

SSEU, L.371, 15 OCB2d 24 (BCB 2022)

(Docket No. BCB-4442-21)

Summary of Decision: The Union claimed that the MBPO violated NYCCBL § 12-306(a)(1) and (3) when it imposed a fixed lunch hour policy on employees in retaliation for the filing of an overtime compensation grievance. The City argued that the Union failed to demonstrate a *prima facie* case of retaliation. Alternatively, the City argued that it had a legitimate business reason to impose the new policy. The Board found that the Union 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 Petition

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Petitioner,

-and-

**THE CITY OF NEW YORK AND THE MANHATTAN BOROUGH
PRESIDENT'S OFFICE,**

Respondents.

DECISION AND ORDER

On August 3, 2021, Social Service Employees Union, Local 371 (“Union”) filed a verified improper practice petition against the City of New York (“City”) and the Manhattan Borough President’s Office (“MBPO”). On August 10, 2021, the Union filed an amended petition. The Union alleges that the MBPO 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”) when it imposed a fixed lunch hour on employees in retaliation for the filing of an overtime compensation grievance. The City argues that the Union failed to demonstrate a *prima facie* case

of retaliation. Alternatively, the City argues that it had a legitimate business reason to impose the new policy. The Board finds that the Union failed to present a *prima facie* case of retaliation. Accordingly, the petition is dismissed.

BACKGROUND

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

The Union represents various employees at the MBPO, including those in the civil service title of Community Coordinator, with the functional titles of Urban Planner and Land Use Liaison (“Liaison”). The MBPO consists of six or seven units, one of which is the Land Use Unit (“Land Use”). There are currently four Urban Planners, one Liaison, and a Topographic Associate in this unit. Land Use is responsible for processing applications that go through the Uniform Land Use Review Procedure. Each Urban Planner is assigned to a portion of Manhattan that correlates to a different community board and reviews the land use applications associated with that area. They also follow meetings of the Community Board and local advocacy groups and prepare briefings for the Borough President to make sure they are aware of who may be in favor of or opposed to a particular application.

Lizette Chaparro is the Director of Land Use and supervises the Urban Planners. She was promoted to this title in March 2020, at the same time that employees were instructed to begin working from home due to the COVID-19 pandemic. At that time, Urban Planners Stephanie Chan and Tim Anderson had been recently hired. Shortly thereafter, Urban Planners Michael Nichols and Connor Alerton were hired.

On or about November 30, 2020, those four Urban Planners filed a grievance against the MBPO alleging that they were not compensated for overtime work performed, in violation of Article IV of the Citywide Contract and Article III of the Social Services and Related Titles Collective Bargaining Agreement. Chaparro testified that she reviewed the grievance and discussed it with Chief of Staff Jessica Mates, Director of Human Resources (“HR Director”) Deidre Lyles, and the MBPO’s General Counsel. During this discussion, Chaparro confirmed that she had not approved any overtime requests from the grievants. Chaparro also attended a Step 3 grievance hearing in June 2021. The grievance is currently pending arbitration.

In May 2021, MBPO employees were required to resume working in the office two days per week. Chaparro testified that she began noticing that employees sometimes left the office during regular working hours or took lunch at different times throughout the day without notifying her, which made it difficult for her to keep track of where they were. She discussed this issue with the HR Director, who noted that three of the four Urban Planners had never physically worked in the office before May 2021. Chaparro testified that, rather than disciplining any employees, she and the HR Director decided it would be a good idea to have a meeting to review the time and leave guidelines so that everyone was “on the same page.” (Tr. 77)

The meeting was held in the office on May 26, 2021, and lasted approximately one hour. Chaparro testified that during the meeting, the Time and Leave Guidelines were discussed “essentially page by page.” (*Id.*) On page 1 of the Guidelines, a section titled “Standard Office Hours” states:

Standard office hours are 8:00 A.M. to 6:00 P.M., Monday through Friday. Community Board office hours may vary. Scheduled working hours for staff are based on a seven (7) hour work day and a one (1) hour lunch break.

Each non-managerial employee must take one (1) hour for lunch each day. Lunch break is between 12:00 P.M. and 2:00 P.M. The lunch break must be for one hour and cannot be shortened to compensate for late arrivals and/or early departure.

(City Ex. 1) Chaparro stated that after discussing the standard office hours, the staff was instructed that they should let her know if they were leaving the building for any reason, including during their lunch hour, so that she would be aware that they might be unreachable during that time. Additionally, three of the four Urban Planners requested to change their working hours from 10:00 a.m. to 6:00 p.m., to 9:00 a.m. to 5:00 p.m., and she granted those requests.

