L. 376, DC 37 v. DEP, 73 OCB 15 (BCB 2004) [Decision No. B-15-04 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

LOCAL 376, DISTRICT COUNCIL 37, AFSCME,

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

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Decision No. B-15-2004
Docket No. BCB-2379-04

DECISION AND ORDER

On January 21, 2004, Local 376, District Council 37, AFSCME ("Local 376" or "Union"), on behalf of Robert Weaver, filed a verified improper practice petition against the New York City Department of Environmental Protection ("City" or "DEP"). The Union alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3), DEP sought to terminate Weaver's employment in retaliation for his advising the New York State Department of Labor's Public Employee Safety and Health Bureau ("PESH") of various health and safety violations in the workplace. The City maintains that Weaver's union activity had no bearing on its determination, which, instead, was a consequence of misconduct. Specifically, DEP brought charges against Weaver for insubordination after a backhoe that he was using rolled down an embankment. After an informal conference resulted in a recommendation of termination, the

case concerning discipline was heard at the Office of Administrative Trials and Hearings ("OATH"). An administrative law judge ("ALJ") determined that Weaver had not been insubordinate but negligent in his operation of the backhoe and recommended a 60-day suspension, not termination. This Board, with the approval of both parties, takes administrative notice of the ALJ's finding of facts and of the OATH hearing transcript concerning the question of just cause. As to the issue of improper motivation, this Board, not OATH, has jurisdiction. We find that the Union has demonstrated retaliation by establishing at a hearing at the Office of Collective Bargaining ("OCB") that Weaver was disciplined in a disparate manner from that of other similarly-situated employees because of his union activities. Thus, this Board grants the Union's petition.

BACKGROUND

Robert Weaver has been employed by DEP as a Watershed Maintainer in the Catskill region since June 1985. Watershed Maintainers do such work as mow, snowplow, and repair gates, facilities, and roads around the upstate reservoirs. For 12 years Weaver acted as a shop steward and for several years has been the only upstate representative of Local 376 for the Labor-Management Safety and Health Committee. In October 2002 Weaver became Vice President and Chair of the Watershed Maintainers Chapter of Local 376 and remains in that post.

In the spring of 2003, Kevin Cox, a Senior Industrial Hygienist for PESH, inspected the Catskill facilities for several days. Weaver, Cox, and Anthony Gruerio, DEP's director of health and safety, and three others attended a final meeting in early April 2003. Weaver advised Cox of

various safety violations at the workplace, including the failure to provide Watershed Maintainers conducting chainsaw operations with complete first aid kits, the failure to establish an Exposure Control Plan to minimize employees' exposure to certain pathogens, and the failure to provide training in first aid, CPR, and blood-borne pathogens. At the hearing at OCB, Weaver testified that Gruerio became irate when he heard the complaints. Although Gruerio insisted that Weaver state the names of employees who complained, Weaver refused. Gruerio was combative, but Cox interceded to complete the meeting. Gruerio did not appear at the OCB hearing.

Todd West, who was Catskill District Engineer at the time and who handled personnel matters for DEP, was not at the April 2003 meeting but was told by others who participated in the inspection that Weaver reported violations to PESH. In June 2003, PESH issued to DEP a Notice of Violation and Order to Comply. Several of the eight "serious violations," including training in CPR and blood-borne pathogens, were those Weaver had noted during the April meeting. In August 2003, DEP petitioned for an extension of the abatement date for these violations.

On September 2, 2003, Weaver was in an accident in which a backhoe he was operating slid down an embankment and partially turned over. Because the backhoe was so close to the reservoir, Weaver, who had not been hurt, placed petroleum-absorbent pads on the soil to prevent diesel fuel from seeping into the water. Several hours later, members of the Office of Hazardous Materials Safety placed booms in the water. It took several months to repair the backhoe.

At the end of September, the president of Local 376, Gene DeMartino, called Todd West to discuss West's decision not to permit Weaver to use motorized equipment. West countered

that the Union should "lobby" a Deputy Commissioner. At the beginning of October 2003, Thomas Kattou, Treasurer of Local 376 and a grievance representative, called West to ascertain, according to Kattou, whether West would recommend to DEP's disciplinary counsel that Weaver be brought up on charges. Kattou testified that he tried to talk to West "like a gentleman" to explain that the backhoe's slide down the embankment was an accident that did not warrant termination. West's response, Kattou said, was that Weaver, as a Union representative, had made comments about chainsaw operations at a PESH investigation and that "they were pissed off about it." (Transcript ["Tr."] at 22.) Kattou understood "they" to be West's associates, including Gruerio, who attended the PESH meeting. Kattou also stated that West "assaulted" Weaver's character concerning the way Weaver acts and tells jokes. (Tr. 22, 27.) Despite Kattou's pleas that Weaver was working to the best of his abilities and that he would not try to harm himself when he had a family, West stated that he would proceed with the charges against Weaver. On cross-examination, Kattou stated that his initiating a call to West was appropriate since West would be influential in determining charges, which disciplinary counsel would issue only if Weaver's supervisors pressed for discipline.

West, on the other hand, testified that his conversation with Kattou was similar to that with DeMartino concerning Weaver's not using motorized equipment. West did say that he had referred the incident to disciplinary counsel; however, he did not recall any discussion of Weaver's possible termination or of Weaver's responsibilities as a representative on the health and safety committee. West stated that he and Kattou did not talk about the PESH meeting, Weaver's complaints, or angry DEP officials. Nor did West assault Weaver's character. (Tr. 86,

94-96.)

West said that, typically, if he reached a decision that he had to take disciplinary action, he would call DEP's office of disciplinary counsel, which would make the ultimate determination whether to bring charges. (Tr. 78-79.) Specifically, West spoke to Weaver's immediate supervisor, Gary Koerner, who took no position regarding discipline for the backhoe incident. West did not speak to, or could not recall speaking to, other supervisors about possible discipline. When, on cross-examination, West was asked about the referral of charges, he testified as follows:

> Q: At some point you decided to refer disciplinary charges to the disciplinary counsel for the agency; is that right?
> A: I referred the incident and the allegations to disciplinary counsel.
> Q: Did you make a recommendation to disciplinary counsel?
> A: No, I did not.
> Q: So you just referred the facts of the incident, and you did not offer any opinion to disciplinary counsel about whether or not there should be discipline?
> A: That's correct.
> Q: Did you ever at any time offer an opinion to disciplinary counsel as to whether or not there should be discipline?
> A: Yes.
> Q: When was that?
> A: The fall of '03.
> Q: It was before the charges were brought, right?
> A: Possibly.
> Q: What was your opinion?
> A: Termination.

(Tr. 93-94.)

West stated that he ultimately referred the case to disciplinary counsel based on written statements by Koerner and one of Weaver's co-workers as well as on Weaver's personnel file. During 1994 and earlier, Weaver had been disciplined on various occasions. For example, in

December 1991, Weaver received a written warning for sleeping on the job. In June 1993, Weaver received a written warning for disputing a direct order with inappropriate remarks and for failing to follow instructions. In August 1994 Weaver was fined a sum equal to seven days' pay and a loss of ten days' annual leave for damaging a boat on DEP property. On November 9, 1994, Weaver received a six week suspension for entering a locked DEP facility through a closed window without permission. In addition, in August 2002 Koerner gave Weaver written warnings for insubordination for failing to empty and put away a wheelbarrow, as directed. But from 1994 until the backhoe incident, those written warnings were the only formal discipline that Weaver received. Weaver acknowledged that the prior discipline had nothing to do with his union activity.

On November 5, 2003, Weaver was served with charges for: (1) neglect of duty; (2) failure to follow the direct order of a supervisor to "back blade" the center of a driveway; and (3) failure "to operate an agency vehicle in a safe manner; specifically, you caused the backhoe you were operating to roll over."[1] At an informal conference on December 17, 2003, West found Weaver guilty and recommended termination.

Weaver challenged the merits of the determination at OATH. At the OATH hearing, Koerner testified that following three days of rain, he gave Weaver written and oral orders to smooth out ruts in the driveway of a DEP facility by dragging the bucket on a backhoe only down the center of the road. Koerner, who admitted that he knew little about using a backhoe, said that instead of following these orders, Weaver, on his own initiative, attempted to crown the road by

[1] On February 6, 2004, DEP added two specifications concerning the backhoe incident of neglect of duty and failure to follow a supervisor's direct order to put safety signs on the road.

smoothing it at an angle so the water would run off. Otherwise, the backhoe would not have been on the side of the road instead of in the middle. Weaver's testimony was that he had not tried to crown the driveway but had lifted some dirt to fill in the ruts and level the road, as assigned. Because the ground was so wet, the vehicle lost its grip at the edge of the road.

The OATH ALJ found that Koerner's written orders made no reference to staying in the center of the road; that Koerner's oral instructions probably did not limit Weaver's activity to the middle of the road; that the testimony of one witness who heard the oral instructions was equivocal; and that since the ruts were everywhere on the road, an order to fix only the center would not be logical. The ALJ credited Weaver's testimony that he extended the boom on the backhoe in an unsuccessful effort to brace the vehicle when it started to slide. The ALJ also credited the testimony of Keith Lane, an experienced backhoe operator, who said that the backhoe was the wrong piece of equipment for leveling the roadway; however, if using the backhoe, Weaver correctly loosened some dirt before leveling the ruts. *Dep't of Environmental Protection v. Weaver*, OATH Index No. 981/04 (May 10, 2004) at 3-5. The determination was that Weaver was not insubordinate in that he did not deliberately disobey an instruction to backblade the road, but that he negligently operated the vehicle by allowing a rear tire to get too close to the edge. In addition, Weaver disobeyed an instruction to position road safety signs. The ALJ's recommendation of a 60-day suspension, instead of the original DEP recommendation of termination, was accepted by the Commissioner.

At the OCB hearing on the issue of retaliation, the Union presented evidence that of the five Watershed Maintainers supervised by Gary Koerner, others besides Weaver had had

numerous accidents in the last several years but were not disciplined. Weaver testified that one worker, Jay Truesdell, backed a dump truck into a small cabin and knocked it off its foundation. In a second incident, as he tried to turn into a driveway, the rear of Truesdell's truck fell into a deep culvert, ripping the air brakes off the truck and damaging the fuel tank slightly. Third, while carting overhead cable wire, Truesdell "yanked" the wire from a pole. At another time, he turned over a lawn tractor and slightly damaged the hood. For all these incidents, which occurred between 1998 and 2002, Truesdell received no discipline and was issued no warnings.

Another employee, Scott Truesdell, was driving a City vehicle when he hit the rear of a private vehicle. He had a second automobile accident with a member of the public in a traffic circle. In a third accident, Truesdell, while leaving the workplace, hit an engineer's City vehicle. Fourth, a rock from a dump truck hit the City vehicle that he was driving. For these incidents, which occurred between 2000 and 2003, Truesdell received no discipline or warnings.

When another Watershed Maintainer, Carl Rappleyea, drove a lawn tractor up a ramp and onto a trailer, he engaged the "power take off," which, in turn, engaged the mower blades. This action shredded the ramp, the blades, and the mower deck. Another employee, Don Ventura, hit a car with a van. Neither employee received any discipline or warning. Weaver had personally seen several of the accidents and heard about the rest. Neither Koerner, West, nor DEP's Director of Labor Relations, who attended the hearing, testified about this subject.

As a remedy, the Union asks that Weaver be given back pay for the two months' suspension; that DEP expunge all disciplinary notices from Weaver's record; and that DEP restore all his job duties.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that DEP brought disciplinary charges and, specifically, tried to terminate Weaver because of his efforts on behalf of Union members to ensure their safety and health. During the April 2003 meeting, Gruerio became irate. PESH's inspection was not like a labor-management meeting but resulted in violations for which DEP had to engage in extensive remediation, including seeking an extension for the establishment of training. Thus, Kattou's testimony that West told him that DEP officials were angry at Weaver's criticisms is believable. Furthermore, Kattou's statement was clear and specific, and he did not likely make it up "out of whole cloth."

According to the Union, the office of disciplinary counsel would not have specified charges unless West had so advised. West eventually admitted that he suggested dismissal; he also acted as the hearing officer at an informal conference and recommended that Weaver's employment be terminated.

Although the City argued at the OCB hearing that Weaver was insubordinate in operating the backhoe on the side of the road, the ALJ specifically decided that Weaver was not. The ALJ found that Koerner was not unbiased and credited Weaver's and Lane's testimony that the work order required Weaver to use the wrong equipment in bad weather conditions.

Finally, the Union argues that since Weaver was not found to be insubordinate, the backhoe incident was not unlike other accidents of the employees in his group. Yet those workers were not charged or even warned. DEP's witnesses did not dispute Weaver's testimony,

and the Union does not have to offer documentary evidence on discipline that did not occur. By bringing charges against Weaver but not similarly-situated employees, DEP was retaliating against Weaver for his union activities in violation of NYCCBL § 12-306(a)(1) and (3).[2]

City's Position

The City argues that DC 37 has failed to allege sufficient facts to state a *prima facie* case that DEP committed an improper practice based on retaliation or discrimination. No causal connection exists between any claimed union activity and DEP's decision to terminate Weaver's employment. He had been the Union's representative on the Labor-Management Health and Safety Committee and a shop steward for 12 years. Nothing in the record indicates that union activity was the cause of his being charged with insubordination and neglect of duty in the fall of 2003. Rather, Weaver's willful failure to obey his supervisor's clear verbal and written directives and Weaver's neglect of his duties resulted in the backhoe's overturning and generated the charges against him. DC 37 has not shown that union activity was a motivating factor in Weaver's termination.

Furthermore, the City asserts that the decision to discipline Weaver was based on

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[2] 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 . . . .

legitimate business reasons under NYCCBL § 12-307(b).[3] Even if participation in union activity was a motivating factor, DEP would nevertheless have brought charges against Weaver for valid reasons. Prior discipline was for occurrences similar to this one, involving insubordination and misuse and damage of agency equipment. Moreover, although Weaver testified that other Watershed Maintainers had incidents with equipment, he did not directly see most of those. Nor was he privy to the decisions made by the office of disciplinary counsel, and it is that office, not West or Koerner, that ultimately decides whether to issue charges. Weaver's reckless behavior and disrespect for supervisors justified the recommendation of termination.

DISCUSSION

The issue in this case is whether DEP disciplined Weaver in December 2003 because of his union activities, including his complaints to PESH in April 2003. This Board holds that DEP retaliated against Weaver, the only Local 376 representative who participated in health and safety issues in his region, when, because of his union activities, DEP treated him differently from the way it treated other Watershed Maintainers who experienced similar vehicular accidents.

Preliminarily, we note that this Board has exclusive jurisdiction to consider the question whether the charges against Weaver were motivated by anti-union animus and, therefore,

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[3] 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; take disciplinary action; 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. . . .

constituted an improper practice in contravention of NYCCBL § 12-306(a)(1) and (a)(3). *See Civil Serv. Employees Ass'n, Local 1000 v. New York State Pub. Employment Relations Bd.*, 276 A.D.2d 967, 969 (3d Dep't 2000), *citing Matter of City of Albany v. Pub. Employment Relations Bd.*, 57 A.D.2d 374, 375 (3d Dep't 1977), *aff'd*, 43 N.Y.2d 954 (1978) (concerning PERB's jurisdiction).[4] The relevant inquiry here is different from that engaged in at a hearing to determine whether an employee was disciplined for good cause, as is done in an OATH proceeding pursuant to Civil Service Law § 75. Indeed, in deciding a discipline action, OATH will not hear defenses of disparate treatment or selective prosecution. *See Off. of the Comptroller v. Frazier-Lee*, OATH Index No. 1199/03 (Dec. 4, 2003); *Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 (Oct. 9, 1996), *rev'd in part on other grounds*, N.Y.C. Civ. Serv. Comm'n Item No. CD 97-109-0 (Dec. 4, 1997). When a petitioner alleges disparate treatment and establishes anti-union animus at an OCB hearing, "it is irrelevant . . . whether or not cause for the employers' action in terminating [the employee] actually existed." *Civil Serv. Employees Ass'n, supra,* at 969; *City of Albany, supra*, at 375. Thus, concerning the instant disparate treatment claim, while the OATH ALJ's decision is controlling as to Weaver's alleged misconduct, any finding of wrongdoing is not relevant to our inquiry whether DEP was improperly motivated initially in issuing charges.

As to the merits, in determining 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

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[4] *See Holbrook Fire Dist.* 31 PERB ¶ 4589, *rev'd*, 31 PERB ¶ 3084 (1998), *rev'd and remanded sub nom. Civil Serv. Employees Ass'n. Local 1000 v. New York State Pub. Employment Relations Bd.*, 32 PERB ¶ 7027 (3d Dep't 1999), *rev'd on other grounds*, 33 PERB ¶ 3050 (2000); *aff'd*, 35 PERB ¶ 7011 (3d Dep't 2002) (issue as to jurisdiction not reversed).

adopted by the 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 United Probation Officers Ass'n*, Decision No. B-4-90 at 27-28.

For activity to be protected under the NYCCBL, it must be related, even if indirectly, to the employment relationship and must be in furtherance of the collective welfare of employees. *See Archibald*, Decision No. B-38-96 at 18; *McNabb*, Decision No. B-48-88 at 14-17. Participating in a labor-management meeting on behalf of other employees is a protected activity. *See District Council 37, Local 2627*, Decision No. B-27-2003 at 9; *United Probation Officers Ass'n*, Decision No. B-53-90. If management has knowledge of the activity, a petitioner establishes the first prong of the test.

Here, the City does not dispute that Weaver acted on behalf of members of Local 376 when he discussed at the meeting with a PESH inspector first-aid kits for chainsaw operators, plans to minimize employees' exposure to certain pathogens, training in CPR, and alleviation of pathogen exposure. Since Weaver's activity at this meeting related directly to the employment relationship and was in furtherance of the collective welfare of employees, it was protected under

the NYCCBL. Furthermore, a DEP official, Gruerio, was involved in the meeting, and PESH issued a Notice of Violation and Order to Comply to DEP. Thus, management had knowledge of the activity at issue. The Union has satisfied the first element of the *Salamanca* test.

For the second prong of the test, a petitioner must show a causal connection between the protected activity and the motivation behind the management act complained of. *See Committee of Interns and Residents*, Decision No. B-26-93 at 44, *enforced sub nom. Committee of Interns and Residents v. Dinkins*, No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993). Examination of this issue requires that the Board ascertain whether the employer was motivated by anti-union animus when the challenged decision was made. *See Local 768, District Council 37*, Decision No. B-15-99; *United Probation Officers Ass'n*, Decision No. B-4-90.

Here, Kattou testified that when he spoke to West in October 2003 about possible disciplinary actions against Weaver, West's response was that DEP officials were "pissed off" at Weaver for having alerted a PESH inspector about problems with the chainsaw operations. We find Kattou's testimony credible. First, Weaver testified that at the PESH meeting, Gruerio became upset and combative. Without Gruerio's appearance or any cross-examination of Weaver on this issue, Weaver's testimony buttresses the point that agency officials were angry. Second, PESH characterized the violations as "serious." In addition, because some of the remediation required training, the time and effort necessary were considerable, as DEP's request for an extension reveals. The consequences were no doubt greater than those which would normally result from a labor-management meeting. Finally, Kattou's demeanor was forthright.

On the other hand, West first testified that his conversation with Kattou was like that with

the Local's president, DeMartino, concerning Weaver's assignments. West did not recall any discussion about Weaver's possible termination. We find it unlikely that West and Kattou did not discuss that issue. On cross-examination West agreed that he told Kattou that he had referred the case for charges. West also gave evasive testimony concerning his recommendations to the office of disciplinary counsel. Thus, West's statement that DEP officials were angry, a direct response to a question about charges against Weaver, reveals that a motivating factor in disciplining Weaver was his union activity of complaining to PESH.

Once the Union has made a *prima facie* showing under the *Salamanca* test, as it has here, the burden shifts to the respondent to refute the evidence or demonstrate legitimate business reasons for its actions. *See Local 1087, District Council 37*, Decision No. B-50-90 at 25. Furthermore, if a petitioner presents evidence of disparate treatment to show retaliation, the respondent has the burden to rebut such evidence. *See Fabbricante*, Decision No. B-30-2003 at 15, 31, 36 (Board found retaliation when City offered no evidence to refute that other employees in a unit were not disciplined); *Committee of Interns and Residents*, Decision No. B-26-93 at 53 (Board found retaliation when City failed to rebut Union's allegation that grievant's file was tampered with); *Convention Center Operating Corp.*, 28 PERB ¶ 4675 (1995), *aff'd*, 29 PERB ¶ 3022 (1996) (termination of employees without legitimate explanation for disparity of treatment or severity of penalty led to conclusion of retaliation)*; Deer Park Union Free School District*, 22 PERB ¶ 3014 (1989), *conf'd*, 167 A.D.2d 398, 23 PERB ¶ 7021 (2d Dep't 1990) (same).

Here, the Union presented evidence that other Watershed Maintainers who recently worked at the same facility and under the same supervisor as did Weaver had serious accidents

on several occasions but were not issued warnings or other disciplinary charges. One employee, for example, toppled a cabin off its foundation, drove so that the rear of a truck fell into a culvert, pulled cable wire off a pole, and turned over a tractor. Other employees damaged mowers, trailer ramps, and vehicles belonging to the City or private individuals. Although Koerner, West, and DEP's Director of Labor Relations, were present at the hearing, the City failed to offer any rebuttal. The record contains no evidence to show that DEP treated other, similarly-situated employees in the same way it disciplined Weaver. That Weaver had not directly witnessed some of the incidents is of no consequence because his testimony was credible and undisputed.

The City's other argument is to no avail. In an attempt to refute the Union's showing of improper motivation, the City asserts that Weaver, active in the Union for 12 years, admitted that other charges against him had no connection to his union activities. However, "[m]erely because [management officials] did not act in a hostile manner at all times, does not mean that they may not have acted in a hostile manner at some later date." *United Probation Officers Ass'n*, Decision No. B-4-90 at 29-30.

In conclusion, the same person, West, who told Kattou that DEP officials were angry at Weaver for complaining to PESH, was the person who recommended Weaver's discharge at the informal conference. The City presented no evidence to show that DEP treated other, similarly-situated employees in the same way it disciplined Weaver. This Board concludes that but for Weaver's union activity, West would not have recommended the discipline Weaver received.

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-2379-04, filed by Local 376, District Council 37, AFSCME, be, and the same hereby is, granted; and it is further

ORDERED, that DEP and its agents cease and desist from retaliation and discrimination against Robert Weaver in the exercise of rights protected by the NYCCBL; and it is further

ORDERED, that DEP expunge all reference to the disciplinary charges concerning this incident from the Agency's files; and it is

ORDERED, that Weaver's 60-day suspension be vacated and that he be compensated with back pay for the time of suspension.

Dated: September 30, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

VINCENT BOLLON
MEMBER