

L. 246, SEIU v. City & FDNY, 9 OCB 10 (BCB 1972) [Decision No. B-10-72 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

NEW YORK CITY LOCAL 246,
S.E.I.U.,

DECISION NO. B-10-72

DOCKET NO. BCB-82-70

Petitioner

V.

THE CITY OF NEW YORK
(FIRE DEPARTMENT)

Respondent.

-----X

A P P E A R A N C E S :

NEIL D. LIPTON, ESQ.
Associate Counsel
Office of Labor Relations
for The City of New York

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for New York City Local 246, S.E.I.U.

REPORT AND CONCLUSION

On March 10, 1972, Eleanor Sovern, Esquire, Trial Examiner, issued her Intermediate Report herein, a copy of which is attached hereto and made a part hereof. She found that Respondent had not engaged in practices violative of the provisions concerning full faith compliance under the New York City Collective Bargaining Law (NYCCBL), as charged in the amended petition.

Copies of the Intermediate Report were duly served upon all parties.

No exceptions having been filed (see Board's Consolidated Rules, Section 12.3), and no Board member having requested review, therefore the Board adopts the Intermediate Report as the Report of the Board herein.

Findings of Fact

1. Respondent is a public employer within the meaning of the NYCCBL.
2. New York City Local 246, S.E.I.U., is a public employee organization which, as a primary purpose, exists and is constituted to represent public employees concerning wages, hours, and working conditions.
3. On or about January 2, 1970, Respondent discharged Pat Laudanno, theretofore employed as an auto mechanic in the Fire Department.
4. Respondent did not discharge Pat Laudanno because of union activity.

Conclusions of Law

Upon the basis of the foregoing, the Board finds and concludes as a matter of law that:

1. Respondent, The City of New York (Fire Department) is a public employer within the meaning of Section 1173-3.0 g (1) of the NYCCBL.
2. New York City. Local 246, S.E.I.U., is a public employee organization within the meaning of Section 1173-3.0 j of the NYCCBL.
3. By discharging Pat Laudanno, Respondent has not engaged in practices violative of any provisions concerning full faith compliance within the meaning of Section 1173-5.0 a (1) of the NYCCBL.

CONCLUSION

Upon the basis of the foregoing and pursuant to Section 1173-5.0 a (1) of the NYCCBL, it is hereby

CONCLUDED, that the petition herein, as amended, be, and the same hereby is, dismissed.

DATED: New York, N.Y.
April 26, 1972.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHIMERTZ
M e m b e r

EDWARD SILVER
M e m b e r

HARRY VAN ARSDALE, JR.
M e m b e r

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BOARD OF COLLECTIVE BARGAINING

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**INTERMEDIATE REPORT
OF THE
TRIAL EXAMINER**

On December 18, 1970, New York City Local 246, S.E.I.U., the certified representative of various titles including auto mechanics in the Fire Department and Pat Laudanno, a provisional auto mechanic in the Fire Department, served and filed the Petition herein alleging that the Fire Department had violated Executive Order 52 and other applicable laws and rules by continual harassment of Laudanno and by his discharge, allegedly for union activity. The Petition demanded arbitration and sought reinstatement with back pay.

On January 15, 1971, the City served and filed its Answer denying the allegations of the Petition and asserting, in substance, that the Petition requested relief which could not be granted under the NYCCBL.

On February 17, 1971 the Union filed a Reply restating its position.

On March 31, 1971, the Union served and filed an amended petition withdrawing the request for arbitration and requesting the Board to conduct a full faith compliance proceeding under §1173-5.0a(1) of the NYCCBL.

A hearing was duly held before the undersigned Trial Examiner duly designated by the Board on May 20, 1971.

Both parties submitted briefs.

THE EVIDENCE

Pat Laudanno was appointed an auto mechanic, temporary in the Fire Department on July 24, 1967. His status was changed to provisional on January 13, 1969.

Auto mechanics are employed pursuant to §220 of the New York State Labor Law which requires the City to pay them the prevailing wage rates as determined by the Comptroller of the City of New York. Section 220 also establishes 8 hours as a legal day's work, and prohibits the City from working more than 8 hours a day "except in cases of extraordinary emergency or upon dispensation by the Industrial Commissioner, in which case overtime work would be compensable at premium wage rates." (McElroy v. City of New York, 270 NYS 2d 113, 114)

Laudanno testified that he repaired hood and ladder equipment at the Fire Department's Long Island City shop. For six months prior to his discharge, on January 2, 1970, he and Mitchell Cohen, the union shop steward for Local 246, worked as a team. Their foreman was Joseph

Laukitis. Burton Clark was Chief in Charge, Division of Repairs and Transportation, and Robert Farris was his technical assistant.

Laudanno's Union Activity

When Laudanno first began working for the Fire Department, there was no City-wide representative of auto mechanics, and the men in the shop belonged to several unions. Laudanno was a member of and shop steward for District 15, Local 432, I.A.M. & A.W., AFL-CIO, during his first two and a half years at the Fire Department. Then he helped Mitchell Cohen organize the shop for Local 246, and persuaded members of the I.A.M. and District Council 37 in his shop to join Local 246.

Laudanno testified that after the men switched to Local 246 he was assistant shop steward for that union: he assisted Mitchell Cohen in presenting grievances, and listened to grievances and presented them in Cohen's absence. In addition, "I made complaints about what the men complained about and tried to bring them to Chief Clark or his assistant Bob Ferris." Laudanno testified that he told Ferris he was shop steward for the I.A.M., but he never informed Clark, Ferris or Laukitis of his organizing activities for Local 246 or that he was assistant shop steward for Local 246. Laudanno maintained that it was generally known in the shop that he was working for Local 246.

When he was asked to give specific examples of his role as a union spokesman and assistant shop steward, Laudanno described two incidents. The first incident arose from a complaint by the men that it was too cold in the shop. The men went to the locker room to warm up and were warned by Ferris that their pay would be docked for the time they were away from their posts. Cohen approached

Chief Clark to present the men's grievance. Laudanno testified that Cohen was the spokesman. He testified that Chief Clark was "in a rage" and said if they wished to discuss union activities it would have to be done on their own time. Laudanno did not speak to Clark on this occasion, but he told Bob Ferris that it was too cold to work. At first Laudanno maintained that this incident took place in the cold weather the year he was fired; then Laudanno said he could not recall in which year the incident occurred. Finally, Laudanno testified that there were two separate incidents regarding the cold, but he was not able to distinguish between the two in his testimony.

Laudanno further testified that he had once brought a grievance involving union and personal matters to Bob Ferris and that Ferris had replied he was a troublemaker. Laudanno could not remember what the grievance was or when it occurred, except that it was while he was shop steward for the I.A.M. Laudanno testified that both Chief Clark and Bob Ferris told him that he was a troublemaker. However, when pressed to elaborate, he, could only recall the incident with Ferris described in the preceding paragraph.

Mitchell Cohen testified that he is the first shop steward of Local 246 in the Fire Department, having assumed his duties early in 1969. He testified that Pat Laudanno and he organized the men into Local 246 in 1969. Cohen testified that Laudanno was designated assistant shop steward at an informal lunch-hour meeting. "At that meeting, I recommended that Laudanno be made my assistant . . . It was unanimous. There was no objection whatsoever." Cohen testified that he informed Chief Clark and Clark's assistant

Robert Ferris that Laudanno was his assistant and that Clark responded, "I expected that troublemaker to be your assistant." No written notice of Laudanno's status was sent to the Fire Department, and Cohen said it was not the practice to send a written notice. Cohen testified that he is paid by Local 246 to act as shop steward. Laudanno was not paid by Local 246 while he was assistant shop steward, although Laudanno's successor is paid by the Union. Cohen offered as an explanation that "At that time we did not have enough members to require a paid assistant. Since that time we now pay the assistant."

David Ruffino, President of Local 246, testified that he did not notify the Fire Department of Laudanno's status. He stated that "The Union notifies all departments in which it has a written memorandum. When there is no written memorandum, there is no policy of notifying the department as to which men are shop stewards."

Cohen was asked to give an example of Laudanno's union activities. He mentioned Laudanno's organizational efforts on behalf of Local 246 in the middle of or late 1969. On direct examination, Cohen also testified that in the early part of 1969, when he was shop steward for the I.A.M., Cohen and Laudanno went to Chief Clark to discuss a grievance. Chief Clark refused to talk to them. "He called Pat a troublemaker. He said he would speak to us on our own time and he went off in a huff." On cross examination, Cohen said that Chief Clark called Laudanno "A union troublemaker. For some reason there seemed to be not only union animosity but personal animosity between them and he flew into a rage." This appears to be the incident concerning the cold which Laudanno described in his testimony. (See p. 4 above)

Cohen also testified that Laudanno represented him "several times" when he was on annual leave. However, Cohen gave only one example -- Laudanno asked that poor lighting in the shops be remedied -- and Cohen did not indicate to whom Laudanno made the request or whether the request took place while Laudanno was shop steward for the I.A.M. or assistant shop steward for Local 246. There is no testimony that the request was made to an agent of the employer who was aware that Laudanno was acting as assistant shop steward.

Mitchell Cohen described other occasions when Laudanno's alleged union activity brought forth anti-union statements by the supervisors in the shop. Cohen related an incident which occurred when the temperature in the shop rose about 90 degrees. Some of men left their jobs due to the heat. According to Cohen, Robert Ferris believed that a worker named Doyaga and Laudanno led the movement off the floor, and Ferris said "Those two troublemakers would get their due. Every time there is a grievance on the union hall, it is that troublemaker Doyaga or Laudanno." Cohen described an argument with Robert Ferris which arose when Laudanno was required to report for a medical examination. Cohen objected to the alleged use of medical examinations as harassment, and Ferris told Cohen that "him and another man were troublemakers and they would get their due . . . I was told that he would get his comeuppance, he was a union troublemaker." It does not appear from the record that Laudanno played any part in this discussion.

Burton Clark and Robert Ferris both denied any knowledge of Laudanno's activities on behalf of Local 246. Robert Ferris testified that at one time Laudanno had informed him that he was shop steward for the I.A.M., but he was never told that Laudanno was Mitchell Cohen assistant, nor did he receive official notification of Laudanno's position. (However, he received an official notice from the Commissioners office that Cohen and a man named Terrone were shop stewards after Laudanno's discharge.) Chief Clark testified that he had never been told that Laudanno was a union shop steward and that he did not know Laudanno was active for Local 246. He did not remember any occasion when Laudanno spoke to him concerning conditions in the shop or grievances concerning other employees. Robert Ferris further testified that he had never observed Laudanno engaging in any union activity. Ferris recalled the cold weather incident described above, and stated that Cohen had acted as the Union spokesman on that occasion. He also recalled the incident concerning-excessive heat in the shop and he said Cohen and Doyaga were the leaders, not Laudanno. Ferris testified that he overheard conversations among Laudanno and the other men and that these were not union grievances but consisted of Laudanno's assertions that "conditions were all wrong, and that he was going to see to it that things were straightened out through his political friends." Laudanno told Ferris that he had political connections and that "nobody could touch him."

Laudanno's testimony does not support his assertion that he assisted Mitchell Cohen in presenting grievances for Local 246 on behalf of the men in the shop.

Laudanno could not recall a single specific instance where he did this; and he could recall only vaguely presenting a grievance when he was shop steward for the I.A.M. Further, Laudanno testified that he did not inform any of his supervisors that he was assistant shop steward for Local 246. From his demeanor on the stand, it is clear that Laudanno is a person who is inclined to push himself to the fore and is not reticent about his accomplishments. If Laudanno had indeed been chosen assistant shop steward he would have told his supervisors about it and he would not have lost an opportunity to exercise his function. Laudanno did tell his supervisors about his position as shop steward for the I.A.M. before the men in the shop switched to Local 246. From his testimony, I conclude that Laudanno was not assistant shop steward for Local 246.

Mitchell Cohen's testimony does not support the assertion that Laudanno was his assistant shop steward. The incident concerning the cold described by Cohen occurred when Laudanno was with the I.A.M. It does not appear that Laudanno was acting as a union spokesman or assistant shop steward during the incident concerning high temperatures in the shop; when he left his post he was acting as an individual. Indeed, Cohen did not testify that Laudanno led the men or was their spokesman during this incident, and Laudanno did not mention this occasion as an example of, his union activity. Finally, Cohen's testimony that Laudanno represented him while he was on annual leave is vague and lacks specificity.

do not credit Cohen's testimony that Chief Clark and Farris made anti-union remarks to Cohen about Laudanno. I credit their testimony that they were not aware that Laudanno engaged in activity on behalf of Local 246.

Furthermore, both Clark and Ferris knew of Shop Steward Mitchell Cohen's activities on behalf of Local 246. It is highly unlikely that these men with long experience in the Fire Department and the City labor relations climate, would have made blatantly anti-union remarks to a union shop steward. Indeed, Cohen testified that he was treated fairly by his supervisors when he himself was engaging in union activity. On cross examination, Counsel for the City asked Cohen:

"I want to know if Chief Clark and Bob Ferris dealt with you fairly as a union representative, not in how they settled the grievances, but how they treated you as a union representative."

Cohen answered:

"In the beginning, very unfairly, since we have organized, there has been a marked improvement in their attitude. Maybe this reflects our strength, I don't know."

and Cohen said of Clark and Ferris:

"I have high regard for them as individuals. . . ."

Cohen testified that he had organized the men to join Local 246 during the latter part of 1969. Thus, the period when he was being treated fairly by Clark and Ferris is the period during which Cohen also testified that Clark and Ferris were making anti-union remarks about Laudanno. It is difficult to reconcile Cohen's testimony that his supervisors' attitude toward him showed a marked improvement in fairness with his testimony that during the same period Clark asserted that Laudanno was being fired for union activity. Cohen offered no explanation for the discrepancy between the fair treatment accorded to him and the alleged discriminatory treatment accorded to his assis-

tant. Nor did he explain how he had a high regard for Clark and Ferris while they discriminated against Laudanno. I conclude, therefore, that there was no anti-union animus directed against Laudanno. just as there was none directed against Cohen. Laudanno's discharge may not be ascribed to anti-union discrimination.

Ferris testified about an occasion when Laudanno had a shouting match with Chief Clark. Ferris observed Cohen and Laudanno talking to Clark about a grievance personal to Laudanno. Laudanno shook his finger under Clark's nose, and Clark said that they should discuss the grievance at another time and not in the middle of the shop floor. Ferris testified that he did not hear Clark call Laudanno a "union troublemaker" during this incident, and Chief Clark denied saying Laudanno was a troublemaker. Ferris explained that the argument took place because Laudanno had been asked to bring a doctor's note to justify absence due to illness. Ferris said that quite a few men were required to bring such notes and that he had told Clark, as well as Laudanno himself, that he thought Laudanno was abusing his sick leave privileges. When asked to justify his conclusion, Ferris said that after Laudanno stayed out because of sunburned, Ferris did not think Laudanno looked sunburn. Chief Clark agreed that Laudanno appeared to be abusing his sick leave. During the first nine months he worked, Laudanno earned nine days and took nine days' sick leave, although of the thirty-six days total sick leave he accrued in three years, he only used twenty-seven and a quarter days.

Laudanno did not testify that he was 'harassed' by being ordered to bring doctor's notes following use of sick leave time. This subject was raised by Cohen whose

testimony followed Pat Laudanno's. Ferris and Clark testified after Cohen, and they maintained that it had appeared to them that Laudanno was abusing the use of sick leave time. Laudanno was present when Ferris and Clark testified, yet he did not take the stand to rebut their testimony. If the Union wished to make a case of harassment, Laudanno, the object of the allegedly harassing tactics, should have testified that he did not abuse his sick leave rights and that Ferris' and Clark's suspicions were without foundation. As the record stands, there is no testimony that Laudanno was indeed sick when he claimed to be: the record contains only Cohen's assertion that "we felt the medical office was being used to harass a man when he was injured."

Ferris was asked about Laudanno's work performance and testified "he wasn't one of the best." Laudanno was once assigned to help Ferris repair a special type of apparatus and Ferris observed that "all the man was capable of doing was possibly handing me a tool of some kind. As far as his working ability it was almost nil." Ferris also recalled an occasion when he received a complaint from the owner of a car that was almost run off the road due to Laudanno's carelessness. He testified that he reprimanded Laudanno for "not being able to or not doing his work." Ferris said he did not make written notations at such times because Laudanno was not a civil service tenured employee and it is Ferris' belief that any temporary or provisional employee would be let go at his recommendation without more. Ferris testified that he saw Laudanno preparing his lunch way ahead of time, and he was

"constantly in the middle of a group with talk going on and usually he was the ringleader or talker with everyone standing around wasting other people's time." This happened two or three times, and Ferris told Laudanno to get back to work. Ferris testified that he kept Laudanno on the job for three years because he could not get men to fill vacant jobs. When he heard that a civil service list for auto mechanics was to be published, he transferred Laudanno from a temporary to a provisional title so that Laudanno could be replaced by a man from the list. The request to transfer was on December 15, 1968, and the transfer was effective on January 13, 1969. As a general rule, Ferris explained, no man on a list would want a temporary job .

Although Laudanno and Cohen were present while Ferris testified that Laudanno was a poor worker and they could have been recalled to testify in rebuttal, they were not recalled. Cohen had sixteen years' experience as an auto mechanic in the Fire Department and his testimony as to Laudanno's abilities would have carried weight. However, Ferris' testimony that Laudanno was a poor auto mechanic and had been reprimanded for not doing his work stands unrebutted and therefore I credit it.¹ Similarly, neither Laudanno nor Cohen denied that Laudanno frequently boasted of his political connections.

¹ Cf. City of Albany and Albany Prof. Perm. Firefighters Assoc., 4 PERB 3056.

Ferris further testified that he had told Mitchell Cohen that Laudanno was a troublemaker, but he did not call him a "union troublemaker" or refer to his union activities, and he denied saying that Laudanno or Doyaga "would get their due."

Chief Clark testified that about one week after his discharge, Laudanno came to the shop and told Clark his political connections would put him back to work. Clark said he may have told Laudanno his connections would not help him.

Finally, Ferris testified that he had been a union man and assistant shop steward of Local 246 for about twelve years ending in 1960. He said that he didn't discriminate against Laudanno for union activity. Chief Clark also denied discriminating against Laudanno for union activity, and he testified that he did not prefer charges against Laudanno or order him discharged because of union activity.

The Discharge

Laudanno testified that on December 10, 1969, between 2:30 and 2:45 P.M., foreman Laukitis asked for volunteers to tow a disabled piece of equipment into the repair shop. The job would take approximately four hours and would require the men to work several hours past their normal quitting time of 4:14 P.M. When none of the sixteen teams in the shop volunteered, Laukitis gave Mitchell Cohen a direct order to go out on the job. Then Laukitis turned to Laudanno and said: "You are his partner and I order you to work." Cohen and Laudanno declined to go on the tow job and they refused to obey the order. Laudanno heard foreman Laukitis report to Chief Clark and his assistant, Bob Ferris, that the team had

refused the order. The trio were standing on the other side of a truck Laudanno was repairing. Farris said, "Stop right there, we got them. Bring them up on charges."

Mitchell Cohen's testimony concerning the events of December 10, 1969, was generally to the same effect as Laudanno's, but it differed as to which people were present when the order was repeated. Cohen testified that he was working on one side of the truck and Laudanno was on the other side. After the crews refused to volunteer for a tow job which would go into overtime, Laukitis "came with an order to Laudanno and myself to go." He informed Cohen that Robert Ferris had ordered him to order the team to do the work. "This was no longer a request." After Laudanno and Cohen refused to obey the order, Chief Clark and Robert Ferris approached Cohen and repeated the order. Cohen again refused to obey the order. Chief Clark started to ask on what grounds he based his action when Robert Ferris said, "Stop right there, we got them."

Cohen testified that on the day Laudanno was fired, Chief Clark spoke to Cohen on the repair floor about Laudanno: "I was told his political connections wouldn't help him. He was going to get the axe for union activity and it was long past due." Asked to recall the exact words spoken, Cohen quoted Clark: "He was a union troublemaker. He was finished and his connections wouldn't help him."

This testimony is so improbable as to be incredible. Clark was aware that Cohen was the Local 246 shop steward. It is most improbable that Clark would have made a blatant anti-union remark to the man charged with asserting the Union's position in his shop. If Chief Clark harbored anti-union sentiments, and if Laudanno was being

fired for union activity, Chief Clark would most likely not have told Cohen that those were the facts. Therefore, I do not credit Cohen's testimony that Chief Clark told him Laudanno was being fired for union activity. Rather, I believe that Clark informed Cohen of Laudanno's discharge and remarked that his alleged political connections would not help him

Laudanno and Mitchell Cohen were served with charges later in the afternoon of the 10th. One week later, Laudanno was called to Chief Clark's office and discharged. Laudanno testified that he asked Chief Clark the reason for his discharge and that Clark replied, "We are just terminating you."

Laudanno testified that after he was discharged he left for a vacation in Florida from which he returned January 4, 1970. He received written notice of his discharge after his return from Florida, about January 10, 1970.

The testimony of Chief Clark and his assistant, Robert Ferris, about the events on December 10, 1969, parallel the testimony of Laudanno and Cohen in most details. They testified that a report was telephoned into the shop that a piece of equipment was disabled on the street. it could not be left out overnight because it might be vandalized. After foreman Laukitis canvassed the men and found there were no volunteers to go out on the tow job and thereby work overtime, he informed Ferris and Ferris replied that Laukitis should order a team to go out. Laukitis ordered Cohen and then Laudanno to do the work and both men refused to obey the order. Laukitis reported their refusal to Ferris and to Chief Clark-who had come over to talk to Ferris. Then

Laukitis, Ferris., and Clark walked over to Cohen and Laudanno, and Laukitis repeated the order. Again, the team refused to obey, and Clark and Ferris instructed Laukitis not to order anyone else to do the work because they realized the order would not be obeyed. Ferris denied making any statement like: "Stop right there; we got them." Chief Clark told Cohen and Laudanno that he had no choice but to take action against them, and he ordered Laukitis to draw up charges. Finally, Clark wrote a memo to Samuel Sheres, the then Acting Fire Commissioner, in which he "recommended that the charges go to trial as it is felt that Mr. Laudanno should have obeyed the order. If so inclined, he could then file a grievance. (The charges against Laudanno and Cohen were never brought to trial.)

The Overtime Problem

Laudanno testified that before December 10, 1969, he had consistently volunteered to work overtime on tow jobs when it was necessary to remove disabled equipment from the street. Joseph Laukitis, foreman auto mechanic in Laudanno's shop testified that before the December 10th incident, he had not needed a direct order to have disabled equipment towed into the shop. However, Laukitis said that some time after December 10th, the same situation arose; he could get no volunteers because a tow job was likely to run into overtime. At that time, Laukitis ordered every one in the shop to do the work and every one refused to obey the order; however, none of the men was served with charges as the result of that incident.

Overtime had always been compensated by time off. However, the Union wished the Department to provide overtime pay instead of compensatory time off. The Union relied on §220 of the New York State Labor Law which provides, inter alia, that "eight hours shall constitute a legal day's work for all classes of employees in this state" and prohibits more than eight hours work a day except in emergencies determined by the Industrial Commissioner when premium overtime rates shall be paid. The Union intensified its efforts to obtain overtime pay after the decision in McElvoy v. City of New York, 270 NYS 2d, 113 (1966). which denied recovery to officers and members of Local 246 who claimed they had worked overtime for the Department of Sanitation. The Industrial Commissioner had not declared an emergency. The court found that the plaintiffs had not worked overtime. However, the decision also contained dictum to the effect that even if the plaintiffs had worked overtime, they would not be entitled to overtime pay because overtime in the absence of a declared emergency is in violation of law. Thus, the Union takes the position that the overtime work at issue in the instant case is illegal.

The Union and the Department held meetings over a period of months in 1969, to try to resolve the issue of overtime pay, and the Union agreed that its men would continue to work overtime when necessary to tow equipment off the street while the Department made an effort to obtain a budget for overtime pay. The Department had, at

first, suggested instituting a second shift, but the Union did not want a second shift. However, the Union grow dissatisfied with the Department's efforts to obtain the funds to pay overtime, and, in September of 1969, Mr. Ruffino "initiated a policy that unless an emergency is called according to law, and there is a prior Commitment to cash payment for overtime work, the union policy is that our members will not work." It was with this policy in mind that Cohen and Laudanno refused the order to go out on the tow job.

THE LAW

Section 1173-5.0 of the NYCCBL provides:

"a. the Board of Collective Bargaining
. . . shall have the power and duty:
(1) on the request of a party to a
disagreement concerning the interpre-
tation or application of the provi-
sions of this chapter, or whether
there has been full faith compliance
with such provisions, to consider
such disagreement and report its con-
clusion to the parties and the public."

The instant proceeding was held pursuant to §1173-5.0(a)(1) to determine whether the City is in full faith compliance with the policy expressed in the Law and Executive Order 52 which favors the right of municipal employees to organize and be represented by the public employee organization of their choice.

Section 1173-2.0 of the NYCCBL provides, inter alia:

"It is hereby declared to be the policy of the City to favor and encourage the right of municipal employees to organize and be represented"

Section 3 of Executive Order 52 provides, inter alia:

"Mayoral agency employees shall have the right to self-organization, to form, or join or assist employee organizations, to bargain collectively through certified employee organizations, and shall have the right to refrain from any or all of such activities."

The Union's position, in substance, is that the City violated the policy expressed above by discouraging Pat Laudanno's right to organize and be represented by discharging him for union activity.

In order to sustain its burden of proof that Laudanno was discharged for union activity, the Union must show that the employer's agent responsible for discharging Laudanno had knowledge of Laudanno's union activity, that this agent harbored anti-union animus, and that Laudanno's discharge would not have occurred when it did but for Laudanno's union activity.²

² City of Albany and Albany Prof. Perm. Firefighters Assn., Hearing officer's Decision, 3 PERB 4507, sustained by PERB at 3 PERB 3096; County of Erie - E.J. Meyer Mem. Hosp. and AFSCME Local 1095, Hearing Officer's Decision, 4 PERB 4510, sustained by PERB at 4 PERB 3059.

The evidence shows that Chief Clark was responsible for ordering Laudanno's discharge. The Union did not sustain its burden of proof, that Chief Clark, or his assistant, Robert Ferris, were aware of any union activity by Laudanno on behalf of Local 246. The Union did not sustain its burden of proof that Chief Clark or his assistant, Robert Ferris, harbored any animus against Local 246 or any other union. Finally, the Union did not sustain its burden of proof that Laudanno's alleged union activity, if any, was in any way related to his discharge.

The Union contends that the overtime work at issue was illegal and, therefore, the order given to Laudanno requiring him to go out on a tow job which would inevitably run into overtime was an illegal order which Laudanno was justified in refusing to obey. The Union argues that any discharge resulting from a failure to obey an illegal order "must be construed to be a discharge for union activity." However, the only support offered by the Union for this position is that "only the Shop Steward and the Assistant Shop Steward were issued said order with the full knowledge on the part of the Department that the same was illegal and also with the full knowledge that it would be refused because it was illegal."

The allegation that Cohen and Laudanno were singled out is not supported by any evidence; in addition, the Union has not demonstrated anti-union animus.

A discharge resulting from a failure to obey an illegal order must not necessarily be construed as a discharge for Union activity. It may be that, in a particular case, an employer may not lawfully discharge an employee for refusing to obey an illegal order: a collective bargaining

contract or a state or local law might prohibit such a discharge, and the discharge would then violate the collective bargaining agreement or the law. But in order to violate a law such as the NYCCBL prohibiting discharge for anti-union discrimination, it must be shown that there was a discriminatory intent.³

From the entire record, it is clear that Laudanno was not an active member of Local 246, and that he did not present union grievances to management or assist in their presentation. Further, the uncontradicted testimony shows that Laudanno's work ability was not esteemed by his superiors and that his deportment and attitude did not please them either. The uncontradicted testimony shows that Robert Ferris had determined to fire Laudanno about a year before the discharge occurred and had Laudanno's status changed so that he could be discharged as soon as a replacement was available. Laudanno's refusal to obey a direct order led his already dissatisfied superiors to discharge him immediately. It is not for this Board to decide whether the employer made a wise decision in discharging Laudanno. The Board is charged only with determining whether Laudanno was discharged for union activity. The evidence shows that Laudanno was not discharged for union activity.

³ Associated Press v. NLRB, 1 LRRM 732, 737 (U.S. Supreme Court 1937)

CITY MOTION TO DISMISS

At the close of the Union's case and before the testimony on behalf of the City, counsel for the City made a motion to dismiss. Decision was reserved. The Board ought to deny the City's motion as the Union had sustained its burden of coming forward with evidence to establish a prima facie case and the burden had shifted to the City.

RECOMMENDED CONCLUSIONS OF LAW

1. The City's discharge of Pat Laudanno did not constitute a failure of full faith compliance with the New York City Collective Bargaining Law.

2. The petition of Local 246 should be dismissed.

DATED: New York, N.Y.
March 10', 1972

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YOUR ATTENTION IS DIRECTED TO PART 12 OF THE
CONSOLIDATED RULES OF THE OFFICE OF COLLECTIVE
BARGAINING.