Lamberti, 77 OCB 21 (BCB 2006)

[Decision No. B-21-2006] (IP) (Docket No. BCB-2482-05).

Summary of Decision: Petitioner alleged that the Department of Transportation improperly passed him over for a promotion because of his Union activities as a shop steward. The City maintained that Petitioner failed to articulate a *prima facie* claim and that DOT demonstrated a legitimate business reason for passing over Petitioner. The Board found that while Petitioner established a causal connection between his Union activities and his failure to receive the promotion, the City demonstrated that DOT had a legitimate business reason not to promote Petitioner. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

JAMES LAMBERTI,

Petitioner,

-and-

THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND ORDER

On June 8, 2005, James Lamberti, a member of the International Union of Painters and Allied Trades, Local Union 1969 ("Union" or "Local 1969"), filed a verified improper practice petition against the New York City Department of Transportation ("City" or "DOT") alleging that DOT

violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3). Petitioner claims that DOT improperly passed him over for a promotion because, as a shop steward, he had filed grievances concerning out-of-title work, health and safety issues, improper promotion, and incorrect payment of overtime rates. The City maintains that Petitioner failed to articulate a *prima facie* claim because the DOT employee who made the promotion decision had no knowledge of Petitioner's protected activity, and thus Petitioner cannot establish a causal connection between his activities as a shop steward and his failure to receive a promotion. Furthermore, the City contends that DOT had a legitimate business reason for passing over Petitioner since the employee who received the promotion already had been acting in the capacity of that title for several years and was only one place behind Petitioner on the civil service promotion list. We find that while Petitioner set forth a *prima facie* case that the decision to pass over him for a promotion was based on his Union activity, DOT had a legitimate business reason for promoting another employee over Petitioner. Therefore, DOT's decision was not in violation of the NYCCBL, and we dismiss the instant petition.

BACKGROUND

DOT is responsible for all functions and operations for the City of New York relating to transportation, which includes the maintenance of the vehicles, facilities, properties and equipment that comprise the Staten Island Ferry Operations ("Staten Island Ferry"). As part of the maintenance of the Staten Island Ferry, DOT utilizes the Staten Island Ferry Maintenance Facility located at One Bay Street in Staten Island ("Maintenance Facility"), out of which many skilled-trades employees operate, including carpenters, painters, plumbers, pipe-fitters, electricians, oilers, boiler makers, and

machinists. The skilled-trades employees at the Maintenance Facility are supervised by Ralph McKenzie.[1]

McKenzie has worked for DOT for 25 years, holds the civil service title of Chief Marine Engineer, and has been the Deputy Director of Maintenance and Repairs for the Staten Island Ferry for the last eight years. At the Maintenance Facility, McKenzie is responsible for coordinating and supervising skilled-trades employees in repairing and maintaining ferries and terminals. His specific duties include assigning all work to the various skilled trades, assigning priorities to specific work orders, signing time sheets, authorizing overtime, and initiating disciplinary actions against subordinates. According to McKenzie's testimony, he does not have the authority to make personnel decisions involving either hiring, firing, or promoting employees in the skilled trades. However, according to the testimony of Petitioner and John Barrell, a Painter at the Maintenance Facility, McKenzie is involved with every decision concerning the skilled-trades including the hiring and promotion of employees.

Prior to Petitioner's arrival at the Maintenance Facility in 2000, the long-term acting Supervisor Painter was Kostas "Gus" Sarantos, who relinquished the position in 1998. Barrell testified that McKenzie offered the position of Supervisor Painter to him, but Barrell turned down the offer. According to Putkowski, after Barrell rejected the offer to take the Supervisor Painter position, McKenzie and Tony Mancino, Director of Terminal Maintenance for the Staten Island Ferry, offered the position of Supervisor Painter to Putkowski, who accepted. McKenzie, on the other hand, testified that he did not recall any details of Putkowski's promotion to acting Supervisor

[1] Hearings were held on February 1 and 2, 2006, by a Trial Examiner designated by the Office of Collective Bargaining. To the extent he has made credibility findings as set forth herein, the Board, upon review, adopts them.

Painter in 1998 because he did not participate in the promotion process.

Regardless of who offered Putkowski the position, the record demonstrates that, from 1998 until February 2005, Putkowski performed various administrative duties, such as attending morning organizational meetings where all the skilled-trades supervisors met to discuss and coordinate various projects, completing necessary paperwork, inspecting ongoing jobs, ordering materials, and interacting with manufacturer representatives. In addition to these duties, Putkowski continued to perform the typical duties of a Painter.

In 2000, Petitioner became a Painter at the Maintenance Facility for DOT. Petitioner had begun his career with DOT in the provisional title of Debris Remover from 1983 until 1985. He then worked for the New York City Department of Parks and Recreation as a Laborer from 1985 until 1993 and for the New York City Housing Authority as a Painter from 1993 until 2000.

Petitioner's duties at the Maintenance Facility include: painting the interior and the exterior of the ferry boats and the ferry boat terminals, painting and/or priming pipes on the boats, painting parking lines and curbs in DOT parking lots, painting the offices within DOT buildings, stenciling, and taping. Furthermore, when Putkowski was absent from the Maintenance Facility, Petitioner also routinely performed Putkowski's administrative responsibilities. These duties are performed at various DOT locations, including the ferries, the ferry terminals, the Staten Island Ferry facility located in downtown Manhattan, DOT offices, parking lots, and other public space maintained by DOT.

In September 2001, a Notice of Examination was distributed by the City of New York concerning the Supervisor Painter job title. In December 2001, Petitioner, Putkowski and another

Painter from DOT took this civil service promotional exam.[2]

According to Petitioner, also in December 2001, he initiated a group grievance against DOT for its failure to pay proper overtime wage rates. This grievance alleged that the parties' collective bargaining agreement ("Agreement") required that certain work, such as performing " spray painting, decorating, fire escape, scaffold and/or taping work" be paid at the premium rate of pay. (Petitioner's Exhibit 1). The grievance further asserted that if this premium work occurred during overtime hours, then the employees performing such work were entitled to time and one-half at the premium wage rate, not at the normal wage rate.[3]

In February 2003, Petitioner raised several health and safety concerns regarding the conditions present in the Painters' workshop/locker room area at the Maintenance Facility with McKenzie. According to Petitioner and Barrell, the first issue was that the workshop/locker room, which was adjacent to the area the welders and boiler makers worked, was not fully enclosed.[4] Thus, exhaust, smoke, and particles from the welders and boiler makers continually drifted into the area where the Painters ate meals, rested during break times, and stored supplies. Another health and safety issue raised by Petitioner to McKenzie at this time concerned the lack of proper safety equipment in the Painters' workshop/locker room area. According to Petitioner, this area needed

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[2] The results of this exam were then published in the December 13, 2002, issue of The Chief-Leader and listed Petitioner second with a score of 85, above Putkowski who scored an 80.

[3] In the fall of 2005 this grievance was scheduled for arbitration, but the dispute was settled and DOT agreed to pay these employees at the premium wage rate for the overtime work performed. According to DOT, the Office of Payroll Administration assigned the inappropriate codes to the premium work, and thus these employees had not been receiving the proper differentials.

[4] The partition separating workshop/locker room area from the rest of the Maintenance Facility was not a complete ceiling-to-floor wall; rather it was "a half wall."

fire extinguishers, explosion-proof fixtures, a high-wash flush station, and first aid kits because Painters worked with and stored potentially toxic and highly flammable materials in this area.[5]

In August 2003, Petitioner initiated two more grievances. One dealt with Putkowski's performance of out-of-title work, "including glazing work, removal and replacement of non-skid safety strips, and concrete work."[6] (Petitioner's Exhibit 3). The other dealt with Putkowski's "provisional appointment to the position of supervisor painter, despite the existence of a list of eligibles for the title."[7] (Petitioner's Exhibit 2).

According to Petitioner and Barrell, as a result of the filing of these grievances, McKenzie called a couple of meetings during which he expressed his displeasure with the filing of these grievances. At the first meeting, McKenzie specifically raised the grievance concerning Putkowski's provisional appointment to Supervisor Painter. Petitioner testified that at this meeting, he attempted to explain that Putkowski was only a Painter and that he should not be performing the duties of a supervisor. According to Petitioner and Barrell, McKenzie responded by stating that he was a "johnny-come-lately" and that he should "not upset the apple cart." (Tr. 59 and 105-106).[8]

Petitioner and Barrell testified that months later, McKenzie called another meeting at which Putkowski and Sarantos were also present. According to Petitioner and Barrell, when discussing the

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[5] According to the testimony of Petitioner and Barrell, in 2004 the Painter's workshop/locker room was moved to another location and most of the health and safety concerns were addressed.

