OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DARRELL GRENNOCK and DELEGATE WAYNE TATUM,

Petitioners,

-and-

NEW YORK CITY DEPARTMENT OF CORRECTION and its agents, WARDEN VALERIE OLIVER, DEPUTY WARDEN OLIVO and DEPUTY WARDEN OF ADMINISTRATION BRENDA ROSS,

Respondents.

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Decision No. B-19-2004
Docket No. BCB-2384-04

DECISION AND ORDER

On February 6, 2004, Darrell Grennock and Wayne Tatum, a union delegate, filed a verified improper practice petition against the New York City Department of Correction ("City" or "DOC") and its agents, Warden Valerie Oliver and Deputy Wardens Rafael Olivo and Brenda Ross. Petitioners allege that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(3), DOC terminated Grennock's employment in retaliation for his availing himself of Tatum's representation and advice. Respondents maintain that Grennock's union activity had no bearing on the determination and that DOC properly exercised its right to terminate Grennock, a probationary correction officer. After a hearing, this Board finds that while Petitioners have set forth a *prima facie* case that the recommendation to terminate Grennock was based on union

activity, there were legitimate business reasons to so recommend and the final decision to terminate him was not in violation of the NYCCBL. Therefore, we deny the petition.

BACKGROUND

DOC maintains 15 correctional facilities with an inmate population of up to 19,000 individuals accused or convicted of crimes and sentenced to one year or less of jail time. The Anna M. Kross Center ("AMKC") houses approximately 2,500 inmates and employs 1,251 uniformed and 150 civilian employees. Warden Valerie Oliver is AMKC's Commanding Officer, Rafael Olivo is the Deputy Warden ("DW") in charge of security, and DW Brenda Ross is in charge of Administration.

According to the job title, Correction Officers ("COs") maintain security within the City's correctional facilities and are responsible for the custody, control, and care of DOC inmates. A CO's permanent employment is contingent upon successful completion of a 24 month probation period. DOC has the right to terminate probationary COs without cause during their probationary period subject to city, state, and federal law.

Prior to the end of their probationary period, all COs are reviewed by the Correctional Committee on Uniformed Personnel ("COUP"). COUP is an advisory board made up of senior members in DOC and makes recommendations to the Commissioner on whether to approve a CO's permanent appointment or to extend a probationary period. COUP also reviews referrals from Commanding Officers concerning individual COs during their probationary period.

All uniformed members of DOC are subject to discipline within the facility. The lowest level is verbal counseling. A member may also be given a corrective interview and a note that

states the violation and the member's acknowledgment. This interview is not considered discipline but a way to correct behavior.

Pursuant to DOC Directive 4257, violations which are inappropriate for corrective interview are subject to Command Discipline ("CD").[1] A CD is defined as "informal, non-adversarial, non-judicial punishment available to a Commanding Officer to correct minor deficiencies and to maintain discipline among uniformed members within his/her Command." Within 30 days of a violation, the supervisor prepares a complaint setting forth the specifications and the Rules and Regulations alleged to have been violated. If it is determined that the specifications are appropriate for CD, the member has an opportunity to rebut the allegations at an informal hearing. The Directive provides that a member has the right to union representation at the hearing and states: "In no case, shall a member receive an increased penalty because he/she exercised that right." If the charges are substantiated, the member is advised of the penalty, which is based on a pre-set schedule. After one year, if a member has not received penalties for other acts, the CD is expunged from the member's personnel file.

Permanent employees have the right to refuse a CD penalty and receive a memorandum of complaint ("MOC"), which results in formal charges and a hearing pursuant to § 75 of the Civil Service Law ("CSL") at the Office of Administrative Trials and Hearings ("OATH"). Since probationary employees do not have § 75 rights, they do not have the prerogative to refuse a proffered penalty and opt for a trial at OATH. According to Warden Oliver, since there is no other form of discipline within a facility, a Commanding Officer has no choice but to refer a

[1] Certain violations, not at issue here, such as erroneous discharge of an inmate, use of force against an inmate, use, sale or possession of drugs or contraband are considered too serious for CD and are handled outside the facility.

probationary employee who refuses a CD penalty to COUP to see whether it will proceed with termination, grant tenure, or extend probation. A "COUP letter" is prepared detailing the specifics of the violation, the probationer's unwillingness to accept the CD, and a summary of the CO's record.

