Howe, 79 OCB 19 (BCB 2007)

[Decision No B-19-2007] (IP) (Docket No. BCB-2581-06).

Summary of Decision: Petitioner alleged that ACS interfered with his statutory rights, discriminated and retaliated against him. The City claimed that Petitioner's claims were precluded by *res judicata*, most of Petitioner's claims are untimely and that he failed to prove a *prima facie* claim of retaliation and/or discrimination. The Board found that Petitioner's claim was timely, and was not precluded by *res judicata*, but found that collateral estoppel barred Petitioner's effort to use past allegations of discrimination to establish the discriminatory intent behind the timely alleged act, and that the remaining claim did not state a *prima facie* case of discrimination or retaliation in violation of the NYCCBL. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

ROYDEL HOWE,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, LOCAL 1407, THE CITY OF NEW YORK and THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

DECISION AND ORDER

On October 20, 2006, Roydel Howe, a member of District Council 37, AFSCME, Local 1407 ("Union"), filed a verified improper practice petition against the City of New York, the New York City Administration for Children's Services ("City" or "ACS"). Petitioner alleges violations of the

New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(3) on the part of ACS, asserting that he has been subject to unfair criticism of his job performance on August 10, 2006, which he describes as a "continued action[] of [h]arassment, [d]iscrimination, [r]eprisal and [r]etaliation against Petitioner." (Petition at ¶13.)

In response, ACS claims that most of Petitioner's claims are barred by the doctrine of *res judicata*, and that no *prima facie* claim of retaliation and/or discrimination has been pleaded.

As a preliminary matter, we find Petitioner's claim is neither untimely nor precluded by *res judicata*. However, we find that Petitioner has not pleaded facts which, if credited, would establish that ACS harassed, retaliated and/or discriminated against Petitioner in violation of the NYCCBL. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner's allegations follow upon, and cite as background, those comprising his first improper practice petition, docketed as BCB 2523-05, which was denied by this Board in *Howe*, Decision B-32-3006. In that case, Petitioner, an associate accountant at ACS's Fiscal Support Unit, asserted that over a five year period, he had been subject to harassive and abusive treatment by a co-worker whose workspace was near to his, and that his complaints regarding this co-worker's loud music, abusive behavior and other difficulties he experienced had been ignored by management of ACS. [1]

Additionally, petitioner claimed that his complaints to supervisors in 2005 concerning various topics, including but not limited to the removal of a printer from his work area, his perceived

[1]This very brief summary of the facts at issue in Decision B-32-2006 is not meant to be comprehensive; this Opinion and Order will not rehearse each of the factual allegations addressed in that opinion, familiarity with which is assumed for purposes of this discussion.

lack of appropriate preparation afforded him by ACS for a training workshop he was to conduct, changes in the procedure of submitting timesheets, and Petitioner's inability to obtain information from other units within ACS that he felt he needed to complete his tasks, did not result in appropriate remedial action being taken. *Howe*, Decision B-32-2006 at 3-5. Instead, ACS director of Financial Support Unit Bernard Gold sent Petitioner a written communication in May 2005, stating that the information sought by Petitioner from other units in ACS was not necessary for the performance of Petitioner's job and that some employees in those other units have "expressed concern" regarding the manner in which Petitioner insists upon such information. *Id*.

Petitioner had further complained that an e-mail he received from Director Gold sent reproving him for, *inter alia*, his failure to submit Field Visit forms and weekly schedules, his failure to audit a list of programs, and his continued pursuit of information from other ACS units that is not needed to complete his tasks, and his subsequent correspondence rejecting Petitioner's proffered explanations with respect to the issues raised by Director Gold, constituted "harassment, reprisal, and discrimination" against him. In response, Petitioner requested that the Union President speak with Director Gold and his superiors. *Howe*, Decision B-32-2006 at 5 (editing marks and citations omitted).

