct consequence of Petitioner's protected activity and would not have occurred otherwise. As a result of the investigation, the Union argues that Petitioner was forced to resign from her position of provisional Senior Community Liaison Worker and revert to her permanent civil service position of Clerical Associate.

The Union urges the Board to hold an evidentiary hearing on the petition.

City's Position

The City argues that the petition must be dismissed because of the Union's failure to allege facts sufficient to support a claim under §12-306a (1) and (3) of the NYCCBL. The City contends that when such a violation is alleged, the Board applies the test set forth 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 the Union has not alleged facts sufficient to demonstrate that Petitioner's union activity was the motivating factor behind DEP's decision to initiate a residency investigation. Allegations of improper motive cannot be based upon recitals of conjecture, speculation or surmise[6] and the Board may not infer anti-union animus simply because an employee affiliated with a union is disciplined.[7] The City argues that DEP was motivated by the anonymous letter it received on April 13, 1999 which alerted DEP of the possibility that Petitioner did not reside

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5 18 PERB ¶ 3012 (1985).

6 The City cites Decision Nos. B-49-98; B-30-91.

7 *Id*.

within New York City as mandated by the residency requirement. The City further argues that, like all Mayoral agencies, the DEP is obligated to follow and investigate any alleged violations of the residency requirement.

The City argues that assuming *arguendo*, that the Petitioner had satisfied both requirements of the *Salamanca* test and had established a *prima facie* case of improper practice, the management action complained of was motivated by legitimate business reasons not violative of the NYCCBL. It contends that the investigation was conducted as a result of an anonymous letter alleging Petitioner did not reside within the City and that DEP had a duty under the law to either confirm or deny the allegation. Therefore, the investigation would have occurred irrespective of Petitioner's involvement with her union, her complaint regarding DEP promotional practices, and filing an out-of-title grievance.

The City maintains that the decision to conduct a residency investigation of one of its employees was a proper exercise of its managerial prerogative pursuant to § 12-307(b) of the NYCCBL.[8] Thus, the Union's petition must be dismissed for failure to state a claim on which relief may be granted.

DISCUSSION

[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 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. . . .

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

It is clear that Petitioner has presented sufficient evidence to establish the first prong of the *Salamanca* test. In regard to the second prong of the test, a finding of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, or surmise.[12] Merely alleging improper motive does not state a violation where the union has failed to prove the

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[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.

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

requisite causal link between the underlying management act complained of and the grievant's union activity.[13]

In the instant case, the Union argues that DEP was motivated to commence the residency investigation because of Petitioner's status as a union representative, her complaint about the alleged discriminatory promotional practices occurring at the agency, and the filing of her out-of-title grievance. The last of these events, filing Petitioner's grievance, took place on February 24, 1999. On April 29, 1999, Petitioner was informed that an investigation of her residency status was imminent. However, the record reveals that on April 13, 1999, DEP's Disciplinary Unit received a copy of an anonymous letter addressed to the City's Department of Investigations, dated March 24, 1999, alleging Petitioner was in violation of the residency requirements.[14] Upon receipt of the letter, DEP, like any other agency, could not properly ignore it. Under these circumstances, Petitioner has not established the requisite improper motivation.

Accordingly, the improper practice petition is dismissed 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-2088-99 be, and the same hereby is, dismissed in its entirety.

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

[14] A copy of the letter was annexed to the City's answer. Although the Union denied knowledge or information sufficient to establish that the City received such a letter, it did not contest the authenticity of the letter.

Dated: January 9, 2001
New York, New York

MARLENE A. GOLD
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