***SSEU, Local 371*, 77 OCB 28 (BCB 2006)**

[Decision No. B-28-2006] (IP) (Docket No. BCB-2406-04).

Summary of Decision*:** Petitioners claimed that ACS violated NYCCBL § 12-306(a)(1) and (3) when it discharged an employee because she insisted on being paid for overtime hours worked instead of accepting compensatory time and because she was an active alternate Union delegate. The Board found that there was insufficient evidence to show that the employee's protected activity was the motivation behind the termination of her employment and dismissed the petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
and AIKENA SCOTT,

Petitioners,

-and-

CITY OF NEW YORK and
NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

DECISION AND ORDER

On May 20, 2004, Social Service Employees Union, Local 371 ("Local 371" or "Union") filed an improper practice petition on behalf of Aikena Scott alleging that the City of New York ("City") and the New York City Administration for Children's Services ("ACS") violated §12-306(a)(1) and (3), of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it discharged Scott because she

insisted on being paid for overtime hours worked instead of accepting compensatory time and because she was an active alternate Union delegate. The City argues that it did not retaliate against Scott and that Scott would have been terminated regardless of her union activity because she had an unprofessional attitude, failed to adhere to supervisory directives, and failed to complete case work on time. The Board finds that there was insufficient evidence to show that Scott's protected activity was the motivation behind the termination of her employment. Accordingly, we dismiss the petition.

BACKGROUND

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows.[1] Scott was hired as a provisional employee by ACS on February 25, 2002. She was appointed to the civil service title of Child Protection Specialist ("CPS") Level I and assigned to the Immediate Response Team in Unit 205. Scott's job duties were to investigate reports of child abuse and neglect, contact relevant parties, document her findings, and appear in court to testify regarding those findings. Scott's immediate supervisor was James Massey, a CPS II. Massey reported to Child Protection Manager ("CPM") Peter Goldman, who reported to Deputy Director Carmen Giakas.[2] At some point prior to December 2002, James Peters replaced Massey as CPS II and as Scott's immediate supervisor.

Scott was scheduled to work between 9:00 a.m. and 5:00 p.m., Monday through Friday, but

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[1] Hearings, which were delayed while the parties engaged in protracted settlement negotiations, were held on March 22, March 24, and April 21, 2006. The Union offered testimony from Scott, and the City offered testimony from ACS employees, some of whom were Scott's direct or indirect supervisors: Borough Director Brown, Child Protective Manager ("CPM") Balan, and Child Protective Specialist II ("CPS II") McIntyre.

[2] Giakas died before the hearing in this matter.

she sometimes worked overtime as circumstances required. Scott testified that her caseload required her to make field visits throughout Brooklyn, and since she did not have a car, she sometimes spent several hours traveling via public transportation to and from destinations.

In December 2002, Scott accrued 22 hours of overtime in one week. Due to ACS's strained fiscal condition at the time, Giakas requested that employees who worked over 10 hours of overtime per week accept compensatory time in lieu of overtime pay.[3] Some workers accepted compensatory time while others opted for overtime pay. Scott did not accept compensatory time and told Giakas that, "under Union laws, I had the choice either to take comp time or paid." (Transcript 23.)[4] Scott also asserts that Peters was aware of her decision to decline compensatory time. Giakas approved Scott's overtime pay, but, according to Scott, Giakas said "she would remember it and she would make a note of it, like in a threatening-type way." (Tr. 23.)

On March 27, 2003, Scott sent an e-mail to Peters apologizing for going on a field visit that he did not authorize. Scott explained that she was on an authorized field visit to one family and that she thought it would be productive to visit another family since they lived in the area. She stated that because Peters refused to approve the unauthorized time, she would "consult a higher entity." (City Exhibit 2.) She also stated that all of her cases were current, but one was late because the family was not cooperative. She concluded the correspondence by writing: "If you would like to speak to me in person and discuss any further problems you may have with me, I sit only 4 cubicles in front of you." (City Exhibit 2.)

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[3] Article IV, § 3(a) of the Citywide provides:
Ordered involuntary overtime which results in an employee working in excess of forty (40) hours in any calendar week shall be compensated in cash at time and one half (1-1/2 times).

[4] Subsequent citations to the transcript will be referred to as "Tr. [page no.]."

Peters responded on March 31, 2003, via e-mail. He wrote that although he was aware of the time constraints of a Child Protection Specialist, Scott must not independently decide to make field visits. He also wrote that if she had sought approval before she went on the visit, he would have approved it and helped Scott locate the address since she had gotten lost on the way to the visit and therefore was unable to contact the family. Peters also wrote that Scott indeed had past-due work and that she also misinterpreted agency policies and procedures. Finally, he wrote, "The issue at hand is whether or not you are responding to supervision appropriately, and, as stated on a number of occasions, you are not." (City Exhibit 2.)

On or about April 28, 2003, Peters completed a Non-Managerial Performance Evaluation of Scott for the period of April 22, 2002, to March 31, 2003. Scott received an overall rating of "Good." However, Peters noted:

> Ms. Scott has been under my supervision since September 2002. While her work in general is acceptable, it is my opinion that she is in dire need of addressing her attitude towards supervision or the chain of command. For example I have given Ms. Scott three warning memos for things like going out into the field without prior approval, adding field visits without approval and surrepitiously going to my supervisor to get approval for an alternate directive to the one I have given her. Ms. Scott's behavior is not conducive with the team approach that is needed in an instant response unit. Additionally, when given a directive Ms. Scott tends to question the directive excessively.

On May 1, 2003, Peters sent Scott two memoranda. The first memorandum, entitled "Conference Follow-Up," addressed Scott's alleged failure to adhere to directives that were given to her during a January 16, 2003, conference regarding field time. Peters wrote that Scott would arrive to the office after her scheduled time and claim that she was late because she was making an unauthorized field visit even after Peters had warned her not to do so, under any circumstances, at the January 16 conference. He asserted that on February 5, 2003, Scott arrived at the office at 11:10

a.m. with no explanation for her tardiness. He wrote that on the same day, he had been looking for her since his return from lunch, and when he finally contacted her by beeper at 4:05 p.m., she stated that she had been at her own home. Peters wrote that Scott was not self-supervised and that she was still being trained; therefore, he reiterated his directive that under no circumstances should she go into the field without his prior approval.

On that same date, May 1, Peters sent Scott a second, untitled memorandum in which he claimed that Scott's behavior had negatively impacted her work and the work of the unit as a whole. Peters stated that on March 23, 2003, Scott called him at 9:00 a.m. to inform him that she wanted to go into the field. Peters wrote that although he was hesitant to approve the field visit, as it was a spur-of-the-moment idea on Scott's part, he approved the single visit with the direction that she return to the office upon completion of the visit and that she would minimize the total visit time. However, Peters noted that Scott did not return to the office until 4:00 p.m.

Peters also listed seven cases that he claimed were overdue and wrote that since Scott continued to bypass supervision and failed to utilize her time effectively, he was forced to adjust the assignment of new reports to allow her to become current on her work. Her behavior, he wrote, was inconsiderate to her other team members, insubordinate to him, and violative of ACS policy and procedure. In addition, he would not approve a time card that included time for an unauthorized field visit because he could not account for her whereabouts at the time she listed. When she testified, Scott denied that her cases had been submitted late and that she verbally told Peters that he should check the log if he wanted to make sure that her cases were completed on time.

On May 6, 2003, Giakas met with Scott to discuss her purported failure to adhere to supervision, her poor work relationship with Peters, and her failure to obey his directives. At this

meeting, Giakas told Scott that she would be transferred to another unit as a result. Petitioners claim that others, including Peters, were present and that they made false allegations regarding Scott's work performance. Petitioners also claim that Giakas directed Peters to remove his negative comments from Scott's performance evaluation, but Peters failed to do so.

During May 2003, Local 371 held elections. Scott was elected alternate Union delegate and Peters was elected Union delegate. Scott testified that as an alternate Union delegate, she would discuss with the Union ways to ameliorate employees' grievances with the employer and ways to best represent the employees' interests. During her time as an alternate delegate, she did not personally file any grievances, but she would review those filed by others and take them to Local 371 headquarters. Scott further testified that she also participated in demonstrations and a "strike" to get higher wages for union members. (Tr. 40.)

Scott was transferred into Protective Diagnostic Unit 240 on May 12, 2003. The case workers in Unit 240 are responsible for investigating state-reported cases of child abuse and neglect, in part through visits to the child's home. Scott was required to alert her supervisor of her findings and to document them in a timely manner. Scott's immediate supervisor in Unit 240 was Rosemary McIntyre, a CPS II and union member who reported to CPM Fritz Balan, who reported to Giakas.

McIntyre testified that approximately two to three months after Scott was transferred into Unit 240, she noticed that Scott prepared and submitted documentation in an untimely manner and sometimes arrived to work late. Furthermore, she testified that Scott went into the field without permission and failed to document the visits she made during that time.

On November 3, 2003, McIntyre sent a memorandum to Scott regarding what McIntyre characterized as her poor and untimely documentation of a particular case. McIntyre wrote that she

had instructed Scott to document and update the case by November 3 but that Scott failed to do so. Scott testified that the case had been on the unit clerk's desk for at least one and one-half months before the unit clerk gave her the file and that the case had been poorly documented by a prior case worker. Scott claims she was unaware of the urgency of the case until the file name appeared in her caseload list. Although she tried to document the case on time, she had difficulty contacting the family. According to Scott, when she told McIntyre of her difficulties, McIntyre told her not to worry about the case because it was not high priority.

On November 6, 2003, Balan and McIntyre held a conference with Scott to address issues related to her work performance. On November 25, 2003, McIntyre sent a memoranda to Scott memorializing this conference. The first memorandum, entitled "Field Restriction," addressed Scott's alleged failure to properly document her cases in the manner required and to submit safety assessments on time. The memorandum also reminded Scott that she was required to receive prior approval from a supervisor and report to the field office before going into the field. Scott claims that her cases and assessments were submitted in a timely manner but were not accepted by McIntyre and Balan.

Also on November 25, 2003, McIntyre sent a second memorandum to Scott that stated that Scott's request for two vacation days was denied due to a staff shortage. Scott had already requested and received approval for a week's vacation in late December, and the two additional days would have been appended to that vacation. McIntyre wrote, and later testified, that Scott had told her that she would take the extra two days off whether they were approved or not. McIntyre wrote that if Scott took the two additional days of leave despite management's denial of her request, she would take disciplinary action because Scott had taken days off without approval in the past. Scott denies

that she said she would take the days off regardless of approval and denies that she had taken days off without approval in the past.

In a third November 25 memorandum, entitled "Unprofessionalism," McIntyre wrote that during a conference with McIntyre and Balan on that date regarding Scott's field restrictions, Scott "projected a poor attitude," and her behavior was "rude, disrespectful, and unprofessional." (City Exhibit 3.) McIntyre testified that Scott's demeanor was "pompous," she acted as though she didn't care, she was defensive, and she was speaking in an unusually loud tone of voice when she objected to some of the criticism. (Tr 156.) Scott denies that she behaved in such a manner.

On December 16, 2003, McIntyre sent Scott a memorandum entitled "Insubordination." McIntyre wrote that on December 5, she directed Scott to visit two children of a family under investigation; on December 11 Scott visited one of the children at school and Scott was directed to visit the second child at a different school the next morning; on December 15 Scott had still not visited the second child, and McIntyre again directed her to go the next morning. On December 16, according to the memo, Scott called the office at 10:45 a.m. to say that she would be late, and when asked if she had made the school visit to the second child, Scott said no. McIntyre noted that eleven days after Scott received the case, she had not yet assessed one of the children for safety and had not assessed the living conditions in the house. McIntyre added that Scott failed to carry out directives in a timely manner and does not care about the cases assigned to her. Scott claims that she was not able to visit the child because she did not have the correct addresses for the children. She also claims that she was unable to get to work on December 16 because of a several hour train delay.

On December 18, 2003, Scott left an in-progress training session at 3:00 p.m. to go to the airport for her vacation. McIntyre testified that she told Scott not to leave because the training was

mandatory and that, because Scott left early, she was ineligible to receive a training certificate for that session. According to McIntyre, Scott said she was leaving anyway because she had a plane to catch. Scott claims that when the session was scheduled, she informed McIntyre that she had already booked her vacation, that she would have to leave the training session early, and that McIntyre told her that as long as she attended the majority of the training that leaving early should not be a problem.

On December 29 or 30, 2003, the day Scott was due to return to the office from her vacation because her requested extension had been denied, she called in sick and sent McIntyre a signed doctor's note from Las Vegas the next day. Scott testified that she contracted pink eye while on vacation in Las Vegas and that her doctor instructed her not to fly for ten days.

On December 29, McIntyre sent a memorandum to Balan and Giakas that informed them of the problems she was having with Scott's work performance and that summarized the memoranda she had sent to Scott. McIntyre also noted that Scott allegedly had nine undocumented absences from work in the prior six months. The memorandum further stated:

> This behavior is beyond corrective measure, especially when Ms. Scott is adamant about her will to do as she pleases. Her behavior has also influenced the other Child Protective Specialist within the unit. Ms. Scott cannot function in this unit, as she is uncaring and undependable. Hence I am requesting that she be removed from the unit in an effort to stabilize the unit once more, or process termination since she does not follow the mandates of the agency.

McIntyre also listed three of Scott's cases that were past due. McIntyre testified that she wrote the memorandum because she did not feel comfortable with the way Scott handled her cases, she prayed that they would not lose a child, and everyone needed to know what was happening. Scott denies the allegations found in the memorandum.

Giakas sent a memorandum dated December 31, 2003, to Borough Director Brown that summarized the issues McIntyre had outlined in the December 29 memorandum and requested that Scott's employment be terminated.

McIntyre sent a memorandum dated January 8, 2004, to Giakas and Brown that reiterated the problems she was having with Scott. McIntyre also listed five of Scott's cases that were past due and lacked sufficient documentation. Scott claims three of these cases were submitted for closing before her vacation as required. She also states that, in accordance with office protocol, two of the cases should have been reassigned to other workers since Scott was out sick.

Brown sent a memorandum dated January 15, 2004, entitled "Request for Termination" to Michael Taurisano, Executive Director of Personnel Services. Brown requested Scott's employment be terminated because she had time and leave issues, failed to document cases in a timely manner, failed to submit safety assessments and investigation conclusions in a timely manner, failed to maintain bi-weekly contact with families, and failed to respond to supervisory directives.

In a letter dated January 21, 2004, Roger Hannon, Assistant Commissioner for the Division of Administration, Office of Personnel Services, informed Scott that her provisional employment was terminated. On the same day, Balan verbally informed Scott of her termination. According to Scott, Balan did not give her a reason for her termination.

As a remedy, the Union requests that this Board order Respondents to reinstate Scott to her former position of employment with full back pay and benefits and to cease and desist from discriminating against her for engaging in protected concerted activities in violation of the NYCCBL.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that ACS committed an improper practice under NYCCBL § 12-306(a)(1) and (3) when it unlawfully discharged Scott because she was an active alternate union delegate and she insisted to be paid for overtime hours worked.[5] The Union alleges that management knew of Scott's activities as alternate union delegate and that her mistreatment was in retaliation for this protected activity. Scott received unwarranted criticism of her work, particularly from Balan, who has had problems with the Union before, because she exercised her contractual right under the Citywide Agreement to be paid for all overtime hours worked instead of accepting compensatory time. The Union claims that Scott's assertion of a right based in a collective bargaining agreement is protected activity. Giakas's threat and Scott's subsequent mistreatment was in retaliation for Scott exercising her contractual rights, the Union claims.

Several memoranda given to Scott have no factual basis and that several false allegations regarding Scott's work performance were made during testimony. The Union alleges that: the March 31, 2003, e-mail from Peters to Scott was laden with factually inaccurate criticisms; the list

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[5]NYCCBL § 12-306(a) provides in relevant 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.

of past-due cases Peters included in his May 1, 2003, memorandum to Scott is inaccurate; Giakas made false allegations regarding Scott's work performance at the May 6, 2003, meeting to discuss her transfer; and Peters's failure to remove his negative comments from Scott's performance evaluation at Giakas's request was consistent with Peters's professional and personal hostility towards Scott.

According to the Union, following Scott's transfer to Unit 240, ACS's harassment and unwarranted criticism of her work continued and intensified. The Union alleges that: Scott was not officially assigned the case referred to in the memorandum dated November 3, 2003; the three memoranda dated November 25, 2003, refer to incidents that actually occurred on various other dates and were obviously written to make a record against Scott; McIntyre's memorandum dated December 16, 2003, entitled "Insubordination," omits that Scott visited the child's home several times in an attempt to ascertain the location of one of the schools, but despite her best efforts, she was unable to complete a visit until December 15, 2003; and Scott received neither a copy of the memorandum dated December 29, 2003, from McIntyre to Balan regarding her alleged insubordination nor the memorandum dated January 8, 2004, from McIntyre to Balan regarding her alleged failure to submit cases in a timely manner. The Union contends that Scott never had an opportunity to respond to the false allegations in the memoranda..

City's Position

The City argues that the petition must be dismissed because Petitioners have failed to allege facts sufficient to establish a violation of NYCCBL § 12-306(a)(1) and (3). Petitioners have not established the requisite causal connection between the alleged improper act by ACS and Scott's union activity. Any criticism of Scott's work was unrelated to her union activity as evidenced by the

numerous corrective memoranda which pre-date her election to the position of alternate union delegate. Further, it is unlikely that Peters, Scott's supervisor at Unit 205, and McIntyre, Scott's supervisor in Unit 240, harbored any anti-union animus toward her, as they were Union members and Peters eventually became a union delegate.

Even if Petitioners succeeded in presenting facts sufficient to establish a violation of NYCCBL § 12-306(a)(1) and (3), the City's actions were motivated by legitimate business reasons. ACS's actions were reasonable and proper under the circumstances and it would have taken the same action in the absence of Scott's protected conduct. Scott, who was a provisional employee at all times during her ACS employment, was unprofessional, habitually disregarded her supervisors' directives, and she frequently failed to properly perform assigned tasks. Despite notice and corrective counseling, Scott's conduct failed to improve, and she would have been terminated regardless of her union activity.

DISCUSSION

The issue before this Board is whether ACS terminated Scott's employment in contravention of rights protected by the NYCCBL because she insisted on being paid for overtime hours worked instead of accepting compensatory time and because she was an active alternate union delegate. To determine if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, Decision No. B-51-87. 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 Local 237, City Employees Union,* Decision No. B-24-2006.

Regarding the first prong of the *Salamanca* test, the Union argues that Scott was engaged in protected activity when she insisted on being paid for overtime hours worked pursuant to the collective bargaining agreement instead of accepting compensatory overtime. This Board has found that an individual acting solely on his or her own behalf was not engaged in protected activity. *See Vazquez*, Decision No. B-36-2005; *Washington*, Decision No. B-1-2003 at 18-19; *Doctor's Council*, Decision No. B-12-97 at 8-9. Although these prior decisions do not resolve the question of whether an employee who asserts an individual claim founded on the parties' collective bargaining agreement is engaged in protected activity, we need not reach that issue in the instant case. Even assuming that Scott was engaged in protected activity and that the employer knew of that activity, Petitioners have failed to show that the activity was the motivating factor behind ACS's actions.

Typically, the second element of the *Salamanca* test is proven through the use of circumstantial evidence, absent an outright admission. *Burton*, Decision No. B-15-2006. But the mere assertion of retaliation is not sufficient to prove that management committed an improper practice, *Local 983, District Council 37*, Decision No. B-15-2001 at 6, and allegations of improper motivation must be based on specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion. *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. Furthermore,

that a union has challenged an employer's action, by itself, is not a sufficient basis for a finding that an employer has acted with improper motive. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 13; *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 7.

Although here Petitioners assert that the mistreatment of Scott and her subsequent termination were in retaliation for her protected union activity, the record indicates otherwise. While Scott alleges that Giakas threatened her after she asserted her right to overtime, Giakas subsequently asked Peters to remove his negative comments about Scott in her performance evaluation on May 6, 2003, and continued Scott's provisional employment for nearly two years despite her immediate supervisors' well-documented complaints about her performance.

Based on the documentary evidence and the testimony, including Scott's own e-mails, we find that the animosity that developed between Scott and her supervisors was based on Scott's work performance and personal conflicts rather than on anti-union animus. Regardless of Scott's work location, similar disputes between Scott and her supervisors, some of whom were Union members, arose consistently. Both at Unit 205 and Unit 240, supervisors complained that Scott took unauthorized field visits, misused time and leave, and failed to complete her reports in a timely manner. The consistency and similarity of these conflicts, over an extended period of time, undermines any suggestion of pretext.

In this case, the consistent friction between Scott and her supervisors, as well as her transfer to another workplace, militate against any finding of retaliatory animus in her termination, which took place almost two years after the protected activity at issue. *Compare Colella*, Decision No. B-49-2001 at 7-8 (two-year passage of time between an employee's grievance and his suspension, along with a lack of other compelling evidence, provided insufficient evidence of improper

motivation) *with Patrolmen's Benevolent Ass'n*, Decision No. B-25-2003 at 11-13 (proximity in time between an employee's protected activity and an employer's alleged retaliatory action, along with other persuasive evidence, was sufficient to show improper motivation). In this case, the only evidence for retaliatory animus is Scott's conclusory allegations, absent any corroborative evidence even of a circumstantial nature.

Additionally, although Scott was arguably engaged in protected activity after she was elected alternate Union delegate in May 2003, the Union has not shown that her supervisors knew of this activity or that the activity had any causal connection to the termination of her employment.

Finally, since the Union has not shown that the City violated § 12-306(a)(3), there can be no derivative violation of § 12-306(a)(1). *City Employees Union, Local 237*, Decision No. B-24-2006. Accordingly, we dismiss the Petitioners' petition in its entirety.

ORDER

Pursuant to the powers vested in the board of Collective Bargaining by the New York City Collective Bargaining law, it is hereby

ORDERED, that the improper practice petition docketed as BCB-2406-04, be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
September 12, 2006

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

See dissent. CHARLES G. MOERDLER
MEMBER

See dissent. BRUCE H. SIMON
MEMBER

DISSENTING OPINION OF
CITY MEMBERS MOERDLER AND SIMON

We dissent. Review of the entire record simply does not support the Trial Examiner's conclusions. The record reflects, instead , a union activist bent upon asserting what she viewed to be her rights and a bureaucracy equally bent on asserting its prerogatives, especially in the face of a prominent union activist who was known to be such. Notably, this employee (Ms. Scott) served almost two full years in her provisional title and then, on the eve of completing the full two year period, was, as the Trial Examiner factually found, was terminated without any reason being given for such determination. In a word, the determination to terminate her does not on this record pass the "smell" test.

Dated: September 12, 2006
New York, New York

CHARLES G. MOERDLER
MEMBER

BRUCE SIMON
MEMBER