Olszewski & Yovino v. DOS, Falconer, Susol, Burge, et. al., 67 OCB 9 (BCB 2001) [Decision No. B-9-2002 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding
-between-

ANTHONY OLSZEWSKI and MICHAEL YOVINO,

Petitioners,

-and-

DECISION NO. B-9-2001
DOCKET NO. BCB-1763-95

NEW YORK CITY DEPARTMENT OF SANITATION, GARY FALCONER, JOSEPH SUSOL and C. BURGE; JOSEPH MONTGOMERY, SUPERINTENDENT HICKEY, GARY GUYER, SUPERINTENDENT OLDFIELD, SUPERINTENDENT BARCELONA SUPSERVISOR FRANCO, and SUPERVISOR CHIUCCHI,

Respondents.
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DECISION AND ORDER

The instant case arises from circumstances surrounding disciplinary complaints against two Sanitation Workers. Anthony Olszewski and Michael Yovino contend that agents of the New York City Department of Sanitation coerced, retaliated and discriminated against them because of their participation in internal elections of the Uniformed Sanitationmen's Association ("Union") and specifically their opposition to incumbent officers of the Union. Petitioners argue that, because of their activity, they were subjected to dangerous and disparate application of work rules designed to provoke insubordinate conduct for which they were disciplined.

Petitioners contend the individual co-respondents, supervisory employees of the Department, acted together with Union officials to violate Petitioners' rights under the New York

City Collective Bargaining Law ("NYCCBL"). Petitioners have not named the Union as a party to this proceeding. For the reasons stated below, we find that Petitioners have failed to prove that Respondents committed an improper practice within the meaning of the NYCCBL.

PROCEDURAL HISTORY

On June 29, 1995, Petitioners filed the instant verified improper practice petition alleging violation of NYCCBL § 12-306a.[1] The pleadings were complete on September 7, 1995. Following protracted but unsuccessful settlement efforts and several changes in counsel, a hearing was held, and, on March 30, 1999, Petitioners rested their case.

The City filed the instant motion to dismiss as a matter of law on June 25, 1999. The record was closed on September 8, 1999.

BACKGROUND

The following background facts are uncontested. The Department hired Petitioners Olszewski and Yovino as Sanitation Workers in 1982 and 1985, respectively. During the time period relevant here, Petitioners worked in a Department garage in the Brooklyn North One district. Olszewski worked as a driver, often with Petitioner Yovino as his loader.

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[1] Section 12-306a of the NYCCBL provides, in pertinent part:
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 participation in the activities of, any public employee organization. . . .

Petitioners' collective bargaining representative was Local 831, Uniformed Sanitationmen's Association. The applicable collective bargaining agreement ("contract") provided a multi-step grievance procedure, according to which only a duly designated Union representative was permitted to present for resolution a dispute concerning the application or interpretation of the contract.

From the late 1980's and until 1993, Yovino served as a Union shop steward at his work location. In 1989, 1990, and 1995, he also served in a special assignment, clerk for the district superintendent, or "super's clerk."[2] [Tr. 229:05, 233:04][3] He ran for secretary-treasurer of the Union along with other candidates challenging incumbents in 1991. That slate, known as the "Right Team," lost the election. In 1995, Yovino ran for Union president and lost the election again. Anthony Olszewski supported the Right Team but did not run for Union office.

The Petitioners have been the recipients of numerous disciplinary charges. In 1993, Yovino received a written reprimand after a plea bargain on a charge of violating Departmental rules. In November 1994, he received a six-month adjournment in contemplation of dismissal for two charges of misconduct in 1992 and accepted a fine of three days' pay for violation of another Departmental rule.

On March 22, 1995, Supervisor Charles Burge cited Yovino and Olszewski for loitering

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[2] At Article VI (Personnel and Pay Practices), § 4 (Seniority), (b)(ii), the contract states in relevant part, "Seniority . . . shall be the basis for permanent special assignments within the Bureau of Cleaning and Collection . . . except that the Employer reserves the right to establish: (1) Minimum qualifications for such assignments; and (2) a four-week training and evaluation period. . . ." (Emphasis omitted.)

[3] Reference is made in this fashion to the pages and lines of the hearing transcript.

for seven minutes while on duty. On May 10, 1995, Superintendent Hickey cited Yovino for having left his truck unattended for ten minutes with one of several switches which could start the truck in the "on" position. On August 28, 1995, Superintendent Edward Correll saw Yovino and Olszewski backing up their collection truck without a "guide man." On October 9, 1996, an administrative law judge at the Office of Administrative Trials and Hearings found Yovino guilty of the loitering and the unattended truck charges as well as the charge of backing up a collection truck without a guide man and recommended a 20-day suspension.[4] On appeal, the New York City Civil Service Commission ("CSC") on December 4, 1997, upheld OATH's findings on these two infractions and modified Yovino's suspension to 14 days.

Olszewski's disciplinary record also contained a few noteworthy events. On one occasion, he was found guilty at OATH for failing to complete his assigned route and leaving garbage uncollected, among other infractions. The OATH administrative law judge recommended a two-day suspension penalty. Although the record in the instant proceeding contains no specifics as to the misconduct, the dates it occurred, or the OATH determination itself, it is clear that each of those events took place before November 10, 1994, when the CSC heard oral argument on Olszewski's appeal of the charges. On January 20, 1995, the CSC determined that, while Olszewski may have technically violated the rules when he engaged in that misconduct, his claim of selective prosecution had merit. The CSC noted that Olszewski's supervisor at the time had stated in the OATH proceeding that if the acts in question "had been

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[4] Report and Recommendation of the Office of Administrative Trials and Hearings ("OATH"), *In Re: Michael Yovino*, Index No. 1209/96 (October 9, 1996) at 7, 14.

committed by anyone else, complaints would not have ensued."[5] Describing Olszewski's work record as "previously unblemished," the CSC also said, "From the record, it appears that appellant was disciplined solely for his participation in protected labor union activities. . . ." The CSC reversed the OATH determination and directed that Olszewski's monies be restored.

On February 29, 1996, OATH substantiated the Department's March 1995 charge of loitering against Olszewski but denied a charge of failure on that date to meet minimum productivity requirements because of lack of notice.[6]

EVIDENCE

Michael Yovino's Testimony

Michael Yovino testified first, that in the late 1980's and early 1990's, he served as Union shop steward and super's clerk and came to know Olszewski when Yovino helped Olszewski resolve a disciplinary problem. At that same time, Yovino overheard the district superintendent tell a supervisor that "he wanted [Olszewski] 'banged' even if he has to lie on the complaint." [Tr. 69:18] To "bang" an employee means to "give an employee as many disciplinary complaints as possible." [Tr. 13:18]

In 1991, when Yovino later decided to run for the position of Union secretary-treasurer on a slate challenging incumbents, Yovino said, supervisors "retaliated" against him by issuing

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[5] New York City Civil Service Commission, *In Re: Appeal of Anthony Olszewski*, (January 20, 1995) at 2. The CSC report did not name the supervisor.

[6] Report and Recommendation of the Office of Administrative Trials and Hearings, *In Re: Anthony Olszewski*, Index No. 672/96 (February 29, 1996), cited in OATH, *In Re: Yovino*, Index No. 1209/96 (October 9, 1996) at 9..

numerous complaints against him for denouncing the superintendent who allegedly had ordered Olszewski "banged." [Tr. 25:24] The complaints ultimately were dismissed. [Tr. 26:02]

In addition, in 1991, one of Yovino's supervisors, Anthony George, warned him that if he were to oppose the Union, he would no longer have a job. [Tr. 27:14] Around the same time, Supervisor George directed Yovino to maneuver his collection truck in a dangerous manner, *i.e.*, "work both sides of the street." [Tr. 27:22] Yovino said the maneuver was dangerous because he, as driver, could not use the truck to shield the loader from passing traffic. Union officials have advised Sanitation Workers to refuse such an order. [Tr. 29:12] However, for refusing, Yovino was suspended three days. The loader that day, not Olszewski, also refused supervision's order but was not cited for refusing the same command. When Yovino called the Union to complain, he "spoke to Safety" [Tr. 29:21] and was told, "[T]his is how it's going to be if you want to be a leader." [Tr. 29:22] Since then, Yovino said, he has received approximately 60 complaints "as an individual." [Tr. 30:09]

In 1992, when Yovino was working as a loader in his usual district of Brooklyn, supervisors from another district alleged that his truck was "missing off the route." [Tr. 32:08] He denied the allegation but was issued a complaint. Yovino called the citation "selecti[ve] enforcement" because the driver of the same truck received no such complaint. [Tr. 33:24]

Concerning the March 1995 charge that he loitered on the job, Yovino testified that a young person along his route had asked him how to apply for work in the Department. He and his co-worker stopped work briefly to explain the hiring process. According to Yovino, although the loitering complaint against him was prosecuted at OATH, the complaint against the co-worker,

Olszewski, for the same infraction was dropped. [Tr. 35:08] Further, Yovino testified that, although he has been served with disciplinary charges and productivity complaints from time to time, he is not, unlike other Sanitation Workers, routinely invited to resolve the alleged infractions informally. [Tr. 35:18] Infractions of "anybody else, they quashed," he said. [Tr. 35:22]

Between February 29 and June 9, 1995, supervisors cited Yovino in an unspecified number of "draft" complaints. Yovino testified that supervisors do not always show such a written document to the individual alleged to have committed the infraction. [Tr.108:03] "They will show you something in draft, and later on, a year goes by, they never surface until maybe two years later or three years later," he said. [Tr. 108:19]

In routine work assignments, Yovino and Olszewski have been targeted over the years for retaliation as well. Yovino spoke of being required to perform "gate work," which he described as "the hardest conditions that a sanitation worker could work under throughout the whole five boroughs in the City of New York. . . ." [Tr. 46:06] Gate work, he said, consists of going from house to house, picking up refuse placed behind gates as opposed to picking it up at the curb. [Tr. 46:11] He said that gate work is more time-consuming than curb pick-ups. By contrast, Yovino testified, dumpster collection at housing projects yields greater productivity because garbage is compressed and tonnage requirements can be met relatively quickly. [Tr. 48:16] Before Yovino ran for Union office, he performed "project work," but after he "ran against the union," he was no longer assigned to do that work. [Tr. 49:09]

Throughout his candidacy for Union office in 1995, Yovino said that his route changed

and he was required to pick up greater tonnage than he was required to do before. "If the route consisted of eight lines," he said, "they doubled it, made it nineteen lines." [Tr. 57:03] (A "line," he said, consists of one to twenty blocks.) In 1995, Yovino was issued approximately two dozen complaints about his productivity.[7] [Tr. 51:11] By contrast, Yovino said, another shop steward had his own route readjusted to enable that person to complete the route. [Tr. 57:13] Yovino did not say when this occurred in relation to the filing of the instant petition.

Starting in 1995, Yovino said, he filed "fifty to eighty" complaints in the "telephone order book" about work conditions among other matters.[8] He said grievances that are submitted to the contractual, multistep grievance procedure are initially filed in the telephone order book. [Tr. 65:18, 67:03] In order to pursue such a grievance, Yovino added, a grievant would ask that a prospective complaint be written in the telephone order book. Then, he said, the Union "would normally await a written letter from a supervisor in charge of the location," in response to the complaint. [Tr. 68:11]

Yovino further testified that, on several occasions both before and after he filed the instant petition in 1995, management deducted money from his wages in retaliation for filing such grievances and for "blowing the whistle" on alleged safety violations and other alleged wrongdoings in the shop. [Tr. 67:15, 68:03] Asked to give an example, Yovino told about a grievance he assertedly filed with the New York State Department of Labor's office of Public

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[7] Yovino did not specify which months in 1995. He testified at times about events occurring after the instant petition was filed.

[8] The 1994-1995 portion of the telephone order book was offered and accepted into evidence after the close of Petitioners' case as an unnumbered exhibit..

Employee Safety and Health ("PESH") about unsafe trucks and malfunctioning equipment. [Tr. 67:22, 165:04] He added, "They did come down and find some violations inside the garage, and afterwards I was retaliated against in many ways." He added, "For instance, I will give you a for instance. All of a sudden they would take me off a truck and violate my seniority rights, put the broom in my hand, work my collection route, because I blew the whistle and made a grievance that we were ordered to go out with unsafe trucks." [Tr. 68:06] At a later point, Yovino explained that there were monetary consequences to being put on broom duty as opposed to working a collection truck. "It is called 'two-man truck differential,'" he said. [Tr. 74:02, 74:08] Yovino said it amounted to one hundred twenty-eight dollars a week. [Tr. 74:15]

As to when this happened, Yovino testified at one point that the grievance about unsafe equipment was filed between March and April, 1995. At another point, he testified that this grievance was filed in 1996. [Tr. 67:13, 67:17, 67:24, 68:18] Asked on cross-examination to clarify when the grievance was filed and money was deducted from his pay, Yovino said, "During 1995 and 1996." [Tr. 75:02, 75:06, 75:08] Asked to specify which months it occurred, Yovino replied that he did not know and that he would have to look at his payroll stubs. [Tr. 75:11] However, he did not subsequently in his testimony make any reference to his pay stubs.

Yovino also testified that he was certain that he had filed a grievance on this matter in the telephone order book, [Tr. 167:12] and that it was pursued by the Union to the level of the borough superintendent but not beyond that point. [Tr. 169:15] At another point, Yovino said that he could not remember if that grievance was filed other than at PESH. [Tr. 167:08]

After filing this grievance, and after Olszewski filed other grievances in the telephone

order book in February 1995, Yovino said, he and Olszewski were taken off their previously scheduled route, which was given to employees with less seniority. [Tr. 163:15, 163:18]

When asked if the Union represented him in the processing of grievances, he answered, "No how, no way." [Tr. 110:06] Indeed, he filed a complaint against the Union in the telephone order book and with the ethical practices committee of the Union's parent organization, the International Brotherhood of Teamsters, for failure to represent him. He filed no grievance alleging breach of the collective bargaining agreement; nor did he file any complaint with the Office of Collective Bargaining. [Tr. 110:15; 171:09; 194:17]