According to Chaparro, later that same day, she and the Urban Planners were expected to provide the Borough President with a briefing. However, when the Borough President called the office, Chaparro went to gather the Urban Planners and noticed that two of them were not present, and she was informed that they were out to lunch. Chaparro testified that she “had to explain to the [B]orough [P]resident that we would not be able to meet with her and give her the briefing that we had been aware we had to provide to her that day.” (Tr. 82) Chaparro testified that after this incident she spoke with a colleague and “mentioned this issue that I was beginning to have with staff members not being available during different times and not making me aware that they were leaving the building. And she mentioned to me that her unit had assigned lunch hours.” (Tr. 83)

The following day, Chaparro sent an email to the Land Use staff stating, in relevant part, “As discussed at our Wednesday meeting, everyone should have a scheduled lunch time. Please respond to me directly with your preferred schedule.” (Union Ex. 3A) Liaison Dawn Billings, who is also an alternate Union delegate, testified that there had been no discussion of scheduled lunch times during the May 26 meeting.¹ On May 28, 2021, Billings sent Chaparro an email asking

¹ During the hearing in this matter, Chaparro acknowledged that implementation of a preferred or fixed lunch hour was not discussed during the meeting.

if the scheduled lunch hours were just for the Community Coordinators in the Land Use unit, or for all Community Coordinators at the MBPO, and noted that the issue was not discussed at the May 26 meeting. Chaparro did not respond directly to Billings' question but sent an email response that day stating that the Time and Leave Guidelines note the lunch hours and asking Billings to provide her preferred lunch schedule.²

Billings discussed the change in lunch schedule with other Land Use staff, who stated that they did not want to be assigned a fixed lunch hour. Billings testified that she had previously taken her lunch hour around 12:30-1:30 p.m., but this could sometimes vary depending on what she was working on. Additionally, she did not have to report to anyone when she was taking her lunch break prior to the change. Billings discussed the issue with Union Organizer Pauline Moore, as well as with Deborah Timothy, another Union delegate. On June 4, 2021, Moore contacted the Chief of Staff and asked to arrange a meeting concerning the scheduled lunch breaks. A meeting was initially scheduled but then was cancelled because Timothy was no longer available, and Moore wanted her to be present. Ultimately, a meeting to discuss lunch schedules did not occur.

On June 7, 2021, the HR Director sent an email to the Land Use staff stating that effective Wednesday, June 9, the lunch schedule was from 1:00-2:00 p.m., and that “[a]ny change to your schedule requires the approval of your supervisor, Lizette Chaparro.” (Union Ex. 5) Chaparro testified that since no one had provided her with their preferred lunch schedule, she chose 1:00-2:00 p.m. because it seemed to make the most sense and because it was the time she thought people were most frequently taking their lunch break. She also stated that no one requested to change their lunch schedule after they received the June 7 email.

² Nichols also emailed Chaparro objecting to the fixed lunch hour schedule since it did not appear in writing either in the Time and Leave Guidelines or in the Citywide contract. He requested further time to consult with the Union before responding to the request for a preferred schedule.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the MBPO violated NYCCBL § 12-306(a)(1) and (3) by imposing a pre-scheduled lunch hour on its Land Use staff in retaliation for an overtime compensation grievance filed by the Urban Planners. The Union contends that the reason given by the MBPO for the change in its fixed lunch hour is pretextual. According to the Union, the MBPO asserts that the change in policy was prompted by a single instance in which the Borough President called to make contact with an unnamed Urban Planner who was missing. However, the Union claims that Chaparro did not state that this incident, or any other alleged disappearance of Land Use staff, occurred during the lunch hour period. Thus, the Union contends that a specified lunch hour would not fix the alleged problem.

Additionally, the Union contends that no record testimony or exhibits were presented to show that the alleged disappearance of Land Use staff during work hours had ever been the subject of a memo or discussion between office management and staff. Moreover, no warnings or discipline were ever issued for an employee being AWOL during the workday. Thus, the Union asserts that the imposition of a scheduled lunch hour on Land Use staff was clearly a retaliatory action taken to punish the Urban Planners for filing an overtime compensation grievance.

As a remedy, the Union asks that the MBPO restore an unspecified one-hour lunch break to all Land Use employees to be taken between the hours of 12:00 and 2:00 p.m. and requests an order from the Board directing the MBPO to cease and desist from engaging in this or any other retaliatory action against Union-represented employees.

City's Position

The City argues that the petition should be denied because the Union has not demonstrated a *prima facie* case of retaliation. Initially, the Union has not established that the imposition of a scheduled lunch hour is an adverse action under the NYCCBL. The Land Use employees' lunch breaks are still one hour and scheduled within the hours specified in the MBPO Time and Leave Guidelines. Additionally, employees are allowed to make changes to their lunch break by informing their supervisor and receiving approval.

Even if the scheduled lunch hour were found to be an adverse action, however, the City asserts that the Union has not demonstrated any causal connection between its imposition and the filing of the overtime compensation grievance. The only circumstantial evidence of retaliatory motive the Union presented is temporal proximity. However, the City argues that the sequence of events "belies the suggestion that [the City's actions] were improperly motivated." (City Br. at 13) The evidence shows that even at the May 26, 2021 meeting, a preferred lunch hour was not discussed. Rather, it was only after employees were instructed during that meeting to let their supervisor know when they left the building and immediately thereafter Chaparro could not locate some Urban Planners when the Borough President asked to speak with them that a preferred lunch hour was requested. Thus, the City contends that there is nothing in the record other than conjecture and surmise to establish a *prima facie* case of retaliation.