Throughout the summer and into the fall of 2005, tensions continued to escalate. Finally, in December 2005, Petitioner filed his initial petition with the Office of Collective Bargaining. Petitioner alleged that ACS interfered with his statutory rights by restraining his performance of his duties as a shop steward; harassed, discriminated, and retaliated against him; and unilaterally changed Petitioner's working conditions. In addition, Petitioner alleged that the Union breached its duty of fair representation when it failed to file grievances on his behalf. Subsequent to the filing,

the petition in BCB 2523-05 was amended to assert a new claim, arising in the denial of requested leave and the subsequent docking of seven hours of Petitioner's pay. On February 7, 2006, the Union filed a grievance on Petitioner's behalf alleging that "seven hours of salary was wrongfully deducted from his pay check." *Howe*, Decision B-32-2006 at 11. On February 9, 2006, the Union filed another grievance on Petitioner's behalf because ACS refused to schedule a labor-management meeting. The Union identified the issues that were to be discussed at that meeting as the subject of this grievance. *Id.* On April 5, 2006, ACS issued a Step II determination involving the alleged improper deduction of Petitioner's wages and found that, since Petitioner provided proper documentation, "seven hours of pay should be restored to grievant." *Id*.

While that case was pending, Petitioner was assigned, among his other duties, to reviews of the status of employees at three facilities. (Petition, Exhibit F8, G13.) On Monday, August 7, 2006, he reported via e-mail to Director Gold, with a copy to Larry Thomas, Executive Director of the Division of Child Care/Sponsor Management and Compliance on the status of those matters, stating that one such matter, involving the George C. Conliffe Day Care Center, involved only five members of staff, and "should be completed this week." *Id.* On August 9, Thomas replied, referencing the small number of employees involved, and a conversation between himself and Petitioner, in which Petitioner "advises me yesterday, 8/8/06, that you've determined that certain staff was underpaid for a year," leading Thomas to instruct Petitioner to submit the completed review to Gold by noon on August 10, 2006. *Id.*

On August 10, 2006, at 2:26 p.m., Petitioner received an e-mail from Director Gold reading:

> Have you seen the below e-mail? It is now after 2:00 p.m. and I have no response from you. Your performance in this project has failed to meet job expectations and is unacceptable. You have had two months

> to do this. Others in your unit have submitted time and leave analysis for several programs with many employees and you have not submitted the analysis for the one program (George C. Conliffe) with only five employees. How do you explain this?

At 4:30 p.m., Petitioner replied to Thomas's e-mail, stating "I am sorry that I was unable to meet today's deadline. I need just a little more time." (Petion ¶13; Exhibit G13.) Gold was a recipient of this reply, as well as Thomas. (*Id.*)

Petitioner has not asserted any specific subsequent acts alleged to constitute retaliation against him personally, but claims that Director Gold is "manufacturing Progressive Disciplinary Procedures against Petitioner." Petitioner has grieved the e-mail complained of, and has sought the same relief in that grievance as he seeks here. (Petition ¶¶ 25-32; Exhibit G5 at ¶¶ 35-42).

Petitioner has also alleged that his manager failed to make timely payouts to staff at the George C. Conliffe Day Care Center and that arrangements had been made between ACS and the Union, and that Director Gold failed to make the requisite payments to the laid off employees thereunder.

POSITION OF THE PARTIES

Petitioner's Position

Petitioner contends that the improper practice petition is timely, noting that it was filed within four months of the date of the August 10, 2006 e-mail of which he complains, and that the rest of the factual allegations and documentary evidence of events outside the statute of limitations are proffered for background, and to illuminate the intent of ACS in its actions. Petitioner contests that the charge is barred by *res judicata*, on the basis that the adverse action taken was not the subject of the earlier improper practice charge, which was filed on December 5, 2005, and was not the

subject of the Board's decision, which was rendered on October 26, 2006.

On the merits of the improper practice claim, Petitioner asserts that his previous claims of violations against ACS dating back to October 2001, as addressed more specifically in *Howe,* Decision B-32-2006, provide context allowing the Board to find the presence of retaliatory and discriminatory intent underlying Director Gold's e-mail, which he views as a step towards discipline absent just cause. He seeks as relief, *inter alia*, that Director Gold be disciplined; that he be ordered to cease "manufacturing Progressive Disciplinary Procedures against petitioner without due cause"; that provision be made to remove the obstreperous co-worker complained of in BCB 2523-05; and that the printer be returned to his desk.

City's Position

The City contends that most of the alleged improper practices performed by ACS in the instant matter are untimely. Since Petitioner filed the instant petition on October 23, 2006, any acts allegedly engaged in by ACS that pre-date June 24, 2006 are untimely because the statute of limitations for filing a timely improper practice petition is four months.

The City also contends that Petitioner has failed to properly allege violations of NYCCBL § 12-306(a)(3). The City argues that Petitioner failed to set forth a *prima facie* claim against ACS for interference with Petitioner's rights protected by NYCCBL § 12-305, or for discrimination and retaliation for union activity. Petitioner, in his pleadings, failed to allege that he was engaged in activity protected by the NYCCBL and that ACS's actions toward Petitioner were motivated by anti-union animus.

Assuming *arguendo*, that Petitioner set forth a *prima facie* claim against ACS for interference, discrimination and/or retaliation, ACS had a legitimate business reason for acting in

such a fashion, and, as such, is protected by NYCCBL § 12-307(b).[2]

DISCUSSION

As an initial matter, the Board finds that Petitioner's claims arising out of the August 10, 2006 e-mail are not time barred, as the instant improper practice proceeding was filed on October 23, 2006, which is patently within the four month statute of limitations provided within the NYCCBL; the other factual materials set forth in the petition can be accepted only as providing background and context. NYCCBL § 12-306(e); *Castro*, Decision No. B-44-99 at 6; *Patrolmen's Benevolent Ass'n*, Decision No. B-10-2006 at 13.

Nor are the claims arising from the August 10, 2006 e-mail barred by *res judicata*. This Board has consistently applied the doctrines of claim preclusion and issue preclusion – *res judicata* and collateral estoppel – in conformity with their scope as defined by the courts of this State. *See, e.g., Correction Officers' Benevolent Ass'n*, Decision B-42-2002 at 7-8; *Lieutenants' Benevolent Ass'n*, Decision B-13-92.

Under the doctrine of *res judicata*, the Court of Appeals has enunciated "as a general rule" that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Parker* v. *Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347-348 (1999), *quoting O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (19); *citing Matter of Reilly v. Reid*, 45 N.Y.2d 24, 30

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[2] NYCCBL § 12-307(b) provides, in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, . . . to maintain the efficiency of governmental operations, . . . and exercise complete control and discretion over its organization . . . .

(editing marks and citations omitted). Thus, a cause of action that could have been presented in a prior proceeding "against the same party, based upon the same harm and arising out of the same or related facts," is barred by *res judicata*. *Id.; see also, North American Van Lines v. American Int'l Cos.*, 11 Misc.2d 1076A, 814 N.Y.S.2d 849 (Sup. Ct. N.Y. Co. 2006).

In the instant case, Petitioner's assertion of a subsequent, allegedly adverse, action taken against him by ACS after the closing of the record in the prior improper practice case is analytically separate from the causes of action asserted in that prior case. As was recently reaffirmed in *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 64, 100-101 (2005):

> It is not always clear whether particular claims are part of the same transaction for res judicata purposes. A pragmatic test has been applied to make this determination – analyzing whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Id., quoting Smith v. Russell Sage College, 54 N.Y.2d 185, 192 (1981) (quotation and editing marks omitted). Thus, while "a valid final judgment bars future actions between the same parties on the same cause of action, a subsequent action will not be barred by *res judicata* where the nature or object of the second action is distinct from that in the prior action in which the judgment was rendered." *GTFM, LLC v. Nagy*, 18 A.D.3d 266, 268 (1st Dept. 2005), *quoting Parker*, 93 N.Y.2d at 347; *Purcell v. Regan*, 126 A.D.2d 849, 851 (3d Dept. 1987) (editing marks and citations omitted).

In this case, the after-occurring event because of its relation in time does not form a "convenient trial unit" with those decided in *Howe*, Decision B-32-2006, because, although arising from the same series of transactions, it relies upon a separate act, with distinct proof and separate damages alleged to flow from that act. *See GTFM, supra; Jefferson Towers, Inc. v. Public Mutual*

Insurance Group, 195 A.D.2d 311, 313 (1st Dept. 1993); *Coliseum Towers Associates v. County of Nassau*, 217 A.D.2d 387, 391-392 (2d Dept. 1996).

However, Petitioner confuses the issue by seeking a remedies that would address not merely the August 10, 2006 e-mail complained of but Petitioner's prior claims, which were dismissed with prejudice. So, for example, Petitioner asks this Board to order ACS to provide him with a printer, and to take action with respect to the co-worker of whom he complained in the prior improper practice petition. Clearly, these demands for relief reflect claims that are barred by *res judicata*, in that they flow from causes of action that were squarely before us and previously decided in Decision B-32-2006. Accordingly, such demands are precluded by our prior decision, and must be denied in their entirety. *Parker, supra; see also Jefferson Towers, Inc.*, 195 A.D.2d at 313; *Coliseum Towers Associates*, 217 A.D.2d at 391-392.

Additionally, Petitioner is barred from seeking to use these precluded claims as evidence of discriminatory intent or anti-union animus in support of his unprecluded claim sounding in the August 10, 2006 e-mail. As the Court of Appeals reaffirmed in *Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.*, 94 N.Y.2d 426, 432 (2000), collateral estoppel, also known as issue preclusion, prevents a party to two actions "from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party." *Id.; quoting Parker*, 93 N.Y.2d at 349 (citation and editing marks omitted). Collateral estoppel applies where an issue in a second action was "raised, necessarily decided and material in the first action, and if the party had a full and fair opportunity to litigate the issue in the earlier action." *Id.*, *citing Parker, supra* and *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485 (1979).

Here, of course, Petitioner cites the very instances of alleged harassment and discrimination

as to which this Board found in Decision No. B-32-2006 he had failed to carry his burden of proof, and which made up the very core of his discrimination and retaliation claims against ACS in that matter, as establishing the allegedly malign intent underlying Director Gold's August 10, 2006 e-mail. Clearly, the disposition of the alleged instances of discrimination, harassment and retaliation that formed the basis for rejecting Petitioner's claims of such discrimination in violation of NYCCBL § 12-306(a)(1) and (3) in Decision No. B-32-2006 were "raised, necessarily decided and material" to that decision. *Pinnacle Consultants, Ltd.* 93 N.Y.2d at 349; *see also Burrowes v. Combs*, 25 A.D.2d 370 (1st Dept.), *app. denied*, 7 N.Y.3d 704 (2006).

Thus, we find that Petitioner's allegations concerning the August 10, 2006 e-mail are properly before us, and his claims arising therefrom are not precluded, but that, having failed to establish invidious discrimination or retaliation in his prior improper practice petition, he cannot now relitigate the instances involved in that case in order to carry his burden of proof as to the existence of anti-union or other invidious intent underlying the August 10, 2006 e-mail.

Because this case has not proceeded to a hearing, our inquiry is not whether he has established the truth of his factual allegations, but rather "whether, taking the facts as alleged by petitioner, a cause of action within the meaning of the NYCCBL has been stated." *James-Reid*, Decision B-29-2006 at 10, *quoting McAllan*, Decision No. B-25-81 at 6; *citing Melisi*, Decision No. B-52-96 at 3; *Farina*, Decision No. B-20-83. In so doing, in view of the fact that he is appearing *pro se* "we will accord the petition every favorable inference and will construe it to allege whatever may be implied from its statements by reasonable and fair intendment." *Id.* at 11-12, *quoting District Council 37,* Decision No. B-37-92 at 12-13. Even under this standard, we find that Petitioner has failed to plead facts which, if proven, would establish a valid claim under the NYCCBL.

In determining if an action constitutes invidious discrimination proscribed by the NYCCBL, 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.
>
> *Howe,* Decision B-32-2006 at 20.

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute the 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. *Howe*, Decision B-32-2006 at 20-21, *citing Local 237, City Employees Union,* Decision No. B-24-2006.

With respect to the first prong of the *Salamanca* test, Petitioner has made no explicit allegation of protected activity. In his reply, Petitioner states only that "[e]ach action was the result of the previous action, propelled by the same set of circumstances, i.e., ACS wanted Petitioner out and Petitioner was still there complaining about the violations and unfair treatment." (Reply at ¶10.) To the extent that he asserts a mere continuation of the same action as before, any such claim would be precluded by our previous holding that

> there is no evidence on the record that indicates that Petitioner, at any point, drew the ire of his supervisors based upon his activity in his capacity as shop steward. Therefore, we cannot hold that Petitioner's status as a shop steward played any role in the complaints contained in his pleadings.

Howe, Decision B-32-2006 at 21. Similarly, our prior holding that no causal link existed

between Petitioner's complaints on his own behalf and on behalf of other employees concerning work conditions and the challenged action of ACS precludes revival of any such claim here. *Id.* at 21-23. However, we are compelled to take note of the fact that, broadly interpreted, Petitioner might have intended to include his filing of an improper practice petition before this Board, which certainly would satisfy the first prong of the *Salamanca* test. Therefore, we are reluctant to ground our holding, in these circumstances, on a failure to plead facts sufficient to make out the first prong of the *Salamanca* test.

Typically, the "second element of the *Salamanca* test is proven through the use of circumstantial evidence, absent an outright admission." *Howe*, Decision B-32-2006 at 22, *citing Burton*, Decision No. B-15-2006. However, a merely conclusory assertion of retaliation is not sufficient to prove that management committed an improper practice, and allegations of improper motivation must be based on specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion. *Id., citing Local 983, District Council 37*, Decision No. B-15-2001 at 6*; Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. Furthermore, "that a petitioner challenged an employer's action, by itself, is not a sufficient basis for a finding that an employer has acted with improper motive." *Id.; citing 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.

Petitioner can point to proximity in timing between the prosecution of his initial improper practice charge, still *sub judice* at the relevant time, and the August 10, 2006 e-mail. However, such proximity, absent some other link between the protected activity and the adverse action, is not enough in and of itself to establish a *prima facie* case. *Howe*, Decision B-32-2006 at 24, *citing Communication Workers of America, Local 1180*, Decision No. B-20-2006 at 14 ("The petitioner

may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence"); *Civil Serv. Bar Ass'n*, Decision No. B-17-2004 at 18. Because Petitioner has nothing in his pleadings that can support causation, we find that he has failed to plead facts sufficient to make out a *prima facie* case.

No other facts appear in the petition or in its supporting documents tending to support a causal link between the prosecution of his first improper practice petition and the August 10, 2006 e-mail. Indeed, the documents submitted by him in support of the petition strongly contradict such an inference. As set forth in the e-mails submitted by Petitioner, the deadline was set not by Director Gold, but by Executive Director Thomas, to whom Gold reports. The time-frame for the assignment was based, according to the August 9, 2006 e-mail from Thomas to Petitioner, on Petitioner's statement to Thomas that the results of the audit showed that several of the five employees had not been paid monies they were owed. Executive Director Thomas informed Petitioner that he "want[ed] to complete the payout before we begin to receive complaints from the staff and the union," and that he assumed that Petitioner had completed the analysis, based upon his oral report on August 8, 2006. Petitioner's e-mail of August 10, 2006 at 4:30 p.m., acknowledges that he had failed to comply with Thomas's noon deadline, and comes 2 hours after Director Gold's e-mail complained of herein, which memorializes Petitioner's failure to turn in the assignment punctually, and noted that the small number of affected employees and the two months since Petitioner had been assigned to audit those five employees rendered his failure to do so punctually unacceptable, as well as below the standard of his co-workers.

Petitioner has not denied that he was in violation of a deadline. Nor has he proffered any allegations tending to establish that the deadline was not achievable, in view of his prior oral report

of the results of the audit to Thomas on August 8–apparently, all Petitioner was being asked to do was formalize that oral report. Finally, Petitioner has not disputed the City's allegations that he had the audit assignment for two months, and that his co-workers had performed similar tasks in less time. On this record, therefore, no allegations have been pleaded that could, if credited, support petitioner's contention that Petitioner was being singled out for his complaints against his supervisors.[3]

Finally, Petitioner's allegations of managerial nonfeasance with respect to employees other than himself fail to establish a cause of action under the NYCCBL.

Accordingly, Petitioner's claim that ACS violated NYCCBL §12-306(a)(3) is dismissed in its entirety.

[3]Because we find that Petitioner has not pleaded any facts tending to establish that the August 10, 2006 e-mail was motivated by anti-union animus, we need not address whether the e-mail constituted sufficient adverse action upon which to base an improper practice complaint. *See, e.g., SSEU Local 371*, Decision B-22-2003; *compare Communication Workers of America*, Decision B-58-87.

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 Roydel Howe docketed as BCB-2581-06 be, and the same hereby is, dismissed in its entirety.

Dated: May 3, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER