L. 237, CSBA v. City & DOT, 71 OCB 32 (BCB 2003) [Decision No. B-32-2003 (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-32-2003
Docket No. BCB-2345-03

-and-

CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,

Respondents.

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DECISION AND ORDER

On May 30, 2003, 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 Transportation ("City" or "DOT") violated § 12-306(a)(1) and (3) 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 grievances. The City contends that the grievances were not a motivating factor in its decision to terminate his employment. We dismiss the petition because the Union has failed to demonstrate that DOT's actions were improperly motivated.

BACKGROUND

The Union represents employees at DOT in the titles Agency Attorney and Agency Attorney Interne. The job description for Agency Attorney Interne states that the position is a non-competitive class position which has a maximum two-year term. The position is typically filled by recent law school graduates who have not yet been admitted to practice.

Effective July 30, 2000, Madochee Andre was appointed to the title of Agency Attorney Interne even though he was already admitted to practice. He was assigned to the Office of the Advocate, which is responsible for employee discipline. The Union alleges that after Andre had worked in the Agency Attorney Interne position for some time, DOT advised him that he would be advanced to Agency Attorney Level I by January 2001. By April 2001, Andre had not been promoted. On April 5, 2001, Andre filed an out-of-title grievance alleging that he was performing the duties of an Agency Attorney I. The grievance was sustained at Step II of the grievance procedure, and DOT was ordered to compensate Andre and to cease and desist from assigning Andre to out-of-title duties. Andre was paid as a result of the award, but on February 19, 2002, Andre appealed the award because it did not include a promotion to Agency Attorney I.

On January 7, 2002, Andre filed another out-of-title grievance, this time alleging that he was performing Agency Attorney II duties. On February 7, 2002, Andre amended the grievance to request compensation as an Agency Attorney I. The Union contends that after the amendment was filed, Andre was twice pressured to withdraw his grievances by his supervisor, Keith Howard, a DOT Assistant Commissioner. The Union also asserts that Howard told Andre that the new Assistant Commissioner of Human Resources, Marlene Hochstadt, was not pleased with Andre's grievance activities and that he might be fired if he "kept it up." In an affidavit, Howard denied making those remarks and asserted that he later recommended Andre to Hochstadt for a

promotion. Andre did not withdraw the grievances.

On June 2, 2002, Andre was promoted to Agency Attorney I. Also in June, he received a job evaluation covering the period from January 1 through December 31, 2001, rating him as "Very Good," the second highest possible rating. The evaluation was signed by Howard, Hochstadt, and Erica Caraway, Acting Disciplinary Counsel of the Advocate's Office.

On July 1, 2002, Andre met with Hochstadt to discuss his pending grievances and to inform her that he believed he was entitled to back pay for work performed before the date he was promoted to Agency Attorney I. Andre also complained that Caraway was abrasive towards him and belittled his grievances. According to the Union, Hochstadt later told Andre that he should be happy with the promotion and that DOT had done what it could do for him.

At a later date, a Union Business Agent met with DOT representatives to discuss Andre's grievances. The parties agreed that Andre would receive compensation at the Agency Attorney I rate from the date of the Step II decision through the date he was advanced to Agency Attorney I. On December 20, 2002, Andre received that back pay.

On December 2, 2002, Andre requested that he be granted leave for December 3 and 6, 2002. In an e-mail, Caraway responded on December 3 that the leave request was denied because Andre had already requested a significant amount of time off to accommodate his secondary employment. Caraway noted that Andre failed to appear at work that day despite her denial of the request for the day off and that, as a result, he would be marked absent without leave. She recounted that on November 8, 2002, Andre had requested a two week leave from November 12 through 25, and despite being understaffed, she had granted the request. Caraway wrote that her approval of the November 8 request had been made on the condition that any

subsequent requests would be denied. However, Caraway continued, immediately upon Andre's return on November 25, he again asked for a two-week extension of the leave from November 26 through December 6 because of a scheduling conflict with his secondary employment. Caraway denied the second request, but, according to her e-mail, Andre subsequently asked for another two days off from November 26 through 27, again because of his secondary employment. This request was granted. Finally, Caraway explained that Andre's latest request, for December 3 and 6, was in total disregard to their previous conversations on the matter.

Andre replied to the e-mail on December 4, 2002, and claimed that his initial request for two weeks leave was made on November 7, 2002. He then stated: "You constantly make mention of administrative convenience and lack of adequate notice my leave requests are causing. Would you be less inconvenienced if I were to resign with no notice?" He said he recognized that his absence would cause inconveniences, as all absences do, including those due to illness and injury, and asserted that he offered to work evenings and on his days off from his other job to fill in the gaps until he could get a regular schedule at his other job. He then went on to state that he was entitled to his annual leave, but:

> I'm in a non-competitive title and therefore not entitled to personal leave. Somehow, I naively thought that you would take that fact into consideration and allow me to use my annual leave balance to work out my scheduling kinks. Instead, you've chosen the low road. You went from minimizing and marginalizing my role . . . when my grievances were duly filed for compensation owed for the out-of-title work that I was doing, to making it seem like the world will come to a catastrophic end if I'm not here to bring 'balance to the force.' Can't you make up your mind already which role you want me to play, the stepchild or the Jedi?

He went on to state, "This isn't your finest hour as a human being! You should be using your position to mentor and motivate people like me to soar to new heights, not bring them down in a

ball of flames." Caraway's response, if any, is not in the record.

On January 23, 2003, Caraway e-mailed Andre, asking him, in detail, to perform certain tasks on a particular file. On January 24, Andre sent an e-mail to another employee, which was copied to Caraway and Hochstadt, asking the employee to provide him with information relating to the file on which Caraway had directed him to perform work. In that e-mail, he then stated: "In another shameless attempt to color me bad and make it look like I'm not doing my job, [Caraway] is asserting the tape or tapes which are in your possession were forwarded to me . . . ." That day, Caraway, responding to the e-mail, stated that in the end, he is responsible for researching and preparing his cases, and Andre responded that he had been putting forth a good faith effort to comply with her requests on the case, but that:

> [t]his level of nitpicking is horrible for morale and my health (my head has been pounding since your adverse reaction to the charges not being ready yesterday and made worse this morning when I was unpleasantly surprised by your attempts, through e-mail messages, to paint a distorted picture of the kind of employee I am to [Hochstadt]), and only shows me that the day a lapse in judgement causes me to make a real mistake you're going to go straight for my figurative jugular. If you refuse to make live and let live your motto that's all fine and dandy. Just remember that two can play at that game.

On January 31, 2003, Andre's employment was terminated. When Andre asked Hochstadt why he was being terminated, Hochstadt replied that it was a business decision. The Union contends that Hochstadt also stated that "Andre had responded to too many e-mails concerning cases to which he had been assigned." The Union then challenged the termination, and DOT contended that the protections of the Non-Competitive Disciplinary Procedure do not apply to Andre because he had less than one year's service in the Agency Attorney title at the time he was terminated. DOT refused to convene a Step II hearing and the Union appealed to

Step III on February 13, 2003. When the Union did not receive a response, it filed a request for arbitration on April 2, 2003.

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 Andre, to make Andre whole for the discrimination and retaliation he has suffered, including reinstatement with full back pay to January 31, 2003, and to post appropriate notices.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DOT violated § 12-306(a)(1) and (3) of the NYCCBL by terminating Andre's employment and harassing him for exercising his rights to file grievances.[1]

The Union asserts that Caraway and Hochstadt were responsible for Andre's termination and were aware of Andre's protected activity. Caraway, according to the Union, recommended to Hochstadt, who had authority over Personnel, that Andre be terminated, and on January 31, 2003, Hochstadt indeed terminated Andre's employment. The Union denies that Andre acted

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[1] 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 . . . .

unprofessionally toward Caraway.

The fact that Andre never received any counseling memoranda or had any disciplinary action taken against him – receiving only a "Very Good" rating on his performance evaluation – further supports the conclusion that DOT fired Andre because his supervisors were annoyed by his assertion of protected rights. He was also pressured to withdraw his grievances by his supervisor. Thus, the Union has presented direct evidence supporting animus and circumstantial evidence supporting an inference that DOT acted on improper motives in terminating Andre's employment.

The Union further argues that DOT cannot show that it would have fired Andre even in the absence of his protected activity because they failed to discipline Andre contemporaneously for what they now claim was inappropriate behavior and because they had previously rated his overall job performance as "Very Good." An employer's failure immediately to act on behavior only later cited to justify termination can only be read as acceptance of that behavior.

In response to the City's argument that Andre's employment was terminated due to lack of work or for other reasons, the Union notes that Andre's request for leave in December was rejected based upon under-staffing. Thus, it is pretextual for DOT to argue that lack of work prompted its decision. The Union also argues that Andre was entitled to due process rights as an Agency Attorney under the collective bargaining agreement since he was performing more than a year's work in that title.

City's Position

The City argues that Petitioner has failed to make out a prima facie case. While the City admits that Hochstadt knew of Andre's grievance, the Union fails to establish that the grievance

activity was a motivating factor in the employer's decision. The City asserts that it had a legitimate business reason for terminating Andre's employment. After his promotion, Andre consistently behaved in a manner inappropriate to the title Agency Attorney. The record demonstrates that Andre made unreasonable leave requests, disparaged his supervisor in an e-mail to other employees, and evinced unacceptable workplace behavior in that he addressed her in a less than professional manner. Additionally, the City argues that § 12-307(b) of the NYCCBL provides that "[i]t is the right of the City . . . acting through its agencies, . . . to relieve its employees from duty because of lack of work or other legitimate business reasons." The City also contends that Andre had no contractual right of continued employment.

DISCUSSION

The issue in this case is whether the termination of Andre's employment was a result of his union activity. This Board finds that Petitioner has not presented sufficient allegations of fact to state a *prima facie* case that DOT discriminated against Andre because of 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.

A prerequisite to analysis under this standard is a finding that the purported union activity is the type protected by the NYCCBL and that the employer had knowledge of the protected activity. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 12. Here, it is not disputed that Andre engaged in protected activity when he pursued his grievances and that management was aware of that protected activity.

However, Petitioner has not fulfilled the second element of the test. Proof of the second element must necessarily be circumstantial absent an outright admission. *City Employees Union, Local 237,* Decision No. B-13-2001 at 9; *Communications Workers of America, Local 1180*, Decision No. B-17-89 at 13. At the same time, Petitioner must offer more than speculative or conclusory allegations. Claiming an improper motive without showing a causal link between the management act at issue and the union activity does not state a violation of the NYCCBL. *See Civil Service Bar Ass'n*, Decision No. B-5-2003 at 8; *Correction Officers' Benevolent Ass'n,* B-19-2000 at 8.

Although the Union contends that Andre's employment was terminated after he was warned to discontinue his grievance activities, the course of events following the alleged warning does not support that assertion. Andre filed his latest grievance in January 2002 and amended it in February 2002. He claims that he was warned in April 2002 by Howard that the new management, including Hochstadt, might terminate his employment if he continued engaging in protected activity. Nevertheless, in June 2002, months after Hochstadt's alleged statements but

with his grievances still active, Andre was promoted and given a favorable performance evaluation, signed by Howard, Hochstadt, and Caraway. Furthermore, at a later date, the second grievance was settled in a way favorable to Andre.

Then, in November and December 2002, Andre asked for nearly one month off, two weeks at a time and with only a few days' notice, because of a scheduling conflict with a second job. Subsequently, he was specifically told by his supervisor that he could not take any more days off, and his supervisor denied yet another leave request made only the day before it was to be taken. Nevertheless, on December 3, 2002, a day on which he was supposed to report, Andre still failed to come to work.

Thereafter, Andre sent several e-mails which the City contends were inappropriate. Andre, in the time period close to the termination of his employment, repeatedly made statements such as: "Would you be less inconvenienced if I were to resign with no notice? . . ."; "This isn't your finest hour as a human being. . . ;" "You should be using your position to mentor and motivate people like me to soar to new heights, not bring them down in a ball of flames." Later, he disparaged Caraway, his supervisor, to a co-worker in an e-mail copied to her and Hochstadt. He then went on to state, in a direct e-mail to Caraway, that, "This level of nitpicking is horrible for morale and my health (my head has been pounding since your adverse reaction . . . .) Just remember two can play at that game."

The termination of Andre's employment was only seven days after the latest round of his inflammatory e-mails. No facts indicate that the termination of his employment has any causal connection to Andre's grievance filings. *See United Probation Officers Ass'n*, Decision No. B-53-90. The facts indicate that, beginning in November 2002, his conduct, including the

excessive leave requests, the failure to appear at work one day, and the inflammatory e-mails was the reason he was fired, not his filing grievances. Thus, the Union has not shown that DOT was improperly motivated when it terminated Andre's employment. The Board leaves any questions surrounding Andre's contractual rights to the grievance process, which has already commenced. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003. Therefore, this Board dismisses the 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 improper practice petition, BCB-2345-03, filed by Civil Service Bar Association, Local 237, be, and the same hereby is, dismissed.

Dated: October 30, 2003
New York, New York

MARLENE A. GOLD
CHAIR

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