CSBA, L.237 v. OLR & Dep't of Correction, 71 OCB 5 (BCB 2003) [Decision No. B-5-2003 (IP)]

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

-between-

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

Decision No. B-5-2003
Docket No. BCB-2268-02

Petitioner,

-and-

CITY OF NEW YORK AND NEW YORK CITY DEPARTMENT OF CORRECTIONS,

Respondents.
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DECISION AND ORDER

On February 22, 2002, the Civil Service Bar Association, Local 237, International Brotherhood of Teamsters ("CSBA" or "Union"), on behalf of Martin Schulman, filed a verified improper practice petition against the City of New York and New York City Department of Corrections ("City" or "DOC"). The Union alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), DOC harassed Schulman and retaliated against him by forcing him to change his work hours and by investigating his residency after he engaged in protected activity. The City maintains that Schulman's union activity had no bearing on its actions. This Board finds that the Union has not presented sufficient allegations of fact to state a *prima facie* case that DOC

retaliated against Schulman for his union activity, and we therefore dismiss the petition.

BACKGROUND

Martin Schulman, an Attorney, Level III, began working in the Legal Division of DOC in May 1988, at which time he signed a form indicating that he was a resident of New York City and that he would notify DOC if he changed his residence. In November and December 1989, March 1990, and December 1994, Schulman produced letters from an orthopedist, who explained that Schulman had cervical disease, which required him to work for limited hours. Throughout the 1990's, Schulman had a flexible work schedule, usually arriving between 10:30 and 11:00 a.m., and sometimes around noon.

In September 2000, Deputy General Counsel Linda LaGreca started her job at DOC. According to the City, but denied by the Union, LaGreca immediately became concerned over Schulman's hours and advised him to "correct" his schedule. On June 19, 2001, LaGreca sent an e-mail to Schulman concerning his accrual of compensatory time. She warned that she could no longer allow him to receive credit if he worked through his lunch hour. He would have to follow the rule to extend his day in order to receive compensatory time.

Also in June 2001, Elizabeth Loconsolo, General Counsel of DOC, asked Elmer Toro, Deputy Commissioner of DOC, to investigate rumors that three out of the seven attorneys in DOC's Legal Division resided outside New York City. Schulman was not one of those mentioned.

On September 13, 2001, following the attack on the World Trade Center, Rhonda Leader,

an attorney in DOC's Legal Division, called Schulman at home to say that he could return to work at 60 Hudson Street. According to the petition, Schulman called his supervisor, LaGreca, to assert on behalf of himself and his co-workers that the DOC attorneys should not yet return to work since the Mayor had asked that all non-essential workers south of Canal Street stay out of the area. The Union asserts, but the City denies, that Schulman was told that if he did not report to work, a charge would be taken against his annual leave bank, and management was "upset with Schulman's questioning." Schulman allegedly told LaGreca that he did not want to be charged with annual leave for the days he did not come in and that the issue was one for the Union to resolve.

All attorneys in the Legal Division except Schulman returned to work by September 17, 2001. On September 18, 2001, Loconsolo again requested an investigation into the residency, this time, of all attorneys in the Legal Division. She specifically mentioned Schulman along with another attorney in that division.

When he returned to his office on September 24, 2001, Schulman asked LaGreca whether he would be paid for his time away. He said that he had spoken with the Union and believed that he should not be charged with annual leave. While LaGreca did not know that day how the City would resolve the issue, shortly after he returned to work – and consistent with a citywide determination – Schulman learned that he would not be charged with annual leave.

In a letter dated October 10, 2001, Schulman's doctor advised DOC that Schulman should work no more than six to seven hours per day until October 29, at which time he could resume full duty. On October 23, 2001, Loconsolo sent all Legal Division staff a memorandum

indicating the hours that each attorney was to be at work. Schulman's were listed as 0945/1015 to 1745/1815. Schulman's time sheets show that in October, he again used his lunch hour as a work hour, and on the sheets for the weeks ending October 27 and November 3, 2001, LaGreca charged the hour to "sick leave" and wrote: "not authorized to work through lunch."

On November 8, 2001, Loconsolo wrote to Schulman:

> Deputy G/C LaGreca advised me of your discussion with her yesterday, which I found – to say the least – disturbing. Ms. LaGreca has told you repeatedly, over an extended period of time, that you are not to work through lunch or claim "sick time" up front and no lunch.
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> Moreover, by memo dated October 23rd, you were reminded that you are required to be at work no later than 1015 hours each morning. You have been coming in to work at random times that were never authorized by anyone. That practice will not be tolerated. You are doing a disservice to your colleagues and this Department in showing up whenever you feel like it. Not only is that inconsiderate, it is unprofessional. You are rarely available for meetings requiring the attendance of a Department attorney, and rarely available to handle any telephone matters during the morning, which is when this division experiences the greatest volume of phone calls. That's unacceptable and places greater burdens than necessary on your colleagues.
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> As I stated to you during one of our discussions last week concerning your work hours, the fact that you stay up until midnight or 0100 hours during the week does not entitle you to come to work late. . . .
>
> For the week of October 29th, I authorized you to be in work by 1045 hours. I made it abundantly clear that that applied to that specific week only. I reminded you yet again, during our discussion on Friday afternoon, that – at the end of that week – you were to resume your regular work schedule (in work by 1015 hours). When you advised me that you might be late at times, due to the trains, I reminded you that Rhonda Leader rarely reported to work after 1010 hours, and you should be catching the same train as she did. I also advised you that if you reported to work late, the time would be deducted from your leave accrual. I at no time indicated you would not be subject to discipline for repeated lateness. Nor did I indicate that latenesses would impact your leave time only.
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> Again, you are required to be in work each morning by 1015 hours. Your

repeated failure to report to work at that time may result in disciplinary action.

On January 7, 2002, Schulman informed LaGreca that his medical condition was worsening and advised her that he felt stressed since he was working on a particularly difficult case. He sought to restore his previously flexible arrival time. On January 10, 2002, Schulman received a letter to report to DOC's Department of Investigation concerning his residency, and he did so on January 14. After he was sick on January 16 and 17, 2002, he received an e-mail from LaGreca on January 18. She stated that he had not adequately followed up on his cases; that she had to assign other attorneys his work; that she had received numerous complaints about his failure to return phone calls or comply with requests from the Law Department; and that the court, as noted that day in *The New York Law Journal*, wrote that the failure to comply with discovery orders in one of his cases was willful and contumacious.

On January 25, 2002, Schulman sought a three month unpaid leave under the Family and Medical Leave Act; the record is unclear as to the response. On January 31, 2002, a CSBA Office Administrator sent a letter to a DOC investigator seeking more time for Schulman to present his case concerning residency since the Union's president and business agent were unavailable to assist Schulman. That request was denied, and the Union was told that Schulman himself could send documents with his address. The Union asserts that Schulman did provide documentation concerning his residency on February 6, 2002. DOC then advised Schulman by letter dated February 11, 2002, that the investigation was complete but that Schulman could submit relevant documents by February 20, 2002, to support his claim of residency. On March 6, 2002, Schulman was terminated for violating the terms and conditions of his employment by

failure to meet the residency requirement. Without specifying dates, the City states that two other attorneys in the DOC Legal Division resigned and one retired for lack of residency.

The Union asks that the Board direct Respondents to cease and desist from harassing and retaliating against Schulman and to make him whole, including back pay.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City violated NYCCBL § 12-306(a)(1) by interfering with Schulman's rights under § 12-305 to assist a public employee organization in the administration of its collective bargaining agreement and violated NYCCBL § 12-306(a)(3) by discriminating against Schulman to discourage participation in the Union's activities.[1]

According to the Union, DOC's retaliation against Schulman started after he phoned LaGreca on September 13, 2001, to say that time and leave after September 11 was a Union issue. Then, upon returning to work on September 24, 2001, he informed LaGreca that he had spoken with the Union concerning the possible charge of annual leave for absences after

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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.

§ 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 . . . .

September 11.

One form of retaliation, the Union says, was management's altering Schulman's and other Legal Division attorneys' work hours. In her October 23, 2001, memorandum, Loconsolo listed Schulman's arrival time between 9:45 and 10:15 a.m., earlier than his previous starting time. The Union denies that LaGreca became concerned over Schulman's hours when she became General Counsel at DOC in September 2000. DOC had long had a policy of flexible time, especially for Schulman, who had medical problems. Before he spoke with his Union, Schulman had not been disciplined, warned of possible discipline, or informed that he would be marked late. DOC's reasons for requiring Schulman to report to work by 10:15 a.m. – to attend meetings and answer phone calls – is a subterfuge to disguise discriminatory intent.

The second form of retaliation was DOC's initiation of an investigation into Schulman's residency. DOC did not provide Schulman with its evidence or give him an opportunity to test that evidence. Nor was he provided the same length of time afforded others whose residency was questioned to respond to the allegations.

Finally, the Union maintains, the petition is timely because Schulman learned only on October 23, 2001, within four months of filing, that DOC changed his schedule, and he was not aware of DOC's residency investigation until January 2002.

City's Position

The City claims that the petition is untimely because enforcement of Schulman's schedule started in September 2000, when LaGreca started work. In addition, Loconsolo began the residency investigation in September 2001, more than four months prior to the filing of the

petition.

According to the City, CSBA fails to allege sufficient facts to state a *prima facie* case that DOC committed an improper practice. Although Schulman alleges that he told LaGreca that he had called the Union about charging absences to annual leave after September 11, he did not state that he planned to file an individual or group grievance or that he was a spokesperson for his colleagues.

Furthermore, the City contends, the facts do not show that the union activity was a motivating factor in DOC's actions. The Union's allegation that DOC was upset about Schulman's union activity when management had so many concerns at that time is absurd, the City argues. DOC's concern was that Schulman report to work on time, attend morning meetings, and not inconvenience his colleagues. In addition, Loconsolo requested investigation into the residency of all Legal Division attorneys on September 18, 2001, before Schulman came back to work. The allegations that the protected activity motivated the acts complained of are speculative and conclusory.

Finally, the decisions to enforce rules regarding arrival time and overtime and regarding residency requirements were based on legitimate business reasons under NYCCBL § 12-307(b).[2]

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[2] NYCCBL § 12-307(b) provides in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees . . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization . . . .

DISCUSSION

Addressing initially the issue of timeliness, this Board may not consider any claimed violation of the NYCCBL if that violation occurred more than four months prior to the filing of an improper practice petition. NYCCBL § 12-306(e); § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1); *see Social Services Employees Union, Local 371*, Decision No. B-19-2002 at 6. Here, since the petition was initially filed on February 22, 2002, only claims involving events that occurred after October 22, 2001, are deemed timely. The Board will consider allegations regarding prior events only as background. *Id.; Krumholz*, Decision No. B-21-93 at 11.

The issue in this case is whether DOC harassed or retaliated against Schulman because of protected activity. To determine if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, Decision No. B-51-87. Petitioner must demonstrate that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. the employee's union activity was a 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.

This Board has found that an employee's seeking assistance from a Union is protected activity. *See Rivers*, Decision No. B-32-2000; *and cf. Communications Workers of America*, Decision No. B-2-88 at 17 (supervisor's comments did not violate employee's protected right to seek assistance from union). If an agent of the employer has knowledge of that activity, a petitioner establishes the first prong 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. Alleging 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 Ottey*, Decision No. B-19-2001 at 8; *Correction Officers' Benevolent Ass'n,* B-19-2000 at 8; *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 5-6.

Here, the Union has presented evidence that Schulman specifically told his employer that he discussed issues concerning his post-September 11 absences with his Union. Thus, Petitioner has satisfied the first element of the *Salamanca* test.

With respect to the second prong – whether Schulman's protected activity was a motivating factor in his employer's challenged actions – this Board finds that the Union's allegation of retaliation is based on surmise. The evidence does not establish that DOC's issuance of the October 23, 2001, memorandum reiterating the work hours for all Legal Division attorneys was a response to Schulman's union activity. Specifically, there is no showing that DOC harbored anti-union animus. Any causal connection between DOC's enforcing work hours

and Schulman's talking with the Union about another matter is purely speculative. A June 2001 memorandum from LaGreca to Schulman shows that management had been concerned about his hours well before the union activity. That concern continued. In October, LaGreca began charging Schulman with sick time on his time sheets when he counted lunch as a work hour. Furthermore, according to Loconsolo's November 8, 2001, memorandum to Schulman, his lateness was preventing him from adequately performing his duties. Despite these warnings, DOC accommodated Schulman's medical needs through October 29, 2001, the date his doctor said Schulman could resume full duties after a medical problem in mid-October.

Nor does Loconsolo's September 18, 2001, request for an investigation into the residency of all Legal Division attorneys, with mention particularly of Schulman and another staff member, demonstrate retaliation for union activity. The substance of Schulman's September 13, 2001, phone conversation with LaGreca over returning to work and getting paid for post-September 11 absences is in dispute. Assuming that he did have that conversation as described by the Union, we conclude that his assertion of his right to consult with his Union is protected activity. *See Committee of Interns and Residents*, Decision No. B-17-95.

However, Petitioner has not established an improper motive for DOC's investigation of Schulman's residency. As early as June 2001 Loconsolo requested an investigation into the residency of DOC attorneys. Although at that time the request was limited to three attorneys, the Union has not shown that the broadening of the request to include Schulman was motivated by anti-union animus. Factors other than those violative of the NYCCBL may well have impelled the investigation, and, at an unspecified time, three attorneys in the Legal Division retired or

resigned because of this issue. Schulman was treated similarly to the other DOC attorneys. Thus, we find that the allegations of improper motive are based on conjecture and speculation, not on probative facts, as claims must be to satisfy the second prong of the *Salamanca* test. *See Civil Service Bar Ass'n*, Decision No. B-46-2001 at 6.

Even if the Union had established a *prima facie* case of retaliation, the City has demonstrated legitimate business reasons for DOC's attempts to enforce its work hours. Employers have the right to expect employees to report to work on time and perform their assigned duties. NYCCBL § 12-307(b). In this case, DOC's request that Schulman attend morning meetings and assist co-workers and clients during regular work hours was reasonably motivated by its desire to conduct business. Furthermore, DOC's concern that its employees comply with the statutory residency requirement, a qualification of employment, is legitimate. *See District Council 37, Local 375*, Decision No. B-14-2001 at 6.

Finally, the Union claims that Schulman was not given sufficient time to respond to findings concerning his residency. No contractual provision addresses employees' procedural rights with regard to the City's enforcement of its residency requirement. Furthermore, claims concerning this qualification of employment are not properly before us. Residency requirements for City employees are embodied in the Administrative Code, §§ 12-119, 12-120, and 12-121. This Board may not interpret statutes other than the NYCCBL. *See Doctors Council, SEIU*, Decision No. B-31-2002 at 9-10; *Correction Officers Benevolent Ass'n*, Decision No. B-39-88 at 5-6. Therefore, we will not attempt to assess what rights Schulman may have possessed under that law.

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-2268-02, filed by the Civil Service Bar Association, Local 237, International Brotherhood of Teamsters, be, and the same hereby is, dismissed.

Dated: February 26, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
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