Anthony Olszewski's Testimony

Olszewski corroborated Yovino's testimony about the way they became acquainted, about their service as shop stewards, and about Olszewski's support of Yovino during Yovino's run for Union office in 1991. [Tr. 250:23, 252:05, 253:05] Olszewski worked with Yovino most of the time in 1990 and 1991. At the time of the hearing in the instant proceeding, "some [disciplinary] charges" from 1990 and 1991 were still pending against him, but some had been dropped. [Tr.253:16, 254:02]

In 1995, Olszewski also received productivity complaints about his work when Michael Yovino ran for Union office a second time. [Tr. 269:25] Olszewski said it was not unusual for trucks to fail to complete their routes particularly during the spring religious holidays because the seasonal volume of refuse to be collected was greater than at other times. [Tr. 268:14] But he said management's dispensing of productivity complaints was inconsistent.

Olszewski testified that he was singled out for productivity complaints on some occasions. On February 2, 1995, when Olszewski worked with a shop steward other than Yovino, more than two tons of refuse was left on the street. Olszewski testified that management issued no productivity complaint. [Tr. 275:13] Five days later, other employees left refuse on the street, but Olszewski could not recall whether productivity complaints were given to anyone on that occasion. [Tr. 276:10] On February 11, 1995, Olszewski and the shop steward with whom he worked the previous week left refuse uncollected. The shop steward was not issued a productivity complaint. [Tr. 277:11] Again on February 22, 1995, Olszewski, Yovino, and other workers did not pick up a substantial amount of tonnage. Management issued complaints against Olszewski and Yovino and, to the best of Olszewski's recollection, other workers, but only the complaints against Olszewski and Yovino were not dismissed and were still pending at the time of his testimony. [Tr. 279:04]

Other Sanitation Workers' Testimony

Sanitation Worker Michael Sciarillo discussed his support of the Yovino slate of candidates in 1995. [Tr. 408:14] Sciarillo himself had successfully pursued against an improper practice petition against a supervisor for retaliating against Sciarillo's work as a shop steward in another district.[9] He failed to finish his route many times but received no productivity complaints as a result. [Tr. 425:22]

Sanitation Worker William Liebold campaigned for Michael Yovino in 1991. When

[9] *Michael Sciarillo v. New York City Department of Sanitation and John Matula*, Decision No. B-23-97.

Liebold visited various locations during that campaign to discuss election matters, he learned that Yovino's backers had been cited with numerous disciplinary complaints. [Tr. 431:10] He also said that, in 1996, a retired supervisor by the name of Larry Meloro told him that "it came down through the grapevine" to "harass the guys that ran against the union" during the 1991– 92 campaign. [Tr. 444:15, 450:03, 450:04, 450:06] Liebold said he, himself, running on a slate that rivaled incumbents in 1995 for the position of Union delegate, was singled out for discriminatory treatment as well. [Tr. 431:22, 435:23, 436:08 and 436:14]

Sanitation Worker George Martinez ran on the Right Team in the early 1990's as well. [Tr. 558:11] He referred to his own disciplinary record, which contained some infractions before the 1991–92 Union election campaign. But after he became involved in that campaign, Martinez said, management cited him for minor infractions, such as "wrong color hat, making U-turns, campaigning on city property." [Tr. 559:05, 566:18, 577:21] Martinez testified that, in 1995, Union President Peter Scarlatos told him that if Martinez "even [were to] think about" running against Scarlatos for Union office, Scarlatos "was going to come down on [Martinez] with everything." [Tr. 575:12]

In the early 1990's, Sanitation Worker Thomas Bruno had also run on the Right Team slate. [Tr. 599:03] He was cited for disciplinary infractions such as loitering and being out of uniform [Tr. 600:14] but some of those were dropped. By contrast, Bruno said, after the election, the number of complaints against him went down, and from then to the date of his testimony, he had received only a couple of complaints. Bruno attributed this decline in the number of complaints against him to the fact that he was no longer involved in Union activities. [Tr. 601:24] Bruno recalled that, at one time during his career with the Department, he had been

suspended for a "long period of time" but could not say when it was; nor could he recall other suspensions or disciplinary complaints against him. [Tr. 607:05]

Sanitation Worker Patrick Skelly was acquainted with Petitioner Olszewski from 1990 until 1997. He testified that, on August 28, 1995, he drove a truck that Olszewski and Yovino had used that day. He did not elaborate on the significance of that statement. He also testified that he was never involved in Union activity. [Tr. 620:25, 621:20, 622:18]

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners Yovino and Olszewski contend that since 1991, Yovino's campaign for Union office and Olszewski's support of Yovino's candidacy marked them as targets for discrimination and retaliation by supervisors and co-workers working in concert with incumbent Union candidates. Until that time, their respective work records showed few, minor infractions of Departmental rules.

From that time forward, supervisors harassed Petitioners by issuing a large number of unfounded complaints about their work performance. The harassment was the result of filing grievances within the limitations period of the instant petition. The grievances concerned being ordered to operate unsafe trucks and being removed from routes Petitioners previously were assigned to operate.

The disciplinary complaints against Olszewski which charged that he disobeyed a

Departmental order and failed to finish his route also were discriminatory.[10] The CSC determined that Olszewski's claim of selective prosecution was meritorious because he was disciplined for participation in what the CSC described as "protected labor union activities."

The Petitioners continued to be targeted for complaints about minor infractions and for their refusal to operate equipment which they considered unsafe. Petitioners ask that some events which occurred before the instant petition was filed and which were the subject of testimony herein be considered as background evidence.

Respondents' Position

The City argues that the instant petition does not concern conduct violative of the NYCCBL but concerns individual complaints by Yovino and Olszewski who have been disciplined over the years for poor work performance. Petitioners' case, viewed in the light most favorable to them, is procedurally and substantively flawed. The City asserts that the legal standard in this instant motion to dismiss as a matter of law is whether the only conclusion the Board can reach is that Petitioners have failed to meet their burden of proof.[11] The Board must determine that there is no rational basis by which it could find in favor of Petitioners, and the Board's decision must be based on the record at the close of Petitioners' case.[12] The City

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[10] The dates of the complaints are unclear from the record.

[11] *McAllan et al. v. Emergency Medical Services of the New York City Health and Hospitals Corp.*, Decision No. B-12-84.

[12] In *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 664 N.Y.S.2d 252, 254 , the Court upheld the grant of a motion for judgment as a matter of law under § 4401 of the Civil Practice Law and Rules at the close of plaintiff's case (finding it appropriate to grant such a motion when, based

recognizes that this standard is a more stringent one than the Board applies in a motion to dismiss a petition before testimony is received. Here, the evidence presented to support the improper practice petition is so deficient that the only conclusion the Board could reach is that it could not find in favor of Petitioners. Thus, the Board should dismiss the instant petition now without further proceedings.

Procedurally, the City contends, the majority of the Petitioners' complaints relate to disciplinary matters which took place long before the accrual date of February 29, 1995. Even if the Board were to accept evidence of untimely events for background purposes of timely claims, that evidence is based on speculation and unreliable hearsay. Furthermore, OATH's Report and Recommendations in *DOS v. Olszewski* and the CSC determination of Olszewski's appeal some three-and-a-half years later, on January 20, 1995, are too remote to provide support for Petitioners' claims.

Substantively, Petitioners' testimony fails to establish a predicate for their claims under the NYCCBL. First, the Petitioners' allegations are too vague to support their claims. Petitioners have presented no evidence whatsoever against named Respondents Burge, Oldfield, Franco, Barcelona, or Chiucchi, thus effectively abandoning claims against them. Secondly, rather than proving that Petitioners were engaged in activity of a protected nature, the testimony reflects only limited involvement in internal Union elections, a matter which arguably cannot be redressed in the instant forum.

According to the City, record testimony reflects little or no evidence to demonstrate that

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upon the evidence presented, "there is no rational process by which the fact trier could base a finding in favor of the nonmoving party."

either Yovino or Olszewski filed contractual grievances in the telephone order book during the relevant time period or immediately before it. Even if Petitioners could be found to have engaged in protected Union activity during the relevant limitations period, that is, from February 29, 1995, to June 29, 1995, at which time the instant petition was filed, the record shows that Yovino's grievances against Respondent Falconer on April 14, 1995, and Respondent Montgomery on May 10, 1995, were filed after Falconer and Montgomery observed Yovino engaging in misconduct and not before that time. The City argues that a claim of improper practice is not necessarily stated when allegedly violative conduct occurs before the filing of a contractual grievance. Furthermore, the 1991 Union election which Petitioners say they were involved in is too remote to be linked with disciplinary actions taken in 1995.

Even if the Petitioners were found to have engaged in protected activity, such as the filing of any contractual grievances about the operation of malfunctioning or unsafe equipment during the relevant time period, Petitioners admit that they sent their written complaints to the Union only. Thus, the Department and its agents were unaware of the complaints. Moreover, even if Petitioners could prove that agents of the Department knew of any protected activity by Petitioners, they have failed to show they suffered from retaliation or dangerous and disparate application of work rules or that they received orders to provoke insubordination.

Petitioners have failed to support their claim of discrimination by means of "threats, additional wrongful discipline, and a disparate application of work rules" as a result of alleged grievances and appeals to the CSC. Petitioners have not cited instances in which the City treated Petitioners differently from similarly situated employees with respect to disciplinary action taken, and any testimony offered by Petitioners or their witnesses was either vague, non-specific, or

unreliable.

The City asserts that even if Petitioners were able to prove protected activity, knowledge and motive, the Department was within its managerial rights to discipline Petitioners and to direct their assignments. The minor, job-related infractions for which Petitioners have been disciplined over the years add up to a " job just not being done," and the discipline which Petitioners have received for these infractions is appropriate and not related to Union activity.

The Petitioners' reliance on the CSC determination is unwarranted since the CSC proceeding falls outside the jurisdiction of the Board of Collective Bargaining. Moreover, the Commission's conclusion that Olszewski was disciplined for "protected labor union activities" was neither correct, probative of any issue in the instant proceeding, nor binding on the Board. In sum, the Petitioners have failed to satisfy the essential elements of a claim of improper practice under the NYCCBL. Therefore, it would be unfair, burdensome, and unnecessarily costly to require the City to present its case at this point, and the instant improper practice petition should be denied in its entirety without further proceedings, or in the alternative, denied against those individuals as to whom Petitioners have failed to support their claims with evidence. If the Board determines that a *prima facie* claim has been established with respect to any specific allegation or allegations, the Board should identify such and require the City to proceed on only the allegation or allegations specifically identified.

DISCUSSION

A motion to dismiss an improper practice petition following the presentation of a charging party's case may be granted only if the evidence produced by a petitioner, including all

reasonable inferences which may be drawn from it, is plainly insufficient to warrant a finding that the charge should be sustained even in the absence of any rebuttal by the respondent.[9] The proponent of a motion to dismiss has the burden to prove that "there is no rational process" by which the Board could find in favor of the non-moving party.[10]

In the instant matter, we have considered the testimony of seven witnesses, including both Petitioners, as well as documentary evidence and the allegations set forth in the pleadings. We have considered the facts as they were presented in a light most favorable to Petitioners,[11] and we find that they have failed to establish that the Respondents committed an improper practice within the meaning of the NYCCBL. Parenthetically, although Petitioners have not specified the subsections of the NYCCBL which they assert has been violated here, their allegations speak of alleged coercion, retaliation and discrimination, which, if proven, would be violations of §§ 12-306(a)(1) and (3).[12]

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[9] *McNabb et al. v. City of New York*, Decision No. B-67-90, 16, citing *County of Nassau*, 17 PERB 3013 (1984), 3030. *See*, also*, Daniel Thomas Fronczak and New York State Security law Enforcement Employees, Council 81, AFSCME, AFL-CIO and State of New York (Department of Correctional Services)* and *Daniel Thomas Fronczak and State of New York (Department of Correctional Services)*, 28 PERB 4659, 4919 (finding insufficient employee-petitioner's allegations, even when read in light most favorable to him, that either union or public employer committed improper practice in connection with his grievance-filing activity) , *aff'd* 29 PERB 3015, 3038 (March 27, 1996).

[10] *Szczerbiak*. 90 N.Y.2d 553, 664 N.Y.S. 2d at 254.

[11] *See Fronczak and New York State Security Law Enforcement Employees, Council 8 and State of New York (Department of Correctional Services)*, 28 PERB 4659, 4919 (finding insufficient employee-petitioner's allegations, even when read in light most favorable to him, that either union or public employer committed improper practice in connection with his grievance-filing activity), *aff'd* 29 PERB 3015, 3038 (March 27, 1996).

[12] NYCCBL § 12-306 provides, in relevant part:
It shall be an improper practice for a public employer or its agents:

Petitioners in the instant case make troubling allegations of claimed violations of the NYCCBL; however, because of deficiencies in the evidence offered to support the claims, we dismiss the instant petition for the following reasons. The claims against several of the named individual respondents must be dismissed at the outset. Although the Petitioners made allegations in the petition about Respondents Barcelona and Chiucchi, the allegations were not supported by any testimony or documentary evidence. Supervisor Franco was named in the petition but the petition recites no allegation against him, and Petitioners offered no testimony or documentary evidence against him at the hearing. Similarly, while the petition named Superintendent Oldfield, the only testimony about him was presented by a non-party witness, Michael Sciarillo, who said that Oldfield conducted field investigative audits of Sciarillo's work, not the work of Petitioners. Therefore, we dismiss the claims against each of these individuals.

The testimony which Petitioners and their witnesses did offer about the remaining respondents was largely vague, inconsistent and contradictory. Much of the evidence pertained

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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;

(2) to dominate or interfere with the . . . administration of any public employee organization;

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

Moreover, the test we use to assess such claims is that set forth in *City of Salamanca* (18 PERB 3012 [1985]) and endorsed by this Board in *Bowman v. City of New York* (Decision No. B-51-87 [holding that a petitioner must show initially that he was engaged in activity which the NYCCBL was designed to protect; next, that agents of the employer responsible for the alleged discriminatory act (1) had knowledge of the employee's union activity and (2) that the union activity was the motivating factor in the employer's decision; finally, that, if the petitioner proves both of these elements, the employer must establish that its actions were motivated by a legitimate business reason. (*See*, also, Decision Nos. B-16-92, B-36-91; B-4-91; B-24-90)].

to events as early as 1991 and 1992, well before February 29, 1995, the accrual date of the limitations period applicable to the instant petition. Even as background, the reliability of the offered testimony is questionable because it is ambiguous, inconclusive, unsupported by relevant specifics, and often not pertinent to Petitioners' claims. The documentary evidence offered was equally unavailing, either because of its ambiguity or because it failed to contain the information that Petitioners said could be found therein. Petitioners' credibility is further undercut by the fact that while they alleged that Union agents acted together with the employer's agents to retaliate or discriminate against them, they did not name the Union as a co-respondent .

Although Petitioners argue that their involvement in Union elections was the motivating factor in the numerous disciplinary charges against them, they have not presented sufficient, credible evidence to support their claims. While their testimony was credible on the point that they were involved in campaigns to unseat the incumbent Union leadership, their testimony is too ambiguous to support their contention that such involvement was the cause of the disciplinary and productivity complaints issued to them. The documentary evidence they present does little to bolster the ambiguous and often contradictory testimony.

For example, Petitioners assert that they filed numerous grievances ("fifty to eighty") about work conditions, but a review of the telephone order book, where contractual grievances should initially be filed pursuant to the contractually provided procedure, does not support that assertion. The testimony of all the witnesses offered by Petitioners reveals that while some of the grievances which Petitioners allege in the instant petition may have been filed with internal Union grievance mechanisms, such as a committee on ethical practices, or with the New York State Department of Labor, only one during the relevant time period is actually found in the

telephone order book. That complaint concerns Yovino's removal from the special assignment position of super's clerk.

While Petitioner Yovino's filing of a grievance in the telephone order book about his removal as super's clerk may be protected activity, we still find the evidence legally insufficient since it is not probative of the violative conduct alleged. First, Yovino's recollection was ambiguous about when in 1995 he served as super's clerk. Although he recalled that he was initially appointed that year because he had attained sufficient seniority under the contract for such special assignments, his testimony was inconsistent about the reasons he was removed from that post. On one occasion, he said he was not told why he was removed; at another point, he admitted that he "made mistakes" and was removed as super's clerk due at least in part to a scheduling error. Asked further on cross-examination if he believed the reason given for his removal was "something else," he replied, "I didn't feel it, I know it." He said he believed he was blamed "fraudulently" for mistakes he made during his training period. Generally he said, a superintendent whose clerk commits an error can escape having it reflect poorly on him. "All you have to do is be pro union," he said.

This testimony does not support the allegations of retaliatory and discriminatory conduct by the employer's agents. Allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, and surmise,[13] The testimony here

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[13] *See Leahey v. Caruso*, Decision No. B-22-91 at 15; *see*, also, *Darren Baker and City Employees Union, Local 237, I.B.T,v. Lacy C. Johnson, New York City Department of Investigation and New York City Department of Juvenile Justice*, Decision No. B-61-89 at 12; *Liebold v. Uniformed Sanitationmens Association, Local 831, I.B.T. and New York City Department of Sanitation*, Decision No. B-42- 97 at 8; *Communications Workers of America, Local 1180, v. New York City Police Department*, Decision No. B-28-86 at 11-12; *Peshkin v.*

points to nothing more than a legitimate business reason for Yovino's removal from the post.

In addition to the contradiction between Yovino's testimony about the number of grievances filed in the telephone order book and our findings on review of that exhibit, we find contradictions between his testimony about safety grievances he allegedly filed as well. At one point on the stand, Yovino said he filed the safety grievances with PESH in 1995. At another point, he said he filed in 1996, a year after the instant petition was filed. He was equally unclear about whether he had also filed safety grievances in the telephone order book pursuant to the contractual grievance procedure. At one point, he testified that he had indeed filed, but at another point, he could not remember. At still another point in his testimony, Yovino said that management deducted money from his wages in retaliation for filing grievances and for "blowing the whistle" on safety violations and other wrongdoings in his district. When, on cross-examination, that testimony was challenged, Yovino said that he would have to refer to his pay stubs to document the "deductions," but he failed to do so thereafter. We find that this part of his testimony was undermined by his failure to present any documentation of that nature, such as pay stubs or other evidence which would have been within his ability to demonstrate.

Olszewski's testimony was also problematic. He testified that he was singled out for disparate treatment by management agents bent on citing him with productivity complaints, but the substance of his testimony fails to support his claim. In his recitation of four occasions in February 1995 when he and other workers, including Michael Yovino, left refuse uncollected on the street, Olszewski cited only one of those days when he could say for sure that he and Yovino

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Anthony Basilio, Sr., and New York City Department of Social Services, Decision No. B-30-81 at 8-9.

were called down on a productivity complaint. Such recitation does not support the allegation of disparate treatment.

The remoteness in time of events related through Petitioners' testimony is also highly problematic. Yovino alleged that, in 1991, four years before the instant petition was filed, he had a conversation with Supervisor Anthony George who, according to Yovino, said that if Yovino opposed the Union, Yovino would no longer have a job. [Tr. 27:16] Petitioners did not produce Anthony George to testify on this point. Even if we were to assume the truth of the supervisor's statement as related by Yovino (who necessarily is a self-interested party), we cannot accept the testimony because of its ambiguity as to what the supervisor meant. Moreover, the testimony about a statement made four years before the instant petition was filed is too far removed in time to be reliably probative of the issue before us. The testimony of both Petitioners and of most of their witnesses about other events is riddled with inconsistencies and generalizations which cannot support the conclusion they ask us to draw.

As for Yovino's testimony that throughout his campaign for Union office in 1995, he was assigned more difficult routes despite his seniority on the force, Petitioners have offered nothing more than the claim that the campaign and the less desirable assignments are linked because of their proximity in time. Petitioners themselves testified that route assignments were being changed for other Sanitation Workers as well. Yovino testified that his and Olszewski's route assignments changed after they filed their various grievances. But Yovino could not specify the grievances and was not certain that he even recorded them in the telephone order book.

Petitioners' argument is also unavailing with regard to Yovino's claim of selective enforcement of Departmental rules against loitering and being "off-route" and his claim that

some employees are invited to have complaints against them handled informally rather than through the formal disciplinary procedure. Without more than the unsupported assertions, these allegations do not provide any factual basis that Petitioners were engaged in any protected activity or that agents of the Department were engaged in discriminatory or retaliatory conduct as a result of any protected activity.

Yovino's testimony that he was targeted by management for retaliation because he filed safety grievances with the New York State Department of Labor's office of Public Employee Safety and Health about operation of unsafe trucks also does not support Petitioners' claim against the employer under the NYCCBL. Any rights the Petitioners may have under other statutes must be pursued in another arena.

Moreover, even if such a grievance could be pursued in the contractually provided procedure and even if we could find retaliation or discrimination based on such protected activity, Petitioners have not substantiated such a claim on the facts presented here. Yovino failed to specify the date of any such safety or health grievance. While the petition alleges that grievances about dangerous equipment were filed in the telephone order book on March 9 and March 15, 1995, careful review of that document reveals no such notations. Olszewski's testimony, too, consisted largely of non-specific, ambiguous assertions that management issued complaints concerning his productivity and discipline when he worked with Yovino, who was running for Union office.

Furthermore, the other witnesses' similar complaints with respect to their own experiences in running for Union office, were remote and offered little to support the instant petition's allegations. For example, Liebold's hearsay testimony that a supervisor admitted that

he had been directed to harass members challenging the incumbents during the 1991-92 campaign, while specific, concerns events too remote to be causally linked to timely incidents. Finally, the testimony of witnesses about their own disciplinary records is not probative of any allegations in the petition before us.

Other allegations in the petition are unsupported as well. For example, the instant petition alleges that Supervisor Susol allegedly told Petitioners in March 1995 that the Union would not support them in defending disciplinary charges. The allegation is not supported by any testimony or documentary evidence to that effect. Although Susol was the complainant on productivity charges against Petitioners, those productivity charges were issued in September 1995, some three months after the instant petition was filed. In addition, nothing in the record indicates that Susol may have influenced other supervisors who were responsible for disciplining employees before that time.

As to the CSC's January 1995 determination that Olszewski was disciplined for union activities before November 1994, and not for failing to complete his assigned route and leaving garbage uncollected as charged, we note that the CSC determination is based on testimony by a supervisor who said that if the acts in question in that proceeding had been committed by anyone else, complaints would not have ensued. In the instant proceeding, no similar testimony was offered on which we could arguably base such a finding. In addition, the events on which the CSC determination was based took place before November 1994. That is the date on which the CSC heard oral argument on Olszewski's appeal of the original charges. Those events were well outside the limitations period applicable to the improper practice petition before us. For these reasons, the CSC determination is unavailing for Petitioners in the instant proceeding

Although the record shows that the relationship between Petitioners and agents of the City do not exemplify sound labor relations, the evidence offered by Petitioners here simply does not support the statutory violations alleged. Therefore, we find that Petitioners have not proved a *prima facie* case that the Department has violated the NYCCBL with respect either to the claim of discrimination for protected activity or to the independent claim of retaliation, interference, or coercion. We shall, therefore, grant the instant motion to dismiss the improper practice petition 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 City's motion to dismiss the petition docketed as BCB-1763-95 as a matter of law be, and the same hereby is, granted; and it is also hereby,

ORDERED, that the improper practice petition docketed as BCB-1763-95 be, and the same hereby is, dismissed in its entirety.

Dated: March 28, 2001
New York, NY

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER