Kalman, 11 OCB2d 32 (BCB 2018)

(IP) (Docket No. BCB-4251-17)

Summary of Decision*:** Petitioner alleged that Respondents violated NYCCBL § 12-306(a)(1) and (3) by terminating him in retaliation for engaging in union activity. The City argued that Petitioner's claims were untimely, that he was terminated for violating a last chance agreement, and that the termination was not motivated by anti-union animus. The Board found the claim timely. However, Petitioner did not establish a *prima facie* case of retaliation. Accordingly, the petition was dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LARRY KALMAN,

Petitioner,

-and-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On October 10, 2017, Larry Kalman ("Petitioner") filed a verified improper practice petition against the City of New York ("City") and its Department of Parks and Recreation ("Parks"). He alleges that the Parks violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by terminating him in retaliation for engaging in union activity. The City argues that Petitioner's claims are untimely, that he was terminated for violating

a last chance agreement, and that his termination was not motivated by anti-union animus. The Board found the claim timely. However, Petitioner did not establish a *prima facie* case of retaliation for engaging in union activity. Accordingly, the petition is dismissed.

BACKGROUND

The Trial Examiner held a one-day hearing and found that the totality of the record established the relevant facts set forth below.

Petitioner was terminated on June 8, 2017, after approximately 27 years at Parks. At the time of his termination, he was a Parks Supervisor Level I, represented by Local 1508 of District Council 37, AFSCME, AFL-CIO ("Union"). He was also seven weeks from the end of an 18-month probationary period pursuant to a Stipulation of Settlement, referred to by the City as a "last chance agreement." (Tr. at 62).

The Stipulation of Settlement was signed on January 27, 2016 and resolved disciplinary charges issued by the Parks Advocate's Office in August 2015.[1] Under its terms, Petitioner admitted that he violated DPR's Code of Conduct, accepted a demotion, and agreed to an 18-month probationary period, ending July 27, 2017. The Stipulation of Settlement provides that during his probationary period, Petitioner was subject to termination "upon the determination by the [Parks Advocate] that he had violated his probation." (Pet., Ex. 10) Further, Petitioner agreed, pursuant to the Stipulation of

[1] As background to the instant claim, the Board notes Petitioner's assertion that the alleged retaliatory conduct began after Petitioner asked the Union to grieve the denial of a job transfer in February 2014. Although Petitioner admitted to the August 2015 charges, he now asserts that the charges were "meritless" (Pet. at ¶ 12) and testified that he signed the Stipulation of Settlement upon the advice of Union Treasurer Vincent Musillo.

Settlement, that any determination to terminate him was "without any further right of appeal or remedy under any contractual grievance procedure or any other forum." *Id.*

After he signed the Stipulation of Settlement, Petitioner initially had no work-related issues. Indeed, he received several commendations for his involvement in rescuing a woman who jumped off a pier at Midland Beach. These recognitions included being named as "World's Best Park Supervisor," designation as a member of the NYC Parks "Team of the Month" for April 2016, and receiving an NYC Parks "Recognition Coin." (Pet., Ex. 1) He was also named Employee of the Month for August 2016.

However, issues concerning his work performance emerged in 2017. On March 19, 2017, Parks received an anonymous complaint from 311 that Truck #5454, Petitioner's vehicle, damaged a sign at Midland Park. On March 21, 2017, Petitioner's then-Supervisor, Mike Santiago, requested that the Parks Advocate's Office investigate the allegation.

On April 17, 2017, Petitioner and three Union officials met with Santiago and another supervisor, Mike Shuster, as well as his then-manager, Bonnie Williams. Among other topics discussed at this meeting, Union Treasurer Musillo testified that at that time having Petitioner report to two supervisors was causing difficulties and this meeting was an attempt to improve their working relationship. Musillo further testified that the conversation focused on communication issues between Petitioner and his supervisors. According to Petitioner's testimony, his manager said that he was a very good employee and just had to improve his relationship with Santiago and Shuster.

On April 30, 2017, Shuster summoned Petitioner for a meeting and questioned him about a broken pipe within his work zone.[2] Petitioner refused to sign a memorandum memorializing the conversation with Shuster, which stated that he was "aware of the broken pipe and that it was leaking for a couple of days" and that he improperly failed to inform his immediate supervisor and submit a work order. (Pet., Ex. 12) Petitioner denies that he knew that the pipe was broken. Nevertheless, the memorandum was later placed in his employee file.

In mid-May 2017, the Advocate's Office conducted an investigatory interview with Petitioner regarding the anonymous call received in March 2017.[3] At that meeting, Petitioner was informed that the Advocate's Office was investigating whether, on March 19, 2017, Petitioner had: (i) damaged a Parks vehicle by striking a sign; (ii) failed to promptly report damage to the Parks vehicle; and (iii) falsified his trip log and violated the speed limit. Petitioner was afforded an opportunity to respond to the allegations, which he claimed were untrue.

On May 30, 2017, Petitioner emailed Chief of Operations Thomas Russo to request a meeting with him and Union Treasurer Musillo to resolve the "issues [Petitioner] was having within District." (Pet., Ex. 14) The record does not reflect whether Petitioner received a response to this email.

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[2] The record does not reflect whether Union representatives accompanied Petitioner to this meeting.

[3] The Advocate's Office had previously contacted the Union to schedule the meeting, and Petitioner was represented by the Union during the interview.

Approximately one week later, on June 8, 2017, the Chief of Operations gave Petitioner a termination letter. The letter cited the allegations regarding the March 19, 2017 incident and stated that Petitioner was terminated for violating certain Parks Standards of Conduct. The letter noted that under the terms of the Stipulation of Settlement, the violation of "any [Parks] Standards of [Conduct] would result in . . . termination." (Pet., Ex. 11).[4]

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner asserts that Parks terminated him in retaliation for engaging in protected union activity, in violation of NYCCBL § 12-306(a)(1) and (3).[5] Specifically, he argues that he engaged in protected conduct when he filed a grievance in 2014, sought Union assistance during the disciplinary process in August 2015, entered into the Stipulation of Settlement in January 2016, met with his supervisors and manager in April 2017, and

[4] According to Petitioner, Parks did not discipline at least one other unit member who failed to report damage to a vehicle. However, he did not provide details on this alleged matter.

[5] NYCCBL § 12-306(a) provides, in pertinent part, that is shall be an improper practice for the 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;
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> ***
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> (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[.]

participated in an investigatory interview in May 2017. He also alleges that he engaged in protected conduct when he requested a meeting with the Agency Chief and Union Treasurer Musillo in May 2017. Petitioner claims that shortly before the end of his probationary period, Parks "orchestrated" charges against Petitioner "to create the appearance of a violation of the Stipulation of Settlement" to establish a pretext to terminate him. (Pet. Br. at 6) He also contends that Parks retaliated by disciplining him for his alleged failure to take measures regarding a broken pipe.

Petitioner argues that the record establishes anti-union animus. He contends that he did not violate the Stipulation of Settlement because the March 19, 2017 allegations are false and he received multiple commendations in 2016. Even if he had engaged in the alleged misconduct, he asserts that he was treated differently than other similarly situated employees. In particular, Petitioner alleges that Parks did not discipline another employee who had previously failed to report damage to a vehicle. Petitioner further argues that any assertion that Parks terminated Petitioner for violating its Code of Conduct is pretextual in light of its anti-union animus.

Petitioner contends that the petition is not time-barred. He asserts that he initially filed his claims before the New York State Public Employment Relations Board ("PERB") on September 14, 2017. Therefore, he argues, the Board should regard as timely any claims accruing on or after May 14, 2017. In the alternative, Petitioner asserts that the Board should deem the petition timely because his termination occurred within the limitation period. Moreover, Petitioner contends that he was not aware that he needed to complain about the violations against him until Parks terminated him.

Petitioner requests that the Board order reinstatement with backpay and compensatory damages and grant any other and relief the Board deems just and proper.

City's Position

The City argues Petitioner's claims must be dismissed as untimely under NYCCBL § 12-306(e) and OCB Rule § 1-07(b)(4) because the alleged violation flowed from events that occurred prior to June 10, 2017, more than four months before Petitioner filed the petition.[6] Additionally, the City argues that the Board only considers untimely allegations in the context of background information rather than as a violation of the NYCCBL. It also contends that Board rules do not permit tolling the statute of limitations where Petitioner initially filed in an incorrect forum.

Even if Petitioner's claim is timely, the City asserts that Petitioner failed to establish a *prima facie* case of retaliation.[7] Initially, it asserts that the June 2014 EEO complaint is not Union activity because there is no evidence that any Union personnel assisted Petitioner.

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[6] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a . . . public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or the date the petitioner knew or should have known of said occurrence.

OCB Rule § 1-07(b)(4) provides, in relevant part: "A petition alleging that. . . a public employee organization . . . has engaged in or is engaging in an improper practice violation of [§] 12-306(e) of the statue may be filed with the Board within four (4) months thereof . . . ."

[7] The City also argues that the NYCBBL § 12-306(a)(1) claim must fail because Petitioner neither properly alleged anti-union animus nor established that Parks's conduct was "inherently destructive of important employee rights." (Rep. Br. at 35)

It further contends that the filing of EEO complaints generally is not activity protected by the NYCCBL.

The City also argues that the relevant individuals at Parks had no knowledge of the protected activity. It claims that Petitioner's allegations that individuals at Parks harbored anti-union hostility are wholly unsubstantiated. Indeed, the operations and decision making of the Advocate's Office, which issued the disciplinary charges against Petitioner, is entirely insulated from other offices within Parks. To illustrate its point, the City asserts that there is no evidence that the Advocate's Office was aware of either the 2014 transfer grievance or the April 2017 meeting with Petitioner's manager and supervisors.[8]

Furthermore, the City argues that the Petitioner has not established a causal connection between his union activity and the alleged incidents of retaliation. The City emphasizes that Petitioner fails to establish that the disciplinary actions were taken in response to any specific instance of union representation and that there has been no showing that anyone at Parks was motivated by anti-union animus. It additionally asserts that Petitioner has not demonstrated that he was improperly denied an opportunity to defend himself. Although Petitioner, by entering into the Stipulation of Settlement, did waive certain rights that would otherwise have been available to him, he and the Union entered into that agreement voluntarily. Moreover, the City contends, the record does not establish that Petitioner was denied the opportunity to defend himself during the Advocate's Office investigation.

[8] It also claims that there is no evidence that anyone at Petitioner's new work location knew about the 2014 EEO complaint.

Lastly, the City argues that it had legitimate business reasons for terminating Petitioner. It asserts that its decision to terminate Petitioner was a proper exercise of its right under the NYCCBL to take disciplinary action and relieve employees from duty. *See* NYCCBL § 12-307(b).[9] The City also argues that its decision to terminate Petitioner was for substantiated violations of Parks's Code of Conduct and in accordance with the terms of the Stipulation of Settlement. It asserts that the instant petition is an effort to adjudicate a disciplinary matter over which Petitioner and the Union waived the right to appeal.

Accordingly, it requests the dismissal of the instant petition.

DISCUSSION

As a threshold matter, we address the timeliness of Petitioner's retaliation claim. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). NYCCBL § 12-306(e) provides in relevant part:

> A petition that a public employer or its agents. . . has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

See also OCB Rule § 1-07(b)(4) ("The petition must be filed within four months of the alleged violation."). Any claims that arose more than four months prior to the filing of the

[9] NYCCBL § 12-307(b) provides, in relevant part:

> It is the right of the city, or any other public employer, acting through its agencies, to . . . direct its employees; take disciplinary action; [and] relieve its employees from duty because of lack of work or for other legitimate reasons.

petition are not properly before the Board and will not be considered. *See Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007).

The OCB Rules provide that when calculating the four-month period in which a petition can be filed, "the last day of the period so computed shall be included, unless it falls on a Saturday, Sunday or legal holiday, in which event the period shall run to the next business day." OCB Rules § 1-12 (f). Here, Petitioner was terminated on June 8, 2018. Thus, four months from petitioner's termination was Sunday, October 8, 2017. The following day, Monday, October 9, 2017, was Columbus Day, a City holiday. Accordingly, the petition filed on October 10, 2017, is timely as to the claim regarding his termination on June 8, 2017.[10] Events that occurred prior to his termination are considered solely as background.[11] *See Benjamin*, 4 OCB2d 6 (BCB 2011) ("[F]actual statements comprising untimely claims may be admissible as background information.") (quoting *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (internal citations omitted).

This Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the standard in *City of Salamanca*, 18 PERB ¶ 3012 (1985), to determine whether an employer has violated

[10] Petitioner claims that the limitations period should be tolled from the date that he filed a claim before PERB, on September 14, 2017. Petitioner cites to no authority that would justify tolling the statute of limitations and we cannot toll the limitations period on equitable grounds; Petitioner has made no showing that the delay was due to his "reasonable reliance on the conduct of an opposing party." *See Gonzalez*, 8 OCB2d 10, at 8 (BCB 2015) (citing *Donnelly*, 7 OCB2d 23, at 8 (BCB 2014)). Even if we were to regard the Petition as timely filed on September 14, 2017, our analysis below would remain unchanged.

[11] Thus, while Petitioner is time-barred from asserting a violation of the NYCCBL based on the circumstances giving rise to the Stipulation of Settlement, the Board may consider these events as background.

NYCCBL § 12-306(a)(3). This standard provides that a petitioner may establish a *prima facie* case of retaliation by demonstrating that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
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> 2. the employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also Local 376, DC 37*, 5 OCB2d 31, at 17 (BCB 2012). A violation of NYCCBL § 12-306(a)(3) is also a derivative violation of NYCCBL § 12-306(a)(1). *See Local 621, SEIU*, 5 OCB2d 38, at 2 (BCB 2012). If a petitioner is able to establish a *prima facie* case of retaliation, "the burden shifts to the employer who may refute a 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." *CSTG, L. 375*, 4 OCB2d 61, at 24-25 (BCB 2011) (citations omitted); *see also SBA*, 75 OCB 22, at 21-22 (BCB 2005).

Petitioner claims that the City violated NYCCBL § 12-306(a)(1) and (3) by terminating his employment shortly before the end of his probationary period, premised upon disputed misconduct allegations. Upon reviewing the record in this case, we find that Petitioner did not set forth a *prima facie* case of retaliation. We therefore dismiss the petition.

The record clearly establishes that Petitioner engaged in protected union activity and that Parks knew of this activity. Here, it is undisputed that Petitioner sought and obtained assistance from the Union on a variety of workplace and disciplinary matters. The Union represented him in the 2015 disciplinary charges that culminated in the Stipulation of Settlement. Further, in April and May 2017, Petitioner was accompanied by Union

representatives in several meetings with Parks personnel. The City does not dispute that Parks had knowledge of this activity.[12] Petitioner thus satisfies the first prong of the *Bowman/Salamanca* test.

The second prong of the *Bowman/Salamanca* test requires proof of a causal connection between the alleged improper act and the protected Union activity. A causal connection is "typically . . . proven through the use of circumstantial evidence, absent an outright admission." *Benjamin*, 4 OCB2d 6, at 16 (BCB 2011) (citations omitted); *see also CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). Importantly, a "petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22. Rather, "allegations of improper motivation must be based on statements of probative facts." *Feder*, 5 OCB2d 14, at 25 (BCB 2012). Moreover, while "temporal proximity alone is not sufficient to establish causation, the temporal proximity between the protected union activity and the alleged retaliatory action, in conjunction with other facts supporting a finding of improper motivation, [may be] sufficient to satisfy the second element of the *Bowman/Salamanca* test." *Feder*, 4 OCB2d 46, at 44 (BCB 2011); *see Colella*, 79 OCB 27, at 55 (BCB 2008).

Here, there is temporal proximity between the protected union activity and Petitioner's termination. Petitioner sought and obtained the Union's assistance on several

[12] The City acknowledges that multiple Parks supervisors had knowledge of Petitioner's union activity, but contends that such knowledge should not be imputed to the Advocate's Office. This claim is not borne out by the record. The Advocate's Office had specific knowledge of the Union's involvement in the 2015 disciplinary charges and investigatory interview in May 2017. Moreover, for the purposes of establishing the first prong of the *Bowman/Salamanca* test, "the employer's general knowledge of union activity may be established by demonstrating the employer's participation in the grievance process." *See, DC, L. 1113*, 77 OCB 33, at 26 (BCB 2006) (internal quotations omitted); *see also Local 1180*, 8 OCB2d 36, at 17 n. 17 (BCB 2015) (citing *DC 37, L. 376*, 1 OCB2d 40, at 14 (BCB 2008)).

occasions between January 2016 and May 30, 2017. Therefore, his union activity occurred in close proximity to his June 8, 2017 termination. However, Petitioner has not established any facts other than the timing of his termination that support his *prima facie* case. Nothing in the record substantiates Petitioner's claim that Parks "orchestrated" the alleged violations of the Parks Code of Conduct. (Rep. at 13). Crucially, here, there is no evidence that anyone at Parks was hostile to Petitioner's union activity.[13]

Here, we also cannot render a finding of anti-union animus based on the fact that Petitioner was terminated in the final months of his probationary period. The record indicates that the investigation was triggered by an anonymous 311 call. There is no evidence that Supervisor Santiago acted upon hostility to union activity when he reported the 311 call to the Advocate's Office and no claim that his actions in this regard were inconsistent with normal practice. Indeed, the Stipulation of Settlement provides that during the probationary period, Petitioner "will be terminated upon the [Park Advocate's] determination that [Petitioner] has violated his probation." (Pet., Ex. 10) Parks thus appears to have acted within its authority under the Stipulation of Settlement by terminating Petitioner after the Advocate's Office determined that the allegations had been substantiated.

As a result, we are unable to find that Parks acted with an improper motive based on temporal proximity alone. *See DC 37*, 3 OCB2d 40, at 17 (BCB 2010); *see also COBA*, 2 OCB2d 7, at 42 (BCB 2009); *Colella*, 79 OCB 27, at 55 (BCB 2007). Accordingly,

[13] Although Petitioner alleges that another unit member was not disciplined for committing a similar violation, he offers no persuasive evidence to support this assertion. Furthermore, he did not assert or establish that this employee was similarly on probation at the time of the purported misconduct.

Petitioner has not established a *prima facie* case. Further, we find no derivative or independent violation of § 12-306(a)(1). Thus, the improper practice petition is dismissed 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 verified improper practice petition, docketed as BCB-4251-17, filed by the Larry Kalman against the City of New York and the New York City Department of Parks and Recreation is hereby dismissed.

Dated: September 6, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER