

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371, AFSCME, AFL-CIO AND
WILLIAM MEYERS,

Petitioners,

Decision No. B-13-2002
Docket No. BCB-2244-01

-and-

NEW YORK CITY ADMINISTRATION
FOR CHILDREN'S SERVICES,

Respondent.

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DECISION AND ORDER

On October 18, 2001, the Social Service Employees Union ("Union") filed a verified improper practice petition on behalf of William Meyers against the New York City Administration for Children's Services ("ACS"). Petitioners allege that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), ACS discharged Meyers in retaliation for filing four grievances. Respondent argues that Meyers was discharged because of his poor work performance. Since the Union failed to show that Meyers was discharged in retaliation for protected union activity, we dismiss the improper practice petition.

BACKGROUND

William Meyers, a probationary employee, began working as a Caseworker at ACS's

Paternity and Community Outreach Unit (“Unit”) on February 26, 2001. Meyers worked under the immediate supervision of Judith Albury, Director of the Unit.

According to ACS, in an effort to curtail the amount of paid overtime accumulated within the Unit, Jeanette Deida, Acting Director of Program Planning and Development, informed Albury on April 3, 2001, that effective immediately Unit employees could not acquire paid overtime unless they received Deida’s prior approval. Only compensatory time would be granted to employees who worked overtime. That same day, Albury informed Meyers and another Unit employee under her supervision of the change.

Without obtaining Deida’s approval, Meyers accumulated 90 minutes of overtime on April 9, 2001, and requested that Albury approve it as paid overtime. Denying his request, Albury offered to approve 90 minutes of compensatory time. On April 16, 2001, Meyers filed a Step I grievance regarding Albury’s refusal to approve his paid overtime. The grievance was denied, and a Step II grievance was filed on April 24, 2001. A Step II hearing was scheduled for June 18, 2001, but was canceled by the Union. The Union filed a Step III grievance on May 19, 2001, but the record does not indicate the outcome.

ACS alleges that by mid-April 2001, Meyers “refused to verbally communicate with Albury.” On April 17, 2001, Deida and Albury met with Meyers and told him that he would receive, confirm receipt of, and complete future assignments via e-mail.

On May 7, 2001, Albury held a conference to discuss Meyers’s work.¹ In an interoffice

¹ The ACS Non-Managerial Employee Performance Evaluation Procedure requires that supervisors evaluate probationary employees every three months during a one-year probationary period. Before issuing a performance evaluation, the supervisor must schedule a conference with the employee to discuss areas in which the employee needs improvement.

memorandum which she sent to Meyers that same day, Albury criticized his inability to follow instructions and complete assignments in a timely manner. She informed Meyers that he had been registered for additional computer training. On May 8, 2001, Meyers filed a Step I grievance alleging that he was “harassed” during the May 7 conference. On May 9, 2001, Deida met with Meyers and his union representative to investigate the harassment allegation and found no evidence to substantiate the charge. Meyers filed a Step II grievance on May 19, 2001, but the Union cancelled a hearing scheduled for June 18, 2001. A Step III grievance filed on May 29, 2001, was dismissed without a formal hearing on November 2, 2001, for failure to “identify a matter that could be addressed and processed as a grievance.”

On June 4, 2001, Albury gave Meyers his quarterly performance evaluation; the overall rating was “unsatisfactory” and recommended termination. According to the evaluation, Meyers failed to complete assignments in a timely fashion, was disruptive during meetings, disseminated inaccurate information to staff, and failed to produce a required training presentation despite numerous extensions. Shortly thereafter, on June 6, 2001, Meyers filed a Step I grievance alleging that the evaluation “was completely untrue and can only be viewed as retaliatory.” He filed a Step II grievance on June 6, 2001.² A Step II determination issued on August 6, 2001, dismissed the grievance and stated the following: “performance evaluations are . . . not grievable under the parties’ collective bargaining agreement.” The Union’s Step III grievance filed June 15, 2001, is still pending.

Sometime in March or April 2001, Meyers was assigned the task of completing client health insurance referral forms, known as HealthStat Referral Forms. Albury and another

² The record indicates that the Step I and II grievances were both filed on June 6, 2001.

employee, Michelle DeGrasse, taught Meyers how to complete the forms and forward them to ACS's Legal Services Division. Shortly thereafter, several of the HealthStat forms that Meyers filled out were returned as incomplete. While ACS claims that Meyers received extensive training, the Union argues that the incomplete forms were the result of inadequate training and that Meyers observed DeGrasse sabotage his work. The Union does not allege any specific facts regarding the alleged sabotage.

On May 8, 2001, Albury sent an interoffice memorandum to staff reminding them to utilize a recently revised version of the HealthStat form. The record shows that because Albury noticed a "low number of referrals forwarded to the Legal Department," Meyers received more training regarding HealthStat forms on May 18 and June 4, 2001. According to the Union, on June 7, 2001, Albury ordered Meyers to review forms using a method that contradicted her May 8 interoffice memo and her previous instructions. As a result, Meyers filed a Step I grievance on June 7, which stated that he processed "this grievance for his own protection." Although the Union alleges that it filed a Step II grievance on June 19, 2001, ACS contends that it was not received.

ACS Division of Administration and Office of Personnel Services terminated Meyers's probationary employment by letter dated June 21, 2001. Meyers seeks to be reinstated to his former position and awarded back pay.

POSITIONS OF THE PARTIES

Petitioners' Position

_____ Petitioners argue that Respondent discharged Meyers in retaliation for filing four

grievances in violation of NYCCBL §12-306a(1) and (3).³ Furthermore, Petitioners argue that the improper practice petition is timely because it was filed within four months of Meyers's discharge.

Respondent's Position

Respondent argues that the petition should be dismissed because: (1) the allegations are untimely; (2) Petitioners have failed to establish a prima facie case of retaliation; and (3) ACS's decision to terminate Meyers's probationary employment was based on legitimate business reasons.

DISCUSSION

_____ This Board may not consider any claimed violation of the NYCCBL that occurred more than four months prior to the filing of the improper practice petition. NYCCBL § 12-306(e); OCB Rule § 1-07(d); *see also City Employees Union, Local 237*, Decision No. B-13-2001 at 7. Meyers was discharged on June 21, 2001, and the charge was filed on October 18, 2001. Since the petition was filed within four months of Meyers discharge, it is timely.

_____ To determine whether an alleged discrimination or retaliation violates § 12-306a(3), this

³ NYCCBL §12-306a provides, in relevant part, that it shall be an improper practice for a public employer:

(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. . . .

§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. . . .

Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, Decision No. B-51-87. Petitioner must prove that the employer's agent had knowledge of the employee's union activity and that such activity was a motivating factor in the employer's action. The employer may refute the petitioner's showing or demonstrate legitimate motives that would have caused the employer to take the action complained of even in the absence of the protected activity.

_____ We find that there is sufficient evidence to establish the first prong of the *Salamanca* test in that ACS knew that Meyers filed four separate grievances. However, with respect to the second prong of the test, the mere assertion of retaliation is not sufficient to prove that management committed an improper practice. *Local 983, District Council 37*, Decision No. B-15-2001 at 6. Rather, a petitioner must establish that the protected union activity was the motivating factor behind the alleged discriminatory act. *Id.* at 6-7. Allegations of improper motivation must be based on statements of probative facts, rather than conclusory allegations based upon surmise, conjecture or suspicion. *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6.

Here, the Union failed to provide any probative facts to support its claim that ACS was motivated to discharge Meyers because he filed four grievances. We have long held that the mere fact that an employee has filed a grievance, by itself, is not a sufficient basis for a finding that an employer has acted with improper motive. *Local 983*, Decision No. B-15-2001 at 7; *see also Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. ACS has submitted detailed factual allegations demonstrating Meyers's unsatisfactory work performance that prompted his supervisor, Albury, to recommend termination on his June 4, 2001, performance evaluation. We

are satisfied that Meyers's substandard performance during his probationary period constituted the basis of his discharge.

It appears that, with the exception of the first grievance concerning overtime, Meyers filed the three remaining grievances in an attempt to shield himself from the consequences of his substandard performance. *See, Johnson*, Decision No. B-21-91 at 15 (petitioner attempted to shield himself from the consequences of his actions by filing grievances after having been disciplined or in anticipation of discipline). In this regard, we note that Petitioner's second and third (May 8 and June 6) grievances were filed after management actions that were critical of Meyers's work performance. Petitioner filed the fourth grievance "for his own protection" because he feared he might be reprimanded for the way he reviewed HealthStat forms. We are not persuaded that there is any causal connection between the filing of these grievances and his termination. Accordingly, we find that the Union has not established the necessary improper motivation as required under the second prong of *Salamanca*, and we dismiss the petition.⁴

⁴ Since the Union failed to provide any facts to demonstrate that ACS violated § 12-306a(1), we dismiss the claim.

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 filed by SSEU, Local 371, and William Meyers be, and the same hereby is, dismissed in its entirety.

Dated: April 30, 2002
New York, New York

MARLENE A. GOLD

CHAIR

GEORGE NICOLAU

MEMBER

RICHARD A. WILSKER

MEMBER

EUGENE MITTELMAN

MEMBER

BRUCE H. SIMON

MEMBER

CHARLES G. MOERDLER

MEMBER