CSBA, L. 237 v. City & DHS, 71 OCB 24 (BCB 2003) [Decision No. B-24-2003 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

CIVIL SERVICE BAR ASSOCIATION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

Decision No. B-24-2003
Docket No. BCB-2288-02

-and-

CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES,

Respondents.

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DECISION AND ORDER

On May 29, 2002, the Civil Service Bar Association, Local 237, IBT ("Union"), filed a verified improper practice petition alleging that the City of New York and the Department of Homeless Services ("City" or "DHS") violated § 12-306(a)(1), (3), (4), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by retaliating against an employee for filing a grievance and by unilaterally making a change in due process rights during a period of status quo. The City contends that the employee's grievance was not a motivating factor in its decision to terminate his employment and that the issue of the claimed change in due process rights should be deferred to arbitration. The Board defers the unilateral change claim to the grievance process, and after holding a hearing on the retaliation claim, we dismiss the remaining allegations because the Union has failed to demonstrate that DHS's actions were improperly motivated.

BACKGROUND

The Union represents employees at DHS in the titles Agency Attorney and Agency Attorney Interne. The City and the Union are parties to a collective bargaining agreement ("Agreement") effective January 1, 1995, to December 31, 1999, that is in status quo while the parties negotiate a successor agreement.

Agency Attorney Interne is a two year position, which, according to the City, allows a recent law school graduate to work before taking the bar examination and obtaining admission to the bar. The City asserts that employees in this position are not automatically promoted to any other title, but, generally, Agency Attorney Internes who are admitted to the bar are hired as Agency Attorneys.

Based upon a hearing held on January 28 and March 17, 2003, and the pleadings, the Board obtained the following information. Effective October 10, 2000, Adetokunbo Oseni was appointed to the noncompetitive title of Agency Attorney Interne at DHS's Bronx Emergency Assistance Unit ("EAU"). Oseni's primary responsibility was to review case records of families applying to DHS for temporary housing assistance and to determine whether the family was eligible. Oseni's first job evaluation, covering the period from November 22, 2000, to February 12, 2001, was prepared by Deputy General Counsel Lenore Browne, and Oseni was rated a "Good Plus." He received a second positive evaluation for the period covering November 22,

2000, through June 30, 2001. (Union Exhibit 5.)[1]

Oseni passed the bar on March 28, 2001, and because of his initial evaluation, Browne and General Counsel Thomas Rozinski decided to consider appointing Oseni to the Agency Attorney Level I title at a later date.

On September 25, 2001, Oseni had yet to be appointed to the Agency Attorney Level I title when Browne and Rozinski gave Oseni a conference memorandum. The memorandum stated that Oseni's future appointment was canceled because he refused to work overtime shifts with a specific supervisor and copied the same determination from one application to another for the same client, while changing only the date – a violation of DHS's policy that a new determination must be made for subsequent applications. The memorandum also stated that if Oseni's performance improved, he would be reconsidered for appointment to Agency Attorney after January 1, 2002; however, if his supervisors encountered either problem again, he risked immediate termination. Oseni signed the conference memorandum. (C. Ex. 16.) At the hearing, he disputed the allegations, stating that he was always willing to perform overtime, that duplication of determinations on applications was a common practice at EAU, and that other attorneys were not disciplined for issuing similar determinations. (Tr. 42, 49-51, 512.)

On December 19, 2001, Browne and DHS Legal Supervisor Mary-Ann Maloney presented Oseni with an evaluation that covered the period from June 30 to December 15, 2001. His work was rated "Good Minus." The evaluation recommended that Oseni's appointment to Agency Attorney be held in abeyance until his work improved and stated that Oseni "needs to

[1] References to the Union's exhibits hereinafter appear as "U. Ex.," references to the City's exhibits appear as "C. Ex.," and references to the hearing Transcript appear as "Tr."

accept constructive criticism in order to understand the substantive issues that are brought to his attention . . . , [h]e is often seen socializing or taking breaks . . . , [he] has not demonstrated that he has grasped the essential aspects of the work performed . . . given the length of time in the unit . . . , [and he] often fails to apply the guidelines correctly." At the hearing, Oseni claimed that he had asked for specific examples of his deficient performance, but was not presented with any. (Tr. 74-76; 497.)

Although Oseni signed the evaluation, he prepared a memorandum detailing his objections to the performance review, and asserted that he was surprised by the content of his recent evaluation because it was generally unfair and not reflective of his true abilities and contributions. (U. Ex. 11.) He delivered the memorandum to Browne and DHS Acting General Counsel Dennis Young. (Tr. 80-83.) According to Oseni, Young told him that he would attach Oseni's memorandum to the evaluation and suggested, "let's leave it at that," but neglected to tell Oseni that he could formally appeal the performance evaluation. (Tr. 81.)

About one month later, on January 16, 2002, Oseni filed a Step I out-of-title grievance alleging that he was performing the duties of an Agency Attorney Level I. Young and Browne received copies of the grievance.

In late January, Browne and Eugene Uzamere, DHS Chief Disciplinary Counsel, separately, spoke with Oseni. Oseni contends Browne and Uzamere pressured him to withdraw the grievance and Browne told him that his promotion was not automatic. (Tr. 91.) Browne, in an affidavit attached to the City's answer, indicates that she called Oseni for another copy of his grievance because she had misplaced it but Oseni claimed he did not have an extra copy. Browne states that she told Oseni that his promotion was not automatic and that she wanted to

resolve the matter. Because she knew that Uzamere and Oseni were friendly, Browne asked Uzamere to speak to Oseni and encourage him to speak to her about the grievance. At the hearing, Uzamere denied Oseni's allegations that he was pressured to withdraw the grievance and stated that he talked to Oseni about the grievance not in his official capacity, but as a friend. Uzamere testified that Oseni had asked him to review a copy of his grievance before he had filed it, but Uzamere declined because he thought it would be inappropriate for him to do so. (Tr. 361-362.) Uzamere also stated he had helped Oseni prepare his resume for the Agency Interne position, had personally recommended Oseni to Browne, and had been to Oseni's home to celebrate his passing the bar exam. (Tr. 356-360.) Oseni denied that the two had anything other than a business relationship. (Tr. 93.)

On January 31, 2002, Browne e-mailed Oseni a written reprimand for allegedly refusing a request from a Legal Aid Society attorney to review and/or receive a copy of a case file. The attorney had called Young to complain about Oseni. The reprimand alleged that Oseni had erred in refusing the attorney's requests and that Oseni had kept the attorney waiting for one and one-half hours before calling a supervisor for advice. Oseni, contested the allegations in an e-mail on February 1, 2002, stating that the he had not refused the request and that the attorney who made the request was hostile and confrontational. Raomon Barreras, an Associate Fraud Investigator, testified that the attorney was difficult and advised Oseni to call a supervisor to aid him in dealing with the attorney's request. (Tr. 284-285.)

On February 6, 2002, Maloney sent Oseni a supervisory conference memorandum regarding a February 3, 2002, incident in which Oseni allegedly arrived for overtime when he was not needed. Although an overtime calendar listed Oseni as scheduled for duty on February 3

(a Sunday), Maloney testified that she had sent an e-mail to Oseni and the rest of the attorneys on January 27, 2001, stating that for the February schedule, "you will only be asked to do overtime if there is a need. A legal supervisor will advise you if you need to come in for overtime on your scheduled O/T day." (Tr. 491, C. Ex. 19.) DHS's e-mail records show that Oseni did not open this e-mail until February 6, 2001. (C. Ex. 19.) Additionally, Maloney called Oseni at 11:00 a.m. on February 3, and left a message to advise him that there was no need for him to work that day, but Oseni claims he did not receive the message before his shift began and arrived at the office at approximately 1:20 p.m.

After Maloney told Oseni that he was not needed that day, Oseni stated that he wanted to send an e-mail confirming his presence, and Maloney told him to send it the next time he was at work because, according to Maloney, all the available computers were in use by other attorneys, and he would have to displace someone to send the e-mail. Maloney then asked Oseni to leave the building, but, according to Maloney, he ignored her request and displaced another attorney so he could type the e-mail. (Tr. 504.) Oseni and Steven Mogel, a former Agency Attorney Interne, testified that Oseni did not displace anyone from a computer terminal. (Tr. 108, 311.) Katherine Ajayi, an Agency Attorney testifying on Oseni's behalf, stated that there was a general sign-in policy at the commencement of work. (Tr. 320.)

On February 13, 2002, Oseni sent an e-mail to Maloney to assert that sending an e-mail to record his presence on February 3 was in accordance with established procedures and that he hoped Maloney's actions, in canceling his overtime and ordering him out of the building, were not part of an "on-going effort at harassment and retaliation" for filing a grievance.

On February 28, 2002, a Step II conference was held and Oseni's out-of-title grievance

was denied on March 6, 2002. On March 1, 2002, Young sent Oseni a letter stating that as of March 6, 2002, his services as an Agency Attorney Interne were no longer required. The letter gave him the option of resigning prior to that date.

On March 18, 2002, the Union filed an additional grievance, alleging that Oseni's employment was improperly terminated because under Article VI, §§ 1(g) and 7, of the Agreement, Oseni was entitled to due process protection.[2] The Union later filed a Step III group grievance on behalf of all Agency Attorney Internes, alleging that all present and future Agency Attorney Internes are affected by DHS's denial of due process protection. Oseni also filed an Equal Employment Opportunity complaint against DHS, alleging that Maloney discriminated against Oseni because he was Nigerian.

As a remedy, the Union requests that the Board issue an order directing Respondents to cease and desist from the retaliation against and harassment of Oseni, to reinstate Oseni and restore back pay and lost benefits, and to post appropriate notices stating that Respondents will no longer retaliate against and harass employees for filing grievances. The Union also requests that the Board order the City to negotiate in good faith with the Union over due process rights, maintain the status quo during the present period of negotiations, and post appropriate notices acknowledging the City's violation of the law and stating that the City will no longer refuse to negotiate in good faith with the Union.

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[2] Article VI, § 1(g), defines the term "grievance" as:
A claimed wrongful disciplinary action taken against a full-time non-competitive class employee with one year of service in title . . . .

Article VI, § 7, is the procedure that governs after written charges of incompetence or misconduct are served.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that DHS retaliated against Oseni for having exercised his right, protected by § 12-306(a)(1) and (3) of the NYCCBL, to file a grievance against his employer.[3] The agents responsible for the action taken against Oseni knew that he was pursuing a contractual grievance with the assistance of the Union. DHS responded to Oseni's protected activity with veiled threats, harassment, and, six weeks later and one day after his Step II conference, termination of his employment. The Union asserts that Oseni was pre-scheduled to work overtime on February 3, 2002, but when he learned he was not needed that day, he had to send an e-mail confirming his presence in conformance with DHS policy, and he did not displace anyone from the computer terminal. Regarding the incident with the Legal Aid attorney, the Union claims that Oseni attempted to comply with the attorney's requests and even contacted a supervisor to aid him in responding to those requests. The Union asserts that DHS has exaggerated the alleged inappopriateness of these incidents and has not presented any evidence to rebut the clear inference of improper animus for Oseni's filing a grievance. Indeed, DHS failed

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[3] NYCCBL § 12-306(a) 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.

NYCCBL § 12-305 provides in relevant part:
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.

to produce the employees who decided to fire Oseni and offered no explanation for their failure to testify. That alone supports an inference of animus.

The disciplinary and performance record DHS relies upon does not support a contrary conclusion, as it is insubstantial and groundless. Indeed, the baseless performance evaluation and discipline imposed on Oseni demonstrate DHS's bad faith. The September 25, 2001, conference memorandum was also a sham – the accusations were inaccurate at best and at worst a complete fabrication.

The Union also argues that DHS's failure to respond to Oseni's grievance is inherently destructive of employee rights because it signals to all employees the futility of the grievance process and thereby diminishes the Union's ability to represent employees effectively. Furthermore, in claiming a right to terminate Oseni and all Agency Attorney Internes at will, in direct violation of the Agreement's language dictating the procedure to follow when disciplining employees, DHS unilaterally changed the terms and conditions of Union-represented employees. DHS's actions constitute a refusal to bargain in good faith and a violation of the status quo, in contravention of §12-306(a)(4) and (5) of the NYCCBL.[4]

City's Position

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

* * *

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization. . . .

The City argues that the dispute sounds in contract and must be dismissed because the Board lacks jurisdiction over contract violations. Here, the contract does not grant Oseni the right to grieve his termination, but to the extent the Union claims it does, the appropriate forum for the resolution of the dispute would be through the mechanisms provided by the Agreement, and Oseni has already filed a grievance contesting the termination of his employment. In the alternative, the Board should defer the matter to arbitration.

The City does not dispute that it knew of the out-of-title grievance but states that the Union has not offered any facts that might support a conclusion that Oseni's grievance was a motivating factor in DHS's decision to terminate his employment after 18 months in a title with an outside limit of 24 months. Oseni did not file a grievance until after he received a negative evaluation giving him notice – for the second time in three months – that if his job performance did not improve, he would not be appointed to the Agency Attorney title. Furthermore, Oseni filed his grievance in January 2002, the month he was to be reconsidered for promotion.

According to the City, the Union ignores the warnings DHS gave Oseni to improve his work performance or risk "immediate termination." The sequence of events fails to establish animus but rather demonstrates that the termination of Oseni was for legitimate business reasons related to his inadequate performance of his duties during what is, in essence, a two-year probationary period. If anything, it would appear that Oseni's out-of-title grievance filing was motivated by his realization that his supervisors had noticed a decline in his job performance.

DISCUSSION

Initially, we address the City's demand to defer the Union's entire petition. Pursuant to §

12-309(a) of the NYCCBL, this Board has the exclusive jurisdiction to prevent and remedy violations of § 12-306.[5] This Board may exercise jurisdiction over an alleged breach of an agreement when the acts constituting the breach also constitute an improper practice. *Assistant Deputy Wardens/Deputy Wardens Ass'n*, Decision No. B-4-2003 at 7. Here, although the Union has filed a grievance alleging that Oseni's employment was terminated without due process, the outcome of that grievance would not resolve the question whether DHS retaliated against him for his alleged union activity. Thus, we will not defer this section of the petition because the Union's allegations constitute an independent statutory claim under § 12-306(a)(1) and (3). *Local 1180, Communications Workers of America*, Decision No. B-28-2002 at 8.

However, we will defer the portion of the Union's claim that DHS made a unilateral change in due process rights during a period of negotiations, thereby violating the status quo provisions of the NYCCBL. In accordance with New York Civil Service Law, Article 14, § 205.5(d),[6] we have declined to exercise jurisdiction over improper practices when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement. *District Council 37*, Decision No. B-36-2001. This claim involves a matter that arguably is

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[5] Under NYCCBL § 12-309(a)(4), the Board shall have the power and duty:
to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders. . . .

[6] CSL § 205.5(d) provides, in pertinent part:
. . . the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

covered by Article VI of the Agreement, which governs disciplinary procedure. Both Oseni's March 18, 2002, grievance and the Union's subsequent group grievance raise the issue of due process rights. Under these circumstances, we will defer the status quo claim arising under § 12-306(a)(5) because the underlying facts are the same as those in the contractual grievances. *Civil Service Bar Ass'n*, Decision No. B-17-2002.

We now turn to the substantive issue of whether DHS retaliated against Oseni for his Union activity. To determine whether alleged discrimination or retaliation violates § 12-306(a)(1) and (3) of the NYCCBL, this Board uses the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, Decision No. B-51-87. *Salamanca* requires that a petitioner show that:

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

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See Rivers,* Decision No. B-32-2000.

Here, the first prong of the test has been fulfilled because filing a grievance constitutes protected activity under the NYCCBL, *Doctors Council*, Decision No. B-12-97, and the City acknowledges that DHS was aware of Oseni's out-of-title grievance.

However, we find that the Union has not satisfied the second prong of the test because it has not shown that the employee's protected activity was the motivating factor in DHS's decision

to terminate Oseni's employment. 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, and allegations of improper motivation must be based on specific, probative facts, rather than on conclusions based upon surmise, conjecture or suspicion. *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. Furthermore, 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. *Lieutenant's Benevolent Ass'n*, Decision No. B-49-98 at 7.

After considering all the testimony, the affidavits, and the pleadings, we find that union activity was not the motivating factor behind DHS's decision to terminate Oseni's employment. In September 2001, before he filed his grievance, Oseni was placed on notice that the request to appoint him to the Agency Attorney title had been withdrawn based upon concerns about his performance. At that time, Oseni was also told that DHS would reconsider the promotion after January 2002 if his performance improved and that he risked "immediate termination" if the problems with his performance continued. Before he filed the grievance, Oseni also received a second warning, in the December 19, 2001, evaluation, that he had to improve his work performance.

The Union does not limit the claims of hostility and animus against Oseni to those actions that occurred after his January 16, 2002, filing of an out-of-title grievance, which was the only instance of union activity raised in this proceeding. Indeed, the Union claims that the September 25, 2001, conference memorandum and Oseni's December 2001 performance evaluation, delivered prior to the filing of his grievance, were a sham and were meritless. Oseni states that he was shocked to learn of the "Good Minus" on the December 2001 performance evaluation

because it was such a departure from his other evaluations and came without warning, aside from the "dubious" September conference memorandum. Oseni also states that he asked for specific examples of his deficient performance from Browne and Maloney but that they could not provide a single one. We find that even if Oseni's supervisors were hostile to him prior to the filing of his grievance, he had not yet engaged in union activity. Thus, these incidents are not evidence of anti-union animus.

Oseni's effort to downplay the significance of the conference memorandum and performance evaluation is not supported by the record. Although his early evaluations were above average, it appears that at some point before September 2001, his performance had begun to deteriorate. The testimony shows that prior to filing his grievance, Oseni refused to work overtime on a specific supervisor's shift, and his performance evaluation from December 2001 notes that he needed to accept constructive criticism, was often seen socializing and taking breaks, failed to demonstrate that he grasped the essential aspects of the work performed, and failed to apply DHS's guidelines correctly.

Despite warnings that he needed to improve his work, Oseni continued to have performance problems after he filed his grievance. In one instance an outside attorney complained to the DHS Acting General Counsel about Oseni's behavior in handling a request to review a file. Additionally, after neglecting for nearly ten days to open a supervisor's e-mail that expressly told staff not to report to work for overtime unless specifically told to do so, Oseni arrived at the office for overtime work. Then, in direct defiance of Maloney's orders to leave immediately and not to send an e-mail confirming his presence, Oseni insisted on remaining at the office and sending such e-mail. (Tr. 107-108.)

The record simply does not demonstrate that DHS was hostile toward Oseni because he filed the grievance or that DHS's actions constituted an improper practice. Rather, the evidence shows that DHS's treatment of Oseni after he filed his grievance was consistent with DHS's actions before he filed the grievance. *See Communications Workers of America, Local 1180*, Decision No. B-32-2000; *Muller*, Decision No. B-35-80.

We find the Union's remaining allegations of interference to be insufficient to state an improper practice claim. Accordingly, the petition concerning Oseni is dismissed. The Union's status quo claim is deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the due process contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL.

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 portion of the improper practice petition regarding the unilateral change in due process rights for noncompetitive employees, filed by the Civil Service Bar Association, Local 237, IBT, docketed as BCB-2288-02 be, and the same hereby is, deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the due process contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL, and it is hereby

ORDERED, that the remainder of the improper practice petition be, and the same hereby is, denied.

Dated: July 29, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

ERNEST F. HART
MEMBER