The City asserts that even if the Union could prove a *prima facie* case of retaliation, it has a legitimate business reason for imposing a scheduled lunch hour. According to the City, ensuring adequate staff coverage and knowing availability of staff is necessary for efficient operations. This is particularly true given the nature of the work at the MBPO, in which the Land Use unit is often needed to respond to questions or issues that arise on a time-sensitive basis, whether from the

Borough President or another senior staff member. The City contends that given this demonstrated legitimate business reason, the Union's claim of an improper practice must be dismissed in its entirety.

DISCUSSION

The Union claims that the MBPO retaliated against its members for filing a grievance when it imposed a fixed lunch hour on Land Use staff.³ 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. This 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 a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also Feder*, 4 OCB2d 46, at 42 (BCB 2011).

³ While the Union also alleged violations of NYCCBL § 12-306(a) (4) and (5) in its petition, it did not advance any arguments at the hearing or in its brief concerning these sections of the NYCCBL. Thus, we do not analyze these claims. *See UFA*, 3 OCB2d 16 (BCB 2010). We note, however, that this Board has held that work schedules are generally not subject to bargaining because "management has the unilateral right to assign work in the way that it deems necessary to maintain the efficiency of governmental operations." *UFT, L. 2*, 4 OCB2d 54, at 12 (BCB 2011) (quoting *DC 37, L. 2021*, 51 OCB 36, at 15 (BCB 1993)) (internal quotation marks omitted). With respect to a meal break, certain aspects, such as its location and duration, have been found to be mandatory subjects of bargaining. *See Local 858, IBT*, 49 OCB 38, at 9 (BCB 1992) (citing *Addison Central School District*, 13 PERB ¶ 3060 (1980), *Hammondsport Central School District*, 18 PERB ¶ 4647 (ALJ 1985)). However, a PERB ALJ decision previously found that a bargaining demand for a lunch hour taken at a time selected by the employee was non-mandatory. *See Village of Lancaster*, 23 PERB ¶ 4606 (ALJ 1990).

With respect to the first prong, it is clear that the Urban Planners engaged in protected union activity when they filed an overtime compensation grievance in November 2020. *See CSTG, L. 375, 7 OCB2d 9, at 17 (BCB 2014)* (“The Board has long held that the filing of contractual grievances constitutes activity that is protected under the NYCCBL.”) (quoting *DC 37, 6 OCB2d 24, at 29 (BCB 2013)*) (internal quotation marks omitted). Additionally, the City does not dispute that it had knowledge of this activity. Thus, prong one is established.

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 are the subject of the complaint.” *OSA, 7 OCB2d 20, at 19 (BCB 2014)* (quoting *DC 37, L. 376, 79 OCB 38, at 16*) (internal quotation marks omitted). “[T]ypically, motivation is proven through the use of circumstantial evidence, absent an outright admission.” *Colella, 7 OCB2d 13, at 22 (BCB 2014)* (internal quotation and editing marks omitted) (quoting *Burton, 77 OCB 15, at 26 (BCB 2006)*). Thus, the Board 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.” *OSA, 13 OCB2d 2, at 24-25 (BCB 2020)* (quoting *Colella, 7 OCB2d 13, at 22 (BCB 2014)*) (internal quotation marks omitted). However, allegations of retaliation must be grounded upon “specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion.” *Fernandes, 8 OCB2d 21, at 15 (BCB 2015)* (citing *LBA, 61 OCB 49, at 6 (BCB 1998)*).

Here, we find that there is insufficient evidence to conclude that the overtime compensation grievance filed by the Urban Planners in November 2020 was a motivating factor for the imposition of the fixed lunch hour in May 2021. Assuming there is temporal proximity between the union activity and the alleged retaliation, to establish anti-union motivation the Union asserts

only that the decision to implement a fixed lunch schedule was unnecessary.⁴ According to the Union, the policy was implemented after a single instance in which an Urban Planner could not be located when the Borough President called for a briefing, and it claims that the record does not establish that this occurred during the lunch hour. However, we find that these assertions either ignore or misconstrue Chaparro's testimony.

Chaparro offered un rebutted testimony that, upon the MBPO's return to working two days a week in the office, she began noticing that employees were leaving the building without informing her, whether for lunch or otherwise, and that this is what prompted the May 26, 2021 meeting. It is undisputed that during the meeting, time and leave issues were discussed thoroughly, and employees were asked to inform her anytime they left the building. However, Chaparro testified that later that same day, two employees could not be located when the Borough President called, and she was informed that they had left for lunch. After speaking with a colleague who implemented a fixed lunch hour for her staff, Chaparro decided to do the same. Such a policy appears consistent with her goal of wanting to know the availability of her staff at all times.

It is not for the Board to determine if a fixed lunch hour was the most effective way to resolve the issