DC 37, 14 OCB2d 15 (BCB 2021)

(Docket No. BCB-4383-20)

Summary of Decision*:** The Union alleged that the City terminated a Union member in retaliation for filing a grievance and therefore violated NYCCBL § 12-306(a)(1) and (3). The City argued that the Union has failed to provide sufficient evidence of anti-union animus to make out a case of retaliation. In the alternative, the City argues that the termination was motivated by legitimate business reasons related to performance. After a hearing, the Board found that the Union established a *prima facie* case of retaliation, but that the City rebutted the evidence by demonstrating that the decision to terminate was made prior to and not based on the union activity in question. Therefore, the improper practice petition was dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO and LOCAL 2627,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On July 7, 2020, District Council 37, AFSCME, AFL-CIO, and its affiliated Local 2627 (collectively "Union") filed a verified improper practice petition against the City of New York ("City") and the Department of Consumer Affairs ("DCA") on behalf of Union member Abdul-Kader El-Husseini. The Union alleges that the City 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 El-Husseini in response to his filing of a grievance related to his use of sick leave. The City maintains that the Union failed to articulate a *prima facie* case under NYCCBL § 12-306(a)(1) and (3) because the Union has not presented evidence of anti-union animus beyond the temporal proximity of the filing of El-Husseini's grievance and his termination. In the alternative, the City argues that the termination was motivated by legitimate business reasons related to performance. This Board finds that the City rebutted the Union's evidence by demonstrating that the decision to terminate was made prior to and not based on El-Husseini's union activity. Therefore, we find no violation of NYCCBL § 12-306(a)(1) or (3). Accordingly, the petition is dismissed in its entirety.

BACKGROUND

The Trial Examiner held two days of hearings and found that the totality of the record, including the pleadings, exhibits, and briefs, established the relevant facts set forth below.

Abdul-Kader El-Husseini began employment with the City on or about December 15, 2008, as a Computer Associate at the New York City Police Department ("NYPD").[1] In or about February 2018, El-Husseini was appointed from the promotional list to a permanent position as a Computer Specialist Level II at the Human Resources Administration ("HRA"). El-Husseini was appointed from the open-competitive civil service list on April 8, 2019, as a permanent Computer Specialist Level III at DCA, a position that required a one-year probationary period. For the entire period of his employment at DCA, El-Husseini's direct supervisor was Xitji Patel, Director of Application Development and Integration.

[1] On or about January 24, 2015 and March 2017, El-Husseini was provisionally appointed to Computer Specialist Level I and Computer Specialist Level II, respectively. Throughout this period, El-Husseini maintained his underlying permanent civil service title of Computer Associate.

Over the course of his ten-month employment at DCA, El-Husseini received three performance evaluations from his supervisor, dated July 18 and November 8, 2019, and January 8, 2020. The evaluations rate employee performance as "Acceptable," "Needs Improvement," or "Unacceptable" in each of three performance categories: 1) Employee demonstrates merit and fitness for their position; 2) Employee follows policies, procedures, directives and customer service requirements; and 3) Attendance and punctuality. Additionally, each evaluation contains a check box labeled "Employee will be retained for an additional 3-month period" and a text box providing an opportunity for the supervisor to justify their ratings. (Union, Exs. C, D & E) El-Husseini received an "Acceptable" in each category on his first evaluation in July 2019, with the box checked to retain him for an additional 3-month period, and there was no text added by the supervisor in the justification section. In his second and third evaluations, he received a "Needs Improvement" rating in category 1 and "Acceptable" in the other two categories. The justification section of the second evaluation in November 2019 stated, "Employee lacks industry software development standards which affects quality and timely delivery of assigned project. Employee needs to be more proactive in acquiring skills . . . ." (Union Ex. D) The statement in the justification section of the third evaluation in January 2020 is the same as the second evaluation, except it begins "Employee *still* lacks . . . ." (Union Ex. E) (emphasis added). The check box indicating that the employee will be retained for an additional 3-month period is not checked on the second evaluation but is checked on the third evaluation.

El-Husseini disputed the critique of his work performance in his second and third evaluations and refused to sign the third evaluation. On January 27, 2020, El-Husseini submitted a letter to Patel and a number of other managers and human resources representatives rebutting the claims made in those evaluations. His letter asserts that he performed at a high level throughout

his employment at DCA, but that after the November 2019 evaluation issued, Patel excluded him from meetings, assigned his work to other employees, and largely delegated supervision of El-Husseini to another employee at El-Husseini's level. El-Husseini testified that Patel rarely spoke to him after the November 2019 evaluation, and removed him from a project he had previously taken the lead on.

Tampra Chapman is the Director of Human Capital at DCA and held that position throughout the relevant time period. Chapman manages all personnel-related processes, including but not limited to performance monitoring and time-and-leave. Her office is responsible for monitoring the progress of probationary employees, including ensuring that employee evaluations are conducted in a timely manner in conformance with relevant regulations and agreements. Chapman testified that in November 2019 she learned that El-Husseini's supervisor, Patel, had indicated on El-Husseini's November performance evaluation that he would not be retained for another three months. Chapman explained that when the box on the performance evaluation to retain an employee for three months is not checked, Human Capital is usually notified to proceed with termination, but in this instance it had not been notified that Patel was planning to terminate El-Husseini. Chapman reached out to Patel for clarification at that time and was informed that he preferred to wait until after the holidays to make a final decision to initiate termination. Chapman agreed to wait until after the holidays.

El-Husseini took an authorized vacation for the period from December 26, 2019 to January 6, 2020. On January 7, 2020, El-Husseini emailed Patel and Patel's superior Murugan Killada, the Executive Director of Strategic Enterprise Application Development, stating that he was unable to report to work due to illness. El-Husseini was absent from January 7 to January 13, 2020. At some point prior to January 13, 2020, El-Husseini submitted a doctor's note regarding his absence

from January 7 to 13, 2020. On January 13, 2020, Killada emailed the Deputy Director of Human Capital, Margaret Mateo, informing her that El-Husseini has been absent "no call no show" for four days and requesting guidance as to what action he should take. Killada sent a second email to Mateo 23 minutes later stating, "Please ignore as [El-Husseini] has provided doctor's note to Human Capital for all sick days." (Union Ex. G)

On January 24, 2020, Patel issued a memorandum to El-Husseini regarding those absences entitled "Absent Without Official Leave (AWOL)" ("AWOL Memo"). (*Id*.) Killada was copied on the AWOL Memo. The AWOL Memo admonished El-Husseini for having "failed to contact a supervisor or manager to communicate that you would not be in on [January 8 to 10, 2020] as scheduled."[2] (Union Ex. H) The AWOL Memo further stated that El-Husseini was in violation of DCA's time and leave policy, that his leave requests would be denied, and that he could be disciplined. El-Husseini testified that he later received a note informing him that DCA intended to deduct three days' pay from his salary. Chapman testified that DCA time and leave policy requires that employees taking leave must either provide a return date to their supervisor in advance of their absences or call in to notify the supervisor of each day of absence.

Chapman testified that she received word from El-Husseini's supervisors of their intention to proceed with his termination in mid-January 2020 and that the final decision to terminate was made on or about January 17, 2020. She testified that on or about January 28, 2020, she sent an email to HRA, where El-Husseini maintained a permanent position in another civil service title. She explained that the purpose of the email was to prepare for the transition of El-Husseini back

[2] The record does not reflect whether El-Husseini communicated with supervision regarding his absences on January 8-10, 2020, only that he emailed his supervisor on January 7, 2020.

to HRA.[3] Chapman was asked to explain El-Husseini's supervisor's request to terminate him in mid-January, only one week after completing a performance evaluation indicating that he would be retained for an additional three months. Chapman testified that managers have the discretion to terminate a probationary employee at any point during their probationary period, irrespective of such an indication on a performance evaluation.

El-Husseini contacted Union Representative Norlita DeTaza on January 30, 2020, to discuss the AWOL Memo and DCA's plan to deduct three days' pay from his salary. DeTaza testified that she contacted Chapman that same day to confirm that the days were being deducted from El-Husseini's salary and to inform her that the Union planned to file a grievance on El-Husseini's behalf. On January 31, 2020, at 1:19 p.m., DeTaza filed a grievance on behalf of El-Husseini regarding the AWOL Memo and DCA's nonpayment of El-Husseini's sick days. DeTaza submitted the grievance to Patel. Approximately three hours later, El-Husseini was summoned to a meeting with Chapman. At this meeting, he was given a termination letter stating, "Please be advised that your services as [a] Senior Net Developer with the New York City Department of Consumer Affairs will no longer be required." (Union Ex. K)

Because El-Husseini had a permanent civil service title in his prior employment with HRA, he retained a right to return to his previous position in the event he did not pass probation with DCA. After his termination, El-Husseini was restored to his underlying permanent civil service title, Computer Specialist Level II, and returned to his position at HRA. Following El-Husseini's termination, the Union representative continued to pursue the AWOL grievance through the

[3] Neither that email nor any other written documentation regarding a decision to terminate El-Husseini prior to January 31, 2020 was produced for the record.

grievance procedure. On March 31, 2020, DCA issued a memorandum retracting the unauthorized leave/AWOL status for the leave time taken on January 8-10, 2020.[4]

POSITIONS OF THE PARTIES

Union's Position

The Union claims that the City terminated El-Husseini's employment in retaliation for filing a grievance regarding the AWOL Memorandum and DCA's nonpayment of El-Husseini's sick days. The Union argues that submitting a grievance is protected union activity and that El-Husseini's termination is therefore a violation of NYCCBL § 12-306(a)(3).[5] Additionally, the Union asserts an independent violation of NYCCBL § 12-306(a)(1), arguing that penalizing an employee for exercising their right to file a grievance is inherently destructive of and likely to have a chilling effect on the exercise of employee rights.[6]

The Union asserts that it has established a *prima facie* case of discrimination by demonstrating that the employer had knowledge of the employee's protected union activity and that the activity was a motivating factor in the employer's decision. The Union argues that the

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[4] DCA stated in its retraction memorandum that it "determined that under the particular circumstances surrounding this leave, we are willing to address your violation of the agency's time and leave policy with a *warning* memo-which this document is now deemed, instead of recording the aforementioned dates as unauthorized leave. In keeping with this, this Warning Memorandum serves as an amendment to the original AWOL Memorandum issued on 1/24/2020." (Union Ex. L) (emphasis in original)

[5] NYCCBL § 12-306(a)(3) provides, in pertinent part, that "[i]t shall be an improper practice for a public employer or its agents . . . to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;"

[6] NYCCBL § 12-306(a)(1) provides, in pertinent part, that "[i]t shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;"

timing of El-Husseini's termination three hours after the submission of his grievance raises a suspicion of retaliation based on temporal proximity. In addition, the Union claims that the circumstances of El-Husseini's termination suggest anti-union animus. The Union emphasizes that only weeks before his termination, El-Husseini's January 2020 performance evaluation indicated that he would be retained for an additional three-month period. Moreover, El-Husseini was not aware of anything that transpired in the time between his January evaluation and his termination to suggest that his employment was in jeopardy. Over the course of his probationary period, El-Husseini was never given an overall unacceptable rating on his performance evaluations, nor offered any training or guidance as to any deficiencies noted in his evaluations. The Union further argues that typically a manager will contact human resources in advance of terminating a probationary employee, but that there is no evidence that El-Husseini's manager did so in this instance. The Union claims that these factors plus the timing of El-Husseini's termination provides sufficient circumstantial evidence that the union activity in connection with the AWOL grievance was the motivation for his termination.

The Union also argues that in finding animus, the Board must draw an adverse inference against the City for the failure to produce Patel as a witness or any contemporaneous evidence to support its position that the decision to terminate El-Husseini had been made as of the November 2019 performance evaluation. The Union notes that the City has referenced the existence of various written correspondence that would corroborate its claims, including a January 28, 2020 email from Chapman notifying HRA of El-Husseini's impending termination. The Union argues that the City's failure to enter that correspondence into the record requires the Board to draw an adverse inference against the City regarding the contents of that correspondence and find that El-Husseini was terminated for his union activity.

City's Position

The City requests that the Union's improper practice petition be dismissed in its entirety. The City claims that it terminated El-Husseini solely based on his job performance in his probationary position, not out of any retaliatory motive. The City asserts that the Union has failed to allege facts sufficient to state a *prima facie* case of retaliation. The City argues that the Union's case rests solely on the temporal proximity between the filing of El-Husseini's grievance and his termination and that Board precedent does not consider temporal proximity alone sufficient to establish the anti-union animus required to make out a *prima facie* case of retaliation.

Further, the City asserts that the Union has not demonstrated the requisite causal link between the protected activity and the City's allegedly retaliatory actions. The City claims that the decision to terminate El-Husseini for performance reasons was under consideration as early as November 2019 and had been finalized by mid-January 2020. Since the decision to terminate had been made prior to El-Husseini's protected activity, there can be no causal link between the two. The City further argues that it had a legitimate business reason to terminate El-Husseini based on poor performance, as documented in his performance reviews. Additionally, the City argues that the Union's claim of interference under NYCCBL §12-306(a)(1) must be dismissed as the City's actions do not rise to the level of being "inherently destructive."

DISCUSSION

This Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), to determine whether an employer has violated NYCCBL § 12-306(a)(1) or (3). This standard provides that 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 a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *Kassim*, 8 OCB2d 8, at 17 (BCB 2015). If a petitioner is able to establish 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." *Local 30, IOUE*, 8 OCB2d 5, at 23 (BCB 2015) (quoting *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006); *Local 237, CEU*, 77 OCB 24 (BCB 2006)).

Regarding the first prong, the record established that El-Husseini engaged in union activity prior to his termination. Further, Chapman was aware that El-Husseini had sought Union representation as of her January 30, 2020 phone conversation with DeTaza regarding the AWOL determination. *See Kaplin*, 3 OCB2d 28, at 14 (BCB 2010) (employer's knowledge of petitioner's desire to secure union assistance satisfies first prong); *DC 37, L. 376*, 77 OCB 12, at 14-15 (BCB 2006) (knowledge that member sought union assistance in addressing time and leave issues sufficient to establish knowledge of union activity). Accordingly, we find that the Union has satisfied the first prong of the standard.

The second prong of the *Bowman* standard requires that "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions [that] are 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). It "is a rare case where there is direct evidence of the employer's improper motivation." *Local 30, IOUE*, 8 OCB2d 5, at

21. Thus, "typically, motivation is proven through the use of circumstantial evidence, absent an outright admission." *Colella*, 7 OCB2d 13, at 22 (BCB 2014) (quoting *Burton*, 77 OCB 15, at 26 (BCB 2006)) (internal quotation and editing marks omitted). The Board, therefore, considers "whether the temporal proximity between the protected union activity and the retaliatory action, in conjunction with other facts, supports a finding of improper motivation." *Id*. (citing *DC 37, L. 376*, 6 OCB2d 39, at 19 (BCB 2013)). Claims of improper motivation, however, "must be based on statements of probative facts, rather than speculative or conclusory allegations." *Local 30, IOUE*, 8 OCB2d 5, at 21 (citing *DC 37, L. 983*, 6 OCB2d 10, at 29 (BCB 2013); *Morris*, 3 OCB2d 19, at 15 (BCB 2010)).

We find that the Union has established the second prong and thus a *prima facie* case of retaliation. El-Husseini's termination came mere hours after the submission of his grievance. The close temporal proximity of the Union activity to the termination "raises suspicion of a retaliatory motive." *See Local 376, DC 37*, 6 OCB2d 39, at 21 (BCB 2013) (temporal proximity established where disputed act occurred two days after union activity). Further, El-Husseini's January 8 performance evaluation indicated that his work performance was sufficient to continue his employment. Therefore, his termination less than one month later without any additional performance issues suggests that his termination may have been prompted by his filing of the grievance. Therefore, we find that the Union produced sufficient circumstantial evidence to establish the *prima facie* case of retaliation. *See CSTG, L. 375*, 7 OCB2d 16, at 22 (BCB 2014) (*prima facie* case established by temporal proximity coupled with employer's failure to follow its own policies regarding promotions); *CSTG, L. 375*, 7 OCB2d 18, at 15 (BCB 2014) (*prima facie* case established by temporal proximity coupled with an unexplained change in performance evaluation procedures); *DC 37, L. 376*, 79 OCB 38 (retaliatory motive established, in part, by

manager varying from his standard practice regarding discipline); *DC 37, L. 376*, 77 OCB 12, at 15 (retaliatory motive established, in part, by manager varying from his standard practice regarding performance appraisals).

However, we find that there is credible evidence sufficient to rebut the second prong of the Union's *prima facie* case which shows that union activity was not a motivating factor in the decision to terminate El-Husseini. The record demonstrates that DCA's plans to terminate El-Husseini had begun as far back as November 2019. El-Husseini's November 2019 performance evaluation indicated that his work performance was less than acceptable on all criteria and did not indicate that his employment would be continued.[7] Thereafter, Chapman and Patel discussed initiating termination and decided they would hold off until after January 1, 2020. The January 2020 performance evaluation reiterated that El-Husseini's performance was still not acceptable on the same criteria. In addition, we credit the testimony of Chapman that the decision to initiate the termination was made on or about January 17, 2020, and that thereafter she took steps to facilitate the return of El-Husseini to HRA, all of which occurred before El-Husseini's grievance was filed.[8] Chapman's testimony, in conjunction with El-Husseini's November 2019 and January 2020 performance evaluations, establish that DCA had determined that El-Husseini's performance was insufficient to pass probation and began processing his termination prior to his union activity.[9]

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[7] Further evidence that Patel's intent to terminate El-Husseini predated the union activity in question is provided by El-Husseini's own testimony that on or around November 2019, Patel began assigning his work to a coworker and delegated the same coworker to assign him work tickets.

[8] The City's failure to offer corroborating evidence for Chapman's testimony does not undermine the credibility of her testimony or require that an adverse inference be made against the City.

[9] Additionally, we find that the Union failed to establish that the City engaged in inherently destructive behavior in violation of NYCCBL § 12-306(a)(1). The Union's claim is premised on its assertion that the City retaliated against El-Husseini for engaging in union activity. In light of

Accordingly, we find that the City has rebutted the *prima facie* evidence that El-Husseini's probationary termination was in retaliation for union activity.

Therefore, the improper practice petition is denied.

our finding that the City did not engage in unlawful retaliation, there is no basis for finding a violation of NYCCBL § 12-306(a)(1).

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 Local 2627, District Council 37, against the City of New York and the City of New York Department of Consumer Affairs, docketed as BCB-4383-20 hereby is dismissed.

Dated: June 1, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent
GWYNNE A. WILCOX
MEMBER

I dissent
PETER PEPPER
MEMBER