CO Wayne Tatum

On June 19, 2003, CO Wayne Tatum was elected as a union delegate at AMKC. The Warden has formal monthly meetings with Tatum to discuss labor-management issues as well as informal discussions when Tatum calls or comes by her office. Between July 8 and October 15, 2003, Tatum wrote five memoranda to Warden Oliver alleging that DW Olivo's conduct was unprofessional and that he was abusing his authority. During part of this time, Olivo was hearing CDs in place of DW Ross, who was on vacation.

On July 8, 2003, Tatum complained that Olivo was unfamiliar with the procedures concerning CDs. The Warden investigated the complaint and responded that she had issued a copy of Directive 4257 to Olivo and that he would continue hearing CDs.

On July 18, 2003, Tatum claimed that Olivo found Tatum's portable radio and ordered a captain to issue a corrective interview and obtain a report from him. When Tatum asked for a relief officer or overtime to write the report, Olivo ordered the captain to upgrade the offense to a CD. The Warden investigated and found that no action was necessary.

On August 4, 2003, Tatum claimed that Olivo failed to investigate CDs prior to the hearing to determine if the charges were substantiated. Tatum requested that the form which has boxes asking whether the charges are "appropriate for C.D.?" be checked before the hearing. The Warden testified that she spoke with Tatum and agreed to his request for all future CDs.

On September 23 and October 8, 2003, Tatum claimed that Olivo had presided in an unprofessional manner over a permanent CO's CD. According to Olivo, Tatum demanded dismissal of the CD alleging that the CO had submitted a late report and that Tatum would not allow the CO to speak on his own behalf. When the CO asked to speak to Olivo privately, he explained why the report was late. Since there was no dispute that the report was late and such violation called for a one-day penalty, Olivo was unwilling to dismiss the CD. Tatum insisted that if the matter were not dismissed, it be referred for a MOC. Later, the CO asked Olivo about what had occurred and Olivo explained that a MOC remains in a CO's personnel folder. Olivo allowed the CO to accept the penalty and withdraw the request to refer the specifications for a MOC. The Warden investigated Tatum's allegations of improper conduct and found that Olivo had acted properly.

CO Darrell Grennock

Darrell Grennock was appointed as a CO on October 11, 2001, along with some 200 other COs. Grennock testified that he was unaware that he had signed an acknowledgment that he was a probationary employee who could be terminated during the initial two year period. During his probationary period at AMKC, Grennock's overall performance ratings were two B's and three C's. He had perfect attendance and punctuality records.

Starting in June 2002, Grennock was supervised by Captain Amanda Glass in an area known as 2 and 4 upper. As a practice, Glass provides verbal instructions to COs and then writes the instructions in the area log book. On June 4, 2004, Glass directed Grennock to conduct proper security checks and to make sure that all cells were locked and that no towels, blankets, or sheets obstructed doors, windows, or floors. Glass testified that obstruction of views is a security

breach because "you don't know what is going on inside the cell." In the logbook Glass wrote:

> Officer instructed to conduct and perform all departmental policies, count, movement, options, food handlers, etc. No towels are to be hung on windows, doors ajar and keep all gates locked. Notify this writer of any problems immediately.

During her second tour of inspection, Glass was joined by DW Olivo. At the time, Grennock had completed his tour of 4 upper and was on 2 upper. Olivo and Glass testified that during their tour of 4 upper, they observed cell doors ajar, blankets on the floor, and a twine-like item burning in cell 31. Olivo told Glass to address the situation and left the area. Glass found Grennock and told him to check cell 31. He returned and stated that he did not see anything. When asked if he had smelled smoke, Grennock replied no. Glass told Grennock to give her a report and to write an infraction on the inmate in cell 31. Grennock testified that, at the time, he did not understand what was happening.

Grennock wanted a relief officer so he could write his report and infractions. Since no one was sent, he waited until the end of his tour and wrote the following report:

> On June 04, 2003, post QU 2's & 4 "B", I C.O. Grennock #2894 conducted a tour of QU 4 at approximately 1100 hrs. While conducting a tour of the opposite side I was informed by Captain Glass #576 of a smoke smell and blankets on the opposite side. No such conditions existed while conducting physical tour of said side.

Glass found the report insufficient and testified that she never received the inmate infraction. Grennock sought two hours of overtime. The next day, another captain asked Glass if she had authorized the overtime. She had not. As Area Supervisor, she cannot authorize overtime. Moreover, overtime must be approved in advance and is not given for report writing.

On July 3, 2003, Glass filed a CD alleging the following specifications:

On June 4-03, Officer Darrell Grennock #2094 assigned to the meal relief post of

> Quad 2/4 upper was informed by this writer during my first tour of inspection as the Building One Supervisor, to conduct proper and thorough security checks and inspections. This writer instructed Officer Grennock to make his tours of inspection and security good ones. Also to be very vigilant of the obstructions of security view pertaining to towels and sheets on the doors, window [sic] as well as the blankets on the floor. I further reinerated [sic] to Officer Grennock as to the proper performance of options within the guidelines of the department policies. While conducting my 2nd tour of inspection in Quad upper 4 I observed several cell doors ajar, blankets on the floor and what appeared to have been a smoky-like smell coming from cell thirty-one. As I approached the cell I discovered on the sink a twine-like item burning in an incense form. Upon exiting the area I ordered Officer Grennock to submit a written report (see attached) explaining such violations and the accuracy of his tours on inspection as well as a written infraction for the occupant of cell 31 for contraband.
>
> The following Rules and Regulations were alleged to have been violated:
>
> 3.20.070: Members of the Department shall promptly obey all lawful orders of the Supervisor.
> 4.40.010: Members of the Department shall ensure no material is placed near any enclosing walls and that nothing is accessible to inmates that might facilitate the inmate escape or otherwise endanger the security of the facility.
> 3.05.120: Members of the Department are responsible for the efficient performance of their duties.

Grennock testified that Olivo had ordered Glass to give him a corrective interview but that when she found out about the two hours of overtime, she changed the penalty to a CD. Grennock also stated that he spoke to Glass with a union delegate and thought that if he withdrew the overtime slip, Glass would withdraw the CD. Both Glass and Olivo testified that discipline is left to the supervising officer. Moreover, Glass denied that she ever spoke to the COs about the CD and explained that once she writes a CD, she does not bargain over discipline.

On July 29, 2003, Grennock was assigned to the T post corridor, which is responsible for ensuring that inmates traveling through the area are either frisked or instructed to pass through a magnometer (metal detector). DW Olivo testified that he observed Grennock leaning against the

wall and inmates by-passing the metal detector. Olivo asked Captain Kaufman to address the situation. Kaufman directed Grennock to file a report. Grennock's report states:

> I C.O. Grennock #2894 assigned to the 0330 x 1201 tour was working the T-Post on July 29, 03 at approximately 1405 hours. This writer observed a said inmate taking trays to the Messhall at this present time the inmate returned I pat frisk the inmate, after not clearing the magnetic, he then proceeded to the clinic which I had visual eye contacted at all time. At which DW of Security Olivo and a unidentified man in a suit was doing a tour [sic].

On August 6, 2003, Kaufman filed a CD alleging the following specifications:

> On July 29, 2003 at approximately 1400 C.O. Grennock was assigned to the T. Post control. D.W. Olivo was conducting a tour of the facility when he observed Officer Grennock not stopping inmates and checking their hall pass as they passed the T. post. Officer Grennock was also observed by D.W. Olivo not utilizing the magnometer nor pat frisking any inmates. This is a clear violation to the safety and security of the facility. C.O. Grennock is in violation of the following Department rules and regs; 2.30.010 and 3.05.120.

The Rules and Regulations provide:

> 2.30.010: Correction Officers shall be held responsible for the safety, sanitation, and security of their post, for care custody, control and treatment of inmates.
>
> 3.05.120: Members of the department are responsible for the efficient performance of their duties and for the proper supervision of any inmates under their direction.

The Command Discipline Hearings and the Referral to COUP

On September 16, 2003, Tatum and Grennock appeared before DW Ross for the June 4 CD.[2] Ross read the charges and asked Grennock what happened. Tatum immediately asked that the charges be dismissed or adjourned because the CD had not been properly investigated and the appropriate boxes not checked. Ross denied the request because Tatum had already been granted

[2] Although Grennock and Tatum testified that both CDs were heard together on September 22, 2003, the record demonstrates that they were heard on two separate days.

two adjournments. She directed that the hearing proceed. Tatum said that Grennock denied the charges and explained that he had been on the other quadrant when the inspection occurred. Ross rejected this assertion and noted that the highest charge warranted a loss of four vacation days. She advised them that she would modify the penalty to two vacation days. Grennock testified that since the incident did not occur, he was unwilling to lose two days' vacation. Tatum rejected the penalty and stated that they were leaving. Ross told them that since Grennock was a probationary CO, refusal of the penalty was not an option. They refused anyway and walked out. Since there was no box on the form to describe what had occurred, Ross checked "M.O.C.- EMPLOYEE REFUSED COMM. DISCP." and wrote in the margin: "Refused to Sign." Ross was perplexed because she had never had a probationary CO refuse a CD.

After the hearing, Ross took the CD to CO Noemi Martinez, who prepares reports on all CD activity. Since Martinez had also never seen a probationary CO refuse a CD, she called Grennock and told him that he could not be given a MOC but would be referred to COUP. When Grennock asked Martinez to explain COUP, she told him that he could be terminated and asked if his delegate knew that he was a probationary employee. Grennock stated that he would follow his delegate's advise. Martinez then called Tatum to ask if he realized that Grennock was a probationary employee who did not have MOC rights. Tatum said, "yes" and stated that he would speak to the Warden. Later that day, Martinez asked the Warden if Tatum had called about Grennock. Since he had not, she submitted her weekly report.

The Warden instructed DW Ross to prepare a letter for a COUP determination. On September 19, 2003, Ross prepared a letter detailing the charges arising out of the June 4 and July 29, 2004, CDs and what had transpired at the CD hearing. The letter noted:

> Under the advice of his Union Delegate, Officer Grennock refused to accept the offered penalty of the loss of two vacation days and also refused to sign the Supervisor's Complaint report acknowledging his decision.

The Warden reviewed the letter, made some minor grammatical changes, and added the following paragraph at the end:

> Officer Grennock is a probationary officer and has refused to accept the penalty of an informal hearing, therefore, in accordance to Rules and Regulations, I am requesting the Committee on Uniform Personnel to terminate Recruit Darrell Grennock for violation of policies and procedures.

Warden Oliver testified that she added this paragraph to explain why she was sending the matter to COUP – because Grennock was a probationary employee who refused to accept the penalty of an informal command discipline and was not entitled to a MOC. Oliver asserted that she was concerned about the serious nature of Grennock's security violations and his unwillingness to acknowledge that these conditions existed. Tatum's representation had no bearing on her decision to refer Grennock to COUP.

Regarding the first CD, the Warden testified that if cell doors are ajar, inmates can cause injury to other inmates or steal from them. Also, DOC wants a clear view of floors and walls at all times to prevent escape holes. Finally, smokey conditions may lead to fire. Although the hearing regarding the July 29, 2003, violations had not occurred at the time she referred Grennock to COUP, Oliver saw similar security problems with the second CD. Grennock had not monitored or controlled inmate movement in a corridor. The Warden found Grennock's report on the incident unclear and unresponsive to the charges. In both cases it appeared that Grennock was saying that Glass and Olivo were lying about their observations and that he was unwilling to take responsibility for his actions. This pattern showed that Grennock, who had almost two years on the job, was not seeing what his supervisors saw, was not alert, and was not

sufficiently security conscious. As the Commanding Officer who is responsible for all employees and inmates at AMKC, Oliver was concerned that Grennock was not performing the basic duties of a CO and that he would continue to be a liability.

On September 22, 2003, Tatum and Grennock appeared before DW Ross for the July 29 CD. Grennock explained that he did not know that his job was to have inmates clear the metal detector. Ross could not understand why Grennock did not know this since DOC regularly discusses security, frisks, and the use of metal detectors at roll call. Ross notified Grennock and Tatum that the violation called for a penalty of one day but that she would offer a reprimand. Although unhappy that the CD was not dismissed, they accepted the reprimand.

The COUP Determination

In August 2003, COUP began gathering materials, including final evaluations, regarding all COs who were coming off probation on October 10, 2003. On September 19, 2003, COUP received Warden Oliver's request to terminate Grennock. COUP staff prepared a summary report for the COUP Board which sets forth Grennock's attendance/punctuality record, his performance ratings, and his disciplinary record. It details the events of June 4, 2003, the September 16 CD hearing, and the Warden's letter indicating that "under the advice of his Union Delegate" Grennock refused the proffered penalty and refused to sign the supervisor's complaint form acknowledging his decision. The summary also notes the details of the July 29, 2003 CD. The summary sheet concludes:

> Based on Officer Grennock's refusal to accept the penalty of the informal hearing (loss of two vacations days), in accordance to Rules and Regulations, Warden Oliver is requesting the termination of Officer Grennock for violation of policies and procedures.

On October 8, 2003, the COUP Board considered the employment status of

approximately 40 COs, including Grennock. The eight members present voted unanimously to recommend Grennock's termination.

According to Assistant Chief of Administration James Barry, who was on the panel, COUP's decision was based on the serious nature of the charges, which indicated that Grennock was not paying attention and was a security risk. Barry was concerned that if Grennock were made a permanent employee, these kinds of breaches could worsen and result in serious injury to AMKC inmates or staff. Barry testified to the seriousness of cell doors left ajar, blankets used to hide contraband or a planned escape, and smoke used as part of a plot for escape or riotous condition. As to the second set of charges, if a CO is not searching inmates properly in the corridor, contraband could be moved and security in the institution could be jeopardized. Barry stated that Grennock's perfect attendance record was not enough to mitigate the seriousness of the charges. The COUP Board considered him a security risk. That a union delegate represented Grennock at a CD hearing had no bearing on COUP's determination. While not discussed by COUP, Barry noted that Grennock's failure to accept the penalty indicated that he was unwilling to participate in the CD process.

Grennock was terminated on October 10, 2003. Petitioners seek Grennock's reinstatement with seniority and back pay, and that a notice be posted.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners assert that the record demonstrates that DOC referred Grennock to COUP for termination because he was represented by Tatum, a zealous union advocate who had made

numerous complaints to management on behalf of his members. According to Petitioners, Tatum's actions as a delegate made him "odious" to DOC supervisors, and Grennock's termination was inextricably bound with his association to Tatum. Documents show that Grennock's termination was predicated on Tatum's recommendation that he refuse the penalty of two vacation days. Thus DOC violated NYCCBL § 12-306(a)(1) and (3).[3] The City's attempt to discredit DOC's official documents which explicitly set forth DOC's illegal motive and the City's attempt to minimize the impact of Tatum's criticism of the individual respondents upon DOC's handling of Grennock's case is unavailing.

Although the Warden claimed that she had no other choice but to refer Grennock to COUP, she should have sought help in dealing with this situation which had never occurred before. The Warden's failure to consider the uniqueness of the situation, at a minimum, demonstrates a lack of labor law training and sensitivity. In fact, the Warden's actions show a malice based on Respondents' view of Tatum's criticism.

Petitioners also argue that "but for" Warden Oliver's referral to COUP, COUP would not have had any reason to deal with Grennock, and he would have automatically aged into his

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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 . . . .

position as a permanent correction officer. DOC's assertion that COUP is an entirely neutral body is "absurd." COUP's own records demonstrate that Grennock's case was unique. As such, COUP had an obligation to investigate the causal connection between Grennock's union activity and the termination referral to ensure that discipline of probationary officers comports with appropriate legal standards, including the NYCCBL.

Petitioners conclude that Respondents took the occasion of Tatum's advice which they clearly thought was an unwarranted intrusion, to strike at Tatum by increasing Grennock's two-day penalty to termination. Respondents then insured that the recommendation to discipline reached COUP in time for COUP to disguise its action under the aegis of its seemingly unfettered discretion to adjudicate probationary employees. The documentary trail left by DOC reveals its true animus.

Respondents' Position

According to Respondents, the record demonstrates that Petitioners' claims of retaliation are unsubstantiated. Tatum's representation at Grennock's CD hearings played no role in DOC's decision to dismiss Grennock. Petitioners' argument that DOC's motive to terminate one employee to get back at another "is laughable at best."

Probationary employees do not have rights under CSL § 75. Therefore, they cannot refuse a CD and opt to have charges heard at OATH. If, however, a probationary CO does refuse a CD penalty, the facility's next step is to refer the case to COUP. Warden Oliver testified that she referred Grennock to COUP because she was concerned that a probationary employee in her facility had violated DOC policy, breached security, and then refused to accept responsibility for his acts. Respondents also argue that DOC has the right to terminate probationary COs. DOC

dismissed Grennock because the two CDs he received during his probationary period involved serious charges, not because he engaged in protected activity. Therefore, the improper practice petition should be dismissed.

DISCUSSION

This Board finds that while Petitioners have set forth a *prima facie* case that the recommendation to terminate Grennock was based on union activity, there were legitimate business reasons to so recommend and COUP's final decision to terminate him was not in violation of the NYCCBL.

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 adopted by the Board in *Bowman*, Decision No. B-51-87. Petitioners 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.

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. Union

representation during an interview which an employee reasonably believes may result in disciplinary action is considered protected activity under the NYCCBL. *Assistant Deputy Wardens/Deputy Wardens Ass'n*, Decision No. B-9-2003.

Here, Grennock was engaging in union activity when he attended the disciplinary CD hearing accompanied by Tatum, his union delegate. Furthermore since a DOC official, DW Ross, was involved in the hearing, the employer had knowledge of the activity at issue. Therefore, Petitioners have 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).

The COUP letter prepared by DW Ross and signed by Warden Oliver states:

> Under the advice of his Union Delegate, Officer Grennock refused to accept the offered penalty of the loss of two vacation days and also refused to sign the Supervisor's Complaint report acknowledging his decision.
>
> * * *
>
> Officer Grennock is a probationary officer and has refused to accept the penalty of an informal hearing, therefore, in accordance to Rules and Regulations, I am requesting the Committee on Uniform Personnel to terminate Recruit Darrell Grennock for violation of policies and procedures.

When read together, these statements suggest that the decision to refer Grennock to COUP for termination may have been motivated by his refusal to accept the proffered penalty upon the advice of his delegate. This showing, while not dispositive of the issue, is sufficient to state a *prima facie* case under the *Salamanca* test. Therefore, the burden shifts to Respondents to refute Petitioners' showing or to demonstrate legitimate business reasons for their actions.

The Warden testified that the request to terminate Grennock was based on his

unwillingness to acknowledge that serious security conditions existed, not on Tatum's representation at the CD hearing. Security risks are involved when cell doors are ajar, views in cells are obstructed, smokey conditions exist, and inmates are not properly searched when they move through the facility. The Warden saw a pattern that Grennock, who had almost two years on the job, was not seeing what his supervisors saw and was unwilling to acknowledge his mistakes. As the Commanding Officer responsible for all employees and inmates at AMKC, Oliver was concerned that Grennock would be a liability in the future. Since Grennock was a probationary employee who did not have the right to formal charges and a hearing under the CSL, the Warden had no choice but to refer him to COUP.

We are persuaded that Grennock's act of refusing to acknowledge the security lapses by accepting the penalty of two vacation days triggered the referral to COUP. The Warden was faced with a situation in which a captain and the deputy warden in charge of security observed security breaches in a large correctional facility. A probationary officer, learning the responsibility of controlling of inmates, claimed that these conditions did not exist. Even after a seasoned deputy warden in charge of administration reviewed the specifications with Grennock in an informal setting, he still refused to recognize the possibility that these breaches may have occurred. Since there was no alternative but to refer Grennock to COUP, Respondents have demonstrated that the referral was based on legitimate business reasons, not anti-union animus.

We also find that COUP's decision to terminate Grennock was independent of any anti-union animus. When reviewing Grennock's history, COUP focused on the gravity of the charges and considered him to be a security risk. Barry testified that Grennock's neglect of serious conditions and his failure to search inmates properly evidenced an inability to maintain safety in

AMKC. The record demonstrates that neither Tatum's representation of Grennock nor his failure to accept the penalty were ever discussed or had any bearing on COUP's determination.

"While the primary purpose of laws and rules calling for probationary terms is to secure efficient service, they also serve to furnish the appointee with an opportunity to show his or her fitness and to provide a more acceptable and less embarrassing means of terminating the employment of an unsatisfactory appointee." *Albano v. Kirby*, 36 N.Y.2d 526, 531 (1975); *see also District Council 37, AFSCME*, Decision No. B-1-77 at 12. COUP's responsibility is to identify probationary COs whom it deems unsatisfactory so that they are not automatically made permanent employees. COUP may recommend that the Commissioner terminate a probationary CO without cause, and because Grennock's termination was based on legitimate business reasons, we find no violation of NYCCBL § 12-306(a)(1) and (3).

Finally we dismiss the allegations in the petition that by terminating Grennock, Respondents sent a message to Tatum that his union activity will result in retaliation against those whom Tatum represents. At the hearing, Tatum provided no testimony or other evidence demonstrating that DOC's actions had a chilling effect on his representation of other members. Since a referral to COUP is required when a probationary CO refuses a CD, any interference claims arising under NYCCBL § 12-306(a)(1) are without merit.

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-2384-04, filed by Darrell Grennock and Wayne Tatum be, and the same hereby is, denied.

Dated: October 28, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

I Dissent: VINCENT BOLLON
MEMBER