[6] This grievance was withdrawn by the Union on September 23, 2003.

[7] This second grievance was processed by DOT. A labor-management meeting eventually led to the "calling of the list" in February 2005.

[8] "Tr." refers to citations from the hearing transcript.

issue of Putkowski's status as acting Supervisor Painter, McKenzie told Petitioner that, when a permanent Supervisor Painter was to be selected, he would "put his recommendations and suggestions in" and, in doing so, guarantee that Petitioner would not get the promotion. (Tr. 64). Shortly after this meeting, Petitioner went to DOT's Equal Employment Office ("EEO") to file a complaint against DOT and McKenzie.[9] Petitioner's testimony conforms with notes taken by an EEO employee during an in-take interview which indicate that Petitioner stated that McKenzie refused "to call the list" and claimed that Petitioner was "upsetting the apple cart." (Petitioner's Exhibit 4).

According to McKenzie, he never informed Petitioner that he would not receive the promotion to Supervisor Painter or that he preferred Putkowski receive this promotion, nor was McKenzie aware of any health and safety concerns raised by Petitioner regarding conditions at the Maintenance Facility. Furthermore, McKenzie asserted that he never convened any meetings to discuss grievances, never referred to Petitioner as "a johnny-come-lately," and never told Petitioner not to "upset the apple cart." In fact, McKenzie claimed that he only found out about these grievances in preparation for the hearing in the instant matter. However, Putkowski testified that McKenzie was "aware of these various complaints" raised by Petitioner at the time they were filed.

On January 21, 2004, DOT conducted a random drug screening of its employees at the Maintenance Facility. According to Gordon Goldberg, Director of Labor Relations for DOT, "a third party administrator, not the agency" selects the individuals to be tested, and that, prior to January 21, 2004, the titles of Painter and Supervisor Painter were subject to DOT's random drug testing policy.

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[9] During the hearing, Petitioner admitted that he mistakenly went to the EEO because he believed this was the appropriate forum to address the harm allegedly inflicted upon him by McKenzie.

In addition, McKenzie and Putkowski testified that they knew of Painters and Supervisor Painters at DOT who previously had submitted to random drug tests. However, Petitioner and Barrell testified that the titles of Painter and Supervisor Painter had not previously been subjected to DOT's random drug testing policy.

McKenzie and Petitioner both testified that on January 21, 2004, McKenzie approached Petitioner and informed him that he had to submit to a random drug test. Both also testified that Petitioner then refused to submit to such a test because Petitioner believed that his title was not subject to DOT's random drug testing policy. McKenzie testified that he referred Petitioner's refusal to the Director of Ferry Operations and did not deal with the issue thereafter. Goldberg stated that when he was informed by someone at the Maintenance Facility that an employee on the DOT random drug test list refused to take the test, Goldberg responded that the Federal Transit Administration regulations relating to random drug testing covered DOT employees who perform maintenance work on mass transit vehicles, that DOT Painters working at the Maintenance Facility fell under the auspices of these regulations, and that a refusal to submit to this drug test was tantamount to failing a test.

In contrast to McKenzie's testimony, Petitioner stated that after his refusal, McKenzie left but returned to inform Petitioner that his refusal to submit to such testing would lead to his termination. Petitioner then called the Union. After the Union inquired about whether the titles of Painters and Supervisor Painters were subject to DOT's random drug testing policy, Goldberg performed additional research and discovered that the Federal Transit Administration regulations "specifically exempted painters as the one trade that would not be covered." Petitioner was then informed that Painters and Supervisor Painters were not subject to random drug testing and that he

would not suffer any adverse employment action due to his initial refusal to submit to the testing.

On November 29, 2004, DOT hired Arthur Aaronson as the Director of Administration. Aaronson had previously been Director of Human Resources at New York City Office of the Chief Medical Examiner, the Director of Administration at the Landmarks Preservation Commission, and the Director of Personnel Management for the Administration of Child Services. Currently, at DOT, Aaronson oversees all personnel matters, is responsible for all issues pertaining to timekeeping, payroll, assignments, licensing, training, and procurement, but he is rarely involved with the grievance process. More specifically, Aaronson participates in the promotion of personnel in DOT by conducting interviews, reviewing candidates' work history and job performance evaluations, and speaking with colleagues and supervisors of candidates.

Aaronson, who is responsible for the hiring and promotion of many employees, testified that his customary practice is to have the supervisor of the vacant position present at the promotional interview or, at the very least, to speak with the supervisor prior to the interviewing process. He explained that "I don't want to tell somebody else who he or she should hire . . . [because] the supervisor's going to be judged by the production of his or her unit," and the supervisor "should be able to choose who's part of [his or her] unit." (Tr. 130-131). Aaronson further testified that, when interviewing candidates for openings in the skilled- trades, he will have "a supervisor, sometimes a couple of supervisors" present.

Putkowski testified that on January 24, 2005, George Aswald, DOT's Personnel Administrator at the time, informed him that he had been permanently promoted to the position of Supervisor Painter and that he needed to report to DOT Headquarters to complete the necessary paperwork. After completing the requisite paperwork, Aswald congratulated him, and he returned

to the Maintenance Facility. However, a week or so after, Putkowski was informed that his promotion had been rescinded because Petitioner went to the Union claiming that he should have been promoted in accordance with the rankings on the civil service promotion list.

According to Petitioner, on January 24, 2005, Putkowski entered the workshop/locker room and said he was the newly appointed permanent Supervisor Painter. Petitioner was in disbelief because he ranked higher than Putkowski on the civil service promotion list. He confronted Keith Bray, Chief of Staff at the Maintenance Facility, and expressed his concerns regarding Putkowski's promotion. Petitioner then testified that Bray informed Petitioner that he would "look into it." (Tr. 70). A week or two later, Petitioner called Bray, who said that Putkowski's promotion was rescinded, and that "we [DOT] have to call off the list." (Tr. 70).

Aaronson and Captain James DeSimone, Chief Operations Officer of the Staten Island Ferry, testified that DeSimone informed Aaronson, on February 17, 2005, that he needed to "call the list" for Supervisor Painter. (Tr. 273). However, DeSimone never told Aaronson how many vacancies to fill, with whom to fill them, or anything about the candidates on the civil service promotion list. Aaronson testified that prior to the interviewing process, his staff disseminated a form requesting candidates to detail any relevant work experience that qualified them for the Supervisor Painter position. Aaronson stated that this form was the only paperwork he had with him during the interviews of the three candidates.

Aaronson also testified that, on February 23, 2005, Bray informed him that McKenzie would not be attending the interviews the next day, despite Aaronson's customary practice to have the supervisor of the vacant position present at the interview. Aaronson stated that he neither spoke to McKenzie prior to the interviews, nor discussed any of the candidates with him. According to

McKenzie, he was never asked to participate in the interview process because, in his estimation, that is not part of his job duties. He also did not recall informing Bray that he would not attend the interviews for Supervisor Painter on February 24, 2005.

On February 24, 2005, Petitioner, Putkowski, and Richard Schade, who worked out of DOT's Operations Facility located in Queens ("Operations Facility"), reported to DOT Headquarters to interview for two vacant Supervisor Painter positions.[10] Conducting the interviews were Aaronson, Melissa Davis, a DOT employee in the Personnel Unit, and Stephen Restaino, the head of the Operations Facility and Schade's immediate supervisor. According to Aaronson, Schade, who was interviewed first, worked at the Operations Facility, resided in Queens, was recommended by Restaino, was first on the civil service promotion list, and had been performing the duties of the Supervisor Painter at this location. Aaronson testified that these factors prompted him to promote Schade on the spot to the vacancy at the Operations Facility. After that, Restaino and Schade left, and Aaronson and Davis conducted the remaining two interviews.

Next, Petitioner was interviewed and, according to Aaronson, he "interviewed very well." Aaronson further testified that Petitioner was a "strong candidate" and that he "would have been perfectly comfortable" promoting Petitioner. (Tr. 125-126). However, according to Aaronson, Putkowski, the third candidate interviewed, "was better suited for the position" because Putkowski was equally as qualified as Petitioner, had supervisory experience at a previous job, and had been the acting Supervisor Painter at the Maintenance Facility since 1998. (Tr. 126). Based on these factors, Aaronson hired Putkowski on the spot to the vacant position at the Maintenance Facility.

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[10] The record demonstrates that there were two Supervisor Painter vacancies, one at the Maintenance Facility and the other at the Operations Facility.

Finally, Aaronson testified that he did not communicate his selection of Putkowski to McKenzie until he returned to the Maintenance Facility later that day. McKenzie, on the other hand, neither remembered this encounter, nor recalled how he learned that Putkowski had become the permanent Supervisor Painter for the Maintenance Facility.

According to Petitioner, on February 24, 2005, when he arrived at the interview he was surprised that McKenzie was not present because Schade had his immediate supervisor present. Petitioner also testified that he knew that McKenzie had participated in other promotional interviews involving other skilled-trades at the Maintenance Facility and that Aaronson had been at DOT for only three months and thus was not likely to know much about each candidate. Nevertheless, he interviewed with Aaronson and Davis and left. According to Petitioner, shortly after the interview, he learned that Putkowski was promoted to the Supervisor Painter position at the Maintenance Facility. Petitioner testified that he felt slighted because he had scored higher on the civil service exam, had longer tenure of service with the City of New York, had a "superior" time and attendance record, and was a better "leader" and "communicator" than Putkowski. (Tr. 78-79).

On June 8, 2005, Petitioner filed the instant improper practice petition alleging that DOT improperly passed him over for a promotion because of his Union activity and requesting that this Board order DOT to promote Petitioner into the title of Supervisor Painter retroactively to February 24, 2005.

POSITION OF THE PARTIES

Petitioner's Position

Petitioner contends that DOT improperly passed him over for a promotion to the title

Supervisor Painter due to his filing of grievances and his position as shop steward, in violation of NYCCBL § 12-306(a)(1) and (3).[11] DOT knew of Petitioner's protected activities because he filed three grievances, participated in their processing, and attended several meetings with McKenzie regarding Union matters. The causal connection between DOT's failure to promote Petitioner to Supervisor Painter and his protected activities can be found in the direct statements made by McKenzie regarding Petitioner's grievances, the random drug test to which only Petitioner was asked to submit, and DOT's failure to promote the better qualified candidate. Therefore, Petitioner has demonstrated a *prima facie* violation of his statutory rights.

Petitioner denies the City's contention that Putkowski was better qualified for the Supervisor Painter position or that DOT had a legitimate business reason for passing over Petitioner for this promotion. He asserts that Putkowski was not the acting Supervisor Painter from 1998 to 2005 because he continued to perform typical painter duties until he was formally appointed to the Supervisor Painter position in February 2005. Furthermore, even though he may have performed some administrative functions, such as attending skilled-trades organizational meetings, Petitioner also performed those tasks. Therefore, Petitioner asserts that DOT's proffered business reason is not

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[11] NYCCBL § 12-306(a)(1) provides, in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

NYCCBL § 12-305 provides, in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

legitimate.

City's Position

The City contends that DOT did not violate the NYCCBL when it failed to promote Petitioner into the Supervisor Painter position. First, Petitioner failed to establish a *prima facie* case because Petitioner did not establish that Aaronson, the person who made the decision to promote Putkowski over Petitioner, knew of Petitioner's protected activity. Aaronson, who rarely participates in the grievance process, arrived at DOT after Petitioner had already filed his grievances; he knew very little about each candidate, least of all their Union status or the number of grievances they filed, and never spoke to McKenzie prior to the interview about any of the candidates.

Furthermore, Petitioner failed to demonstrate a causal connection between his protected activities and DOT's promotion decision. McKenzie expressly denies making any anti-Union statements to Petitioner concerning his grievances and, in fact, does not recall even conducting such meetings. Petitioner filed his grievances in 2003 and was required to submit to a random drug test in January 2004. As DOT's promotion decision was made in February 2005, there is no temporal proximity among these events.

Assuming, *arguendo*, that Petitioner has carried his burden, the City contends that it had a legitimate business reason for selecting Putkowski over Petitioner for the Supervisor Painter position at the Maintenance Facility. Putkowski was the better qualified candidate for the position since he had been acting Supervisor Painter from 1998 until 2005. In addition, Aaronson objectively asserted that Putkowski's work experience of acting in a supervisory capacity in a previous job as well as in his current post was the sole reason for his selection over Petitioner. Accordingly, Petitioner's improper practice petition should be dismissed.

Finally, the City contends that DOT lawfully exercised its managerial prerogative, pursuant to NYCCBL § 12-307(b) and the Personnel Rules and Regulations of the City of New York Rule 4, § 7.1(c), when it promoted Putkowski because he was third on the civil service promotion list, a position behind Petitioner, and within the parameters of the "1-in-3 rule."[12]

DISCUSSION

The issue before this Board is whether, by passing over Petitioner for a promotion into the position of supervisor painter, DOT retaliated against him for his Union activities in contravention of the rights protected by the NYCCBL. To determine if an employer's 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
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> 2. the employee's union activity was a motivating factor in the employer's decision.

Here, we find that, even though the City contends that McKenzie and Aaronson did not know

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[12] 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 maintain the efficiency of governmental operations, . . . and exercise complete control and discretion over its organization . . . .

Personnel Rules and Regulations of the City of New York, Rule 4 §7.1(c), provides, in pertinent part:

> Promotion from an established eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by . . . the head of the certifying agency, as standing highest on such established list who are qualified and willing to accept such . . .promotion.

of Petitioner's Union activities and his status as a shop steward, DOT had knowledge of Petitioner's protected activity. Based upon the testimony of Petitioner, Barrell, Putkowski, and Aaronson, we find that McKenzie oversaw every aspect of the work environment for the skilled-trades at the Maintenance Facility. As a result of this supervision, we credit the testimony of Petitioner, Barrell, and Putkowski and find that McKenzie was cognizant of the multiple grievances filed by Petitioner. Thus, we find the first prong of the *Salamanca* test satisfied.

Regarding the second prong of the *Salamanca* test, which addresses the motivation behind the employment action in question, typically, this element is proven through the use of circumstantial evidence, 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. Showing a causal link between the union activity and the management act at issue demonstrates an improper motive and, thus, a *prima facie* violation of the NYCCBL. *See District Council 37, Local 768*, Decision No. B-15-1999 at 16-17.

In the instant matter, Petitioner and Barrell credibly testified that, due to Petitioner's filing of grievances, McKenzie called meetings on at least two occasions to express his displeasure with such filings. At one meeting, McKenzie displayed his anti-Union animus by directing Petitioner not to "upset the apple cart," insinuating that McKenzie wanted the filing of grievances to cease. In fact, Petitioner informed an EEO employee that McKenzie had made this statement, as indicated by that employee's notes from the in-take interview with Petitioner. At a later meeting, McKenzie had become so irritated by Petitioner's grievance concerning Putkowski's assignment to acting Supervisor Painter that he stated that, regardless of this grievance's outcome, Petitioner would never be promoted to Supervisor Painter at the Maintenance Facility. Due to this direct link between

Petitioner's filing of grievances and McKenzie's insistence that Petitioner not be promoted, we find that Petitioner has sufficiently established a causal connection between his protected activity and his failure to be promoted.

The City contends that even if McKenzie displayed anti-union animus, he was not involved in the promotional proceedings on February 24, 2005, and had no input in the decision to promote Putkowski; therefore, McKenzie could not taint these proceedings with anti-union animus. However, we do not find these contentions credible.

First, Petitioner and Barrell testified that McKenzie was involved with every decision concerning the skilled-trades, including the hiring and promoting of skilled-trades employees. In particular, Barrell and Putkowski testified that McKenzie was, at least partially, responsible for Putkowski's becoming the "acting supervisor painter" in 1998. Therefore, we find that McKenzie influenced or impacted the decision to permanently promote Putkowski, even though the City contends that Aaronson was the sole decision-maker.

In addition, Aaronson credibly testified that he had extensive human resources experience and, as a common practice, would have the supervisor for the vacant position present during the interview or would speak with that supervisor prior to the interview to assure that the supervisor approved the promotion. Accordingly, we find that, since McKenzie was not going to be at the interview and Aaronson knew very little about the three candidates, it is more likely than not that McKenzie provided input to Aaronson regarding his preference for the promotion of the Supervisor Painter title. Therefore, we reject the City's contentions that McKenzie did not play a part in the

decision to promote Putkowski over Petitioner.[13] Thus, we find that Petitioner demonstrated a sufficient causal connection and established a *prima facie* violation of NYCCBL § 12-306(a)(1) and (3).

Once a petitioner establishes a *prima facie* case of retaliation, the burden then shifts to the City to establish that its actions were motivated by a legitimate business reason. *District Council 37, Local 768*, Decision No. B-15-1999 at 17. The employer may attempt to refute the employee's *prima facie* showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct. *See Civil Serv. Bar Ass'n, Local 237*, Decision No. B-32-2003; *City Employees Union, Local 237*, Decision No. B-13-2001.

When addressing cases involving mixed or dual motive, this Board has determined that "even if it is established that a desire to frustrate union activity is a motivating factor, the employer is nevertheless held to have complied with the NYCCBL where it is proven that the action complained of would have occurred in any event and for valid reasons." *Communications Workers of America, Local 1180*, Decision No. B-17-89 at 17, *quoting Local One, Amalgamated Lithographers of America v. NLRB*, 729 F.2d 172, 175 (2nd Cir. 1984). In other words, once the employee has demonstrated that the decision to pass him over for a promotion was based in whole or in part on anti-union animus and would not have taken place independently of the protected conduct, the

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[13] In addition, the City contended that Rule 4, Section 7.1(c), of the Personnel Rules and Regulations of the City of New York, also known as "the 1-in-3 rule," provides the City and its agencies with authority concerning promotions from an "established eligible list." However, regardless of this rule, the City and its agencies cannot exercise this legitimate managerial prerogative in a discriminatory or retaliatory manner, which would violate the NYCCBL. Accordingly, the City's argument concerning "the 1-in-3 rule" in the instant matter does not disprove Petitioner's position that the failure to promote him was caused by his protected activity.

employer may proffer a business reason establishing that anti-union animus was not the "substantial or motivating factor in the decision" to pass over the employee. *Assessors, Appraisers and Mortgage Analysts, Local 1757, District Council 37*, Decision No. B-1-94 at 50.

In *District Council 37, Local 768*, Decision No. B-15-1999, an employee proved that her demotion from her supervisory position was a *prima facie* violation of the NYCCBL since the agency knew of her status as an active union representative and she demonstrated a causal connection between her union advocacy and her demotion. *Id.* at 16. The City contended that this employee's failure to follow regulations and her inability to supervise properly posed a potentially dangerous risk to the other employees. *Id.* at 17. This Board found that the business reason was legitimate and, accordingly, upheld the demotion. *Id.* at 18.

Here, as in the *District Council 37, Local 768*, we find that, though Petitioner demonstrated a *prima facie* violation of the NYCCBL, DOT had a legitimate business reason for promoting Putkowski instead of Petitioner. It is undisputed that in 1998 Putkowski was offered and accepted the position of "acting supervisor painter." It is further undisputed that from 1998 to February 2005 Putkowski performed administrative and supervisory duties such as inspecting the work orders for the painters, communicating with the other trades, establishing top priority/immediate work orders, handing out work orders to other painters, completing work evaluations for other painters, and disciplining other painters. In addition, Aaronson, who had an extensive background in human resources, credibly testified that he weighed prior supervisory experience very heavily when selecting candidates for a supervisory position. Indeed, the fact that Schade, the candidate selected for the Operations Facility, was, like Putkowski, the "acting supervisor painter," supports Aaronson's assertion that prior supervisory experience was a neutral, determinative criterion he used in decisions

on promotions.

Clearly, McKenzie preferred Putkowski over Petitioner. More likely than not, McKenzie expressed this preference to Aaronson. Thus, the City arguably acted with a mixed or dual motive when deciding to pass over Petitioner. Nevertheless, we find that Putkowski's promotion would have occurred independent of Petitioner's protected activity. As stated above, Aaronson relied upon his customary practice of promoting candidates who have prior supervisory experience into supervisory positions. Furthermore, Putkowski had been performing for over six years the supervisory duties of the exact position being filled, in addition to his supervisory experience at a previous job. Even though Petitioner also performed administrative and supervisory duties, Putkowski performed such duties on a daily basis while Petitioner performed them only when Putkowski was absent from the Maintenance Facility. Therefore, we find the business reason proffered by the City to be legitimate and dismiss the instant petition.

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 filed by James Lamberti, docketed as BCB-2482-05 be, and the same hereby is, dismissed.

Dated: May 30, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
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CHARLES G. MOERDLER
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