SSEU, Local 371, 12 OCB2d 15 (BCB 2019)

(IP) (Docket No. BCB-4276-18)

Summary of Decision: The Union alleged that the Department of Consumer Affairs violated NYCCBL §12-306(a)(1) and (3) by issuing disciplinary charges to an employee in retaliation for filing a grievance. The City argues that the Union has failed to establish a *prima facie* case of retaliation and that the decision to discipline the employee was based on a legitimate business reason. The Board found that the Union produced *prima facie* evidence of retaliation but that the City refuted the evidence of animus and provided a legitimate business reason for its actions. Accordingly, the Board dismissed the improper practice petition. (***Official decision follows***).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICES EMPLOYEES UNION, LOCAL 371,
on behalf of MARGUERITE PRICE,

Petitioner,

-and-

THE DEPARTMENT OF CONSUMER AFFAIRS
and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On May 30, 2018, Social Services Employees Union, Local 371 ("Union"), filed an improper practice petition on behalf of its member Marguerite Price ("Price") against the City of New York ("City") and the New York City Department of Consumer Affairs ("DCA"). The Union alleges that DCA violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law

(New York City Administrative Code, Title 13, Chapter 3) ("NYCCBL") by issuing disciplinary charges to Price in January 2018 in retaliation for her protected union activity. The City argues that the Union has failed to establish a *prima facie* case of retaliation and that it had a legitimate business reason for issuing the disciplinary charges. The Board finds that the Union produced *prima facie* evidence of retaliation but that the City refuted the evidence of animus and provided a legitimate business reason for its actions. Accordingly, the improper practice petition is dismissed.

BACKGROUND

After a one-day hearing, the Trial Examiner found that the totality of the record, including the pleadings, exhibits, transcript, and briefs, established the relevant facts set forth below.

The Union represents employees in the civil service title of Community Associate. Price has been a Community Associate at DCA since February 4, 2013. The only timely claim we consider in this matter is the Union's allegation that disciplinary charges issued to Price in January 2018 were in retaliation for her union activity.[1] Nevertheless, the following background facts are needed to bring context to the claims. Sometime prior to April 2015, Price began working in DCA's Office of Financial Empowerment ("OFE"). In April 2015, Price received a written warning for being absent without leave. It is undisputed that she had a difficult working relationship with her supervisor in OFE and felt that an Assistant Director and her supervisor were "harassing [her] through emails" and "writing [her] up constantly." (Tr. 18) As a result, Price contacted the Union and spoke to a Union representative about her work environment. Shortly

[1] Events that occurred prior to January 31, 2018, four months before the petition was filed are discussed solely as background information.

thereafter, the Union representative accompanied Price to a meeting with her supervisor, and OFE's Director and Assistant Director. In September 2015, the Union's Associate Director of Grievances set up another meeting with Price and management to address similar complaints from Price. At some point after this meeting, Price requested a transfer to a different unit.

In April 2016, Price was transferred to the Case Support Unit ("CSU"), where she served in the in-house position of Case Support Associate.[2] Those who work in the CSU are responsible for processing paperwork related to decisions, settlements, and appeals of DCA enforcement actions; answering consumer queries through the 311 Help Line; and interacting with customers at the reception area. On September 26, 2016, the CSU was relocated to a different location where Price received a new set of responsibilities and duties.

In October 2016, Emma Wong became Price's supervisor.[3] It is undisputed that in the two years that followed, Wong issued Price six warning memoranda ("warning memo" or "memo") for poor work performance, failure to follow work procedures and protocols, and unprofessional conduct. Wong testified that she would consistently email all CSU staff, including Price, regarding corrections that were needed to be made in their work. According to Price, she had difficulty working with Wong. Price admitted that there were errors in her work assignments but asserted that the errors were made because she was unsupported by Wong and other supervisors.

On January 3, 2017, Wong issued Price her first warning memo. The memo listed three incidents that occurred between October 18, 2016 and December 22, 2016, in which Price engaged in Code of Conduct violations by being "insubordinate, unprofessional in [her] interactions with

[2] Price's civil service title remained unchanged.

[3] Wong supervised approximately seven other employees.

[her] supervisor and other employees, and incompetent in the performance of [her] official duties."[4] (City Ex. 2) The following day, Price sent a response to Wong and the Union's Assistant General Counsel disputing the allegations.

On January 13, 2017, Wong issued Price a second warning memo listing 17 incidents between October 31, 2016 and January 10, 2017, in which Price failed to exercise "care in the performance of [her] duties, including performing [her] duties in an improper and negligent manner." (Ans., Ex. 2) Wong's unrebutted testimony was that this memo resulted from errors in Price's decisions and pleading letters.[5]

On July 25, 2017, according to Wong, Price "failed to perform [her] official duties" when she did not log in every entry of work performed between the hours of 9 am and 11 am that day.[6] The Union filed a grievance that same day stating, in relevant part:

> There has been a violation, misinterpretation, misapplication of the SSEU, Local 371 [CBA], including but not limited to Article 8 Section 11. The Supervisor Ms. Emma Wong has been disrespectful and abusive towards the grievant. She has denigrated, disrespected[,] and degraded Ms. Price on the open floor. This unprofessional conduct over the year [has been] inappropriate,

[4] According to Wong, several other employees received similar memoranda at around the same time.

[5] Wong testified that employee errors come to her attention when the Senior Settlement Officer quality checks all Case Support Associate work. The Senior Settlement Officer provides recommendations to Wong and informs her of errors made by Case Support Associates. Wong then checks the work a second time and emails the Case Support Associates to make the corrections.

[6] Wong testified that it is a requirement that every Case Support Associate electronically log their daily tasks and that the purpose of maintaining the entries on the spreadsheet is to ensure that the workload is distributed properly and to provide the necessary support to staff.

> unacceptable[,] and untenable. This issue was addressed to the Director Mr. Simon with no resolution.[7]

(Union Ex. A)

On July 31, 2017, Wong issued Price a third warning memo regarding the July 25 incident. Wong testified that she issued the warning memo to Price, as she had done in the past with other Case Support Associates, because Price did not follow protocol.[8] Wong testified that when she questioned Price on the day of the incident, Price told her that she was "working on something that is personal" and a "job related email." (Tr. 112, 144) Price did not dispute Wong's testimony and testified that she could not recall to whom the email was being sent to or what it concerned.

Price testified that sometime after the July 25, 2017 grievance was filed, she attended a regularly-scheduled staff meeting. Price stated that during the meeting, Igor Simon, the Director of the CSU, informed the attendees that "there was an employee who was getting the union involved in . . . that person[']s affairs with the office . . . and anyone who did that, the agency was going to respond aggressively." (Tr. 41) Price initially testified that the meeting took place on August 31, 2017. However, Price's signature does not appear on an attendance sheet from that meeting. Additionally, the City produced a document showing Price was on leave on August 31, 2017. Moreover, Wong and Simon testified that they did not recall seeing Price at the August

[7] The grievance was denied at Steps I, II and III. The Step III determination was issued on March 9, 2018. (City Ex. 7)

[8] While warning memos issued prior to July 2017 indicated that, "any subsequent similar misconduct may subject you to formal disciplinary charges," the July 31, 2017 and later memos state that, "any subsequent similar misconduct is being referred to the [Disciplinary Advocate's Office], which may result in disciplinary charges that can range from suspension to termination." (City Ex. 2)

2017 meeting.[9] When confronted with evidence of her absence, Price testified that she was unsure of the exact date of the meeting at which the event took place. Subsequently, she testified that the statement was made at either the July 2017 or the September 2017 monthly meeting.

Simon denied that he told employees that there was an employee who was seeking the Union's assistance and the agency was going to respond aggressively, at the August 2017 meeting. He also denied that he made such a statement at any prior or subsequent meeting.[10] He further testified that, in the course of his employment at DCA, he once served as a union vice president and assisted members in filing grievances. Based on this background, he stated that he would not discourage an employee's pursuit of union representation in filing a grievance. Additionally, he testified that the only conversation he had with Price regarding her July 25, 2017 grievance occurred when Price complained to him that she had not received a response to her grievance. Simon told Price that she should follow up with the Human Resources department because he doesn't "handle . . . [or] respond to these types of grievances." (Tr. 90)

On October 23, 2017, Wong issued a fourth and fifth warning memo to Price. The fourth memo stated that Price failed to exercise "care in the performance of duties including performing official duties in an improper and negligent manner" during nine incidents that occurred between August 10 and October 23, 2017. (City Ex. 2) Wong testified that she issued this memo because Price continued to have a number of errors in her work assignments. The fifth memo stated that

[9] Wong testified that she would regularly attend the CSU meetings and send out notes summarizing the discussions.

[10] Simon testified that the monthly meetings at CSU are used to "summarize everything that occurred the month prior and to reinforce any instruction or procedures or policies that needed to be followed through" and that individual employee issues are not discussed at these meetings. (Tr. 87)

Price engaged in "unauthorized use of the city time device" 12 times between September 5 and October 18, 2017.[11] (City Ex. 2) Wong testified that Price was punching in and out on floors where she was not assigned to work and that she sent several emails to Price to inquire about the reasons for this but received no response. According to Wong, she sent similar warning memoranda to other employees within the same unit. Price could not recall whether she received prior warnings from Wong about the agency's Hand Scanner policy via email because it was "impossible to [read] every [email]." (Tr. 152) She testified that she was only made aware of her failure to adhere to the Hand Scanner policy when she received the fifth warning memo.

On November 17, 2017, Wong issued a sixth warning memo to Price. The warning memo listed several incidents in which Price engaged in Code of Conduct violations by "not responding to [her] supervisor's emails, fail[ing] to respond to [her] direct supervisor when asked about multiple time punch submissions, and being insubordinate to [her] direct supervisor and Deputy Director." (City Ex. 2) Wong testified that she noticed that Price was excessively "punching in and punching out and voiding punch[es]." (Tr. 119) According to Wong, she issued this memo because she and Simon sent Price "many emails with no response." (Tr. 119) Wong issued Price the sixth warning memo with the Deputy Director present. Additionally, Wong stated that when she issued the memo, Price's reaction was "unprofessional" and "dismissive." (Tr. 120)

Petitioner's timely claim concerns an occurrence that took place on January 31, 2018. On that day, the Disciplinary Advocate's Office ("DAO") issued four disciplinary charges against

[11] DCA's Hand Scanner policy requires employees to scan in on their assigned floor so that CityTime records accurately show that they are present at work.

Price.[12] (Union Ex. D) The charges were based on the conduct from her prior warning memoranda. The DAO recommended that Price receive a five-day suspension. Price appealed the discipline and on April 1, 2018, a Step II hearing was held. On April 16, 2018, the Step II determination upheld the charges and recommended penalty.[13]

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DCA violated NYCCBL § 12-306(a)(1) and (3) when it issued Price disciplinary charges in retaliation for filing a grievance.[14] The Union contends that the January 31, 2018 disciplinary charges are without merit. According to the Union, Price's supervisor and

[12] Charge 1 alleged that on one occasion dated November 17, 2017, Price failed to be "civil, courteous, considerate and professional in her interactions with her supervisor." (Union Ex. D) Charge 2 alleged Price "consistently ignor[ed] and question[ed] the orders of her supervisors" and listed six occasions in 2017 (July 25, September 5, October 18, October 30, November 14, and November 17). (*Id*.) Charge 3 alleged that Price "persistently violat[ed] the Department's rules, orders, directives, [and] procedures." (*Id*.) Charge 4 alleged that Price engaged in prejudicial conduct.

[13] Price testified that she served the five-day suspension and then appealed the charges and recommended penalty to a Step III hearing, which was held sometime in November 2018.

[14] NYCCBL § 12-306(a) provides, in pertinent part:

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

other managerial employees engaged in hostile and aggressive behavior once Price was relocated to CSU. Although Price made errors, the Union asserts that they were not excessive or sufficient to warrant the discipline she was given. The Union contends that the anti-union statements made at a staff meeting in 2017 are further proof that DCA retaliated against Price since Simon threatened to "respond aggressively" to employees who filed complaints and sought assistance from the Union. (Tr. 6)

As a remedy, the Union seeks an order determining that DCA violated NYCCBL §§ 12-306(a)(1) and (3); enjoining DCA from restraining and coercing employees from engaging in protected activities; ordering DCA to withdraw the disciplinary charges issued against Price; and any other and further relief the Board finds to be proper.

City's Position

The City argues that the Board should dismiss the petition entirely because the Union has failed to establish that it retaliated against Price in violation of NYCCBL § 12-306(a)(1) and (3). The City does not dispute that Price engaged in protected union activity or that the Union attempted to address Price's concerns regarding her supervisors. However, it argues that the disciplinary charges alone are insufficient to support the Union's claim of retaliation. Instead, the City maintains that the issuance of disciplinary charges was the direct result of Price's inappropriate conduct towards her supervisors and her failure to perform her work duties.

Additionally, the City argues that Petitioner's allegations concerning statements made by Simon at a monthly staff meeting are untrue and uncorroborated. The City asserts that the purpose of the staff meeting was to discuss the progress of the work in CSU and issues relating to policies and procedures. It notes that any conversation Price had with Simon relating to her grievance was limited to him telling her that the Human Resources department was handling the matter.

Finally, the City contends that even if Price has established a *prima facie* violation, it has offered a legitimate business reason to demonstrate that her discipline would have been issued even in the absence of any protected activity. The City asserts that Price had a record of misconduct and failure to perform her duties and that this alone led to the issuance of disciplinary charges. Furthermore, Price received ongoing corrective action for a period of time in writing and through in-person counseling. As a result, the City had a right to take disciplinary action. Accordingly, the City asserts that the petition should be dismissed entirely.

DISCUSSION

To determine whether 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 the Board in *Bowman*, 39 OCB 51 (BCB 1987), and its progeny. The test states that, to establish a *prima facie* claim of retaliation, a petitioner 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 the motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also Kalman*, 11 OCB2d 32, at 11 (BCB 2018).

The first prong is satisfied where the employer is shown to have knowledge of the protected union activity. *See Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011). Regarding the first prong, it is undisputed that Petitioner was engaged in union activity when she filed a grievance on July 25, 2017. *See SSEU, L. 371*, 9 OCB2d 3, at 19-20 (BCB 2016); *Local 376, DC 37*, 5 OCB2d 31, at 18-19 (BCB 2012) It is also undisputed that DCA had knowledge of that grievance, which the Union pursued through at least Step III, as early as July 2017.

As to the second prong of the *Bowman* test, "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions which is the subject of the complaint." *OSA*, 7 OCB2d 20, at 19 (BCB 2014) (quoting *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007) (internal quotation marks omitted). Absent an outright admission, motivation can be proven through the use of circumstantial evidence. *See Fulgieri*, 11 OCB2d 34 (BCB 2018); *Colella*, 7 OCB2d 13, at 22 (BCB 2014); *CTSG, L. 375*, 7 OCB2d 18, at 15 (BCB 2014). The Board, therefore, considers "[whether] temporal proximity between the protected union activity and the retaliatory action, in conjunction with other facts, supports a finding of improper motivation." *See DC 37, L. 376*, 6 OCB2d 39, at 19 (BCB 2013). A petitioner's allegations, however, "must be based on statements of probative facts" rather than mere speculation or conclusory allegations. *CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989).

Upon consideration of the entire record, we find evidence that the City has refuted the Union's proof of animus. Here, evidence was proffered to show union animus. Price testified on direct examination that during a monthly staff meeting at CSU in August 2017, Simon said that "there was an employee who was getting the union involved in . . . that person[']s affairs with the office" and that "the agency was going to respond aggressively " to anyone who did that. (Tr. 41) If true, this statement demonstrates animus and would establish a *prima facie* case of retaliation.

Once a prima facie case has been established, our analysis shifts to whether the employer has refuted the *prima facie* claim and/or established a legitimate business reason. *See Local 30, IOUE*, 8 OCB2d 5, at 23 (BCB 2015); *See also DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006) ("the employer may . . . demonstrate that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct.") (quoting *Local 237, CEU*, 77 OCB 24, at 18-19 (BCB 2006). If there is evidence that refutes the *prima*

facie case or a legitimate business reason is shown, the claim is dismissed. *See Kalman*, 11 OCB2d 32, at 13-14 (dismissing the claim after finding that the petitioner did not establish a *prima facie* case).

Upon consideration of the entire record, we find evidence that refutes the prima facie showing of retaliation. First, we credit Simon's testimony that he did not make the animus statement during the August meeting or at any other staff meeting. Unlike Price, Simon had a clear recollection of the August 2017 monthly staff meeting, including what was discussed and Price's absence from the meeting. In addition, his unrebutted testimony was that the monthly staff meeting is not used to discuss individual employee issues, but instead to "summarize everything that occurred the month prior and to reinforce any instruction or procedures or policies that needed to be followed through." (Tr. 87) Further, Simon, who had not been directly involved in Wong's discipline of Price, credibly asserted that he would not make such a statement based on his prior experience handling grievances as a Union vice-president. *See SBA*, 4 OCB2d 50, at 23 (BCB 2011) (detailed and consistent testimony supports finding that a witness is credible).

We find that Price's testimony was less reliable. Initially, she testified with certainty that the statement was made at the August 2017 monthly staff meeting. However, her testimony about the meeting was limited to the isolated animus statement. She offered no details about anything that occurred during the meeting or the context in which the statement was made. In addition, it was only after she was confronted with evidence that she did not attend the August 2017 meeting that she expressed uncertainty as to when Simon made the statement. Overall, we find that Price's testimony lacked indicia of credibility. For the most part, although she did not deny the facts upon which many of the warning memoranda were based, she was unwilling to accept supervisory criticism or concede that her work performance required improvement. Accordingly, we credit

Simon's denial and do not find that he threatened employees who sought union assistance as Price alleged.

Further, prior to the filing of her grievance, two supervisors issued warning memoranda to Price regarding her work performance or failure to follow procedures. It is undisputed that she was warned about being absent without leave in April 2015, and about work-related issues twice in January 2017. The warning memoranda Price received subsequent to July 25, 2017 describe behaviors that were similar to those set forth in the memoranda issued prior to the filing of the grievance. *See SSEU, Local 371*, 8 OCB2d 35, at 14 (BCB 2015) (disciplinary actions predating protected activity cannot be retaliatory).

In addition, we find no evidence that Wong treated Price differently than other employees. Wong supervised seven other employees in the CSU and, like Price, would issue memoranda to them based on work errors. These errors were brought to Wong's attention by a senior settlement officer, not a supervisor of Price. Like Price, Wong issued memoranda to several other employees for their failure to comply with the Hand Scanner policy. Moreover, the record does not indicate that Price was given a different caseload or training than the other employees.

Accordingly, we find that the City has rebutted any evidence of a causal link between DCA's actions and Price's protected activity. *See Kalman*, 11 OCB2d 32, at 13-14.

Even if we were to credit Price's testimony and find animus, we would find that DCA offered a legitimate business reason for taking disciplinary action against Price. *See SSEU, Local 371*, 8 OCB2d 35, at 14 (where anti-union statements were credibly denied, the Board found the *prima facie* case was refuted and legitimate business reasons established). Here, for the most part, Price does not dispute that she committed errors in performing her work as set forth in the January 2018 disciplinary charges. Further, although the Union disputes that Price's conduct rose to the

level of insubordination, it does not dispute that Price failed to respond to Wong's questions at times as stated in the disciplinary charges. It is also undisputed that Price sometimes used the hand scanner on a different floor than where she worked. Price further conceded that she may have received emails addressing her failure to comply with the scanning policy, but asserted that she did not necessarily read all of her emails. As a result, the City demonstrated a legitimate business reason for the January 2018 disciplinary charges.

Accordingly, we find that the Union has not established that Price was discriminated against in violation of NYCCBL §12-306(a)(1) and (3). We therefore dismiss the petition.

ORDER

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

ORDERED, that the verified improper practice petition filed by Social Services Employees Union, Local 371, docketed as BCB-4276-18, on behalf of its member Marguerite Price, against the City of New York and the Department of Consumer Affairs, hereby is dismissed in its entirety.

Dated: June 3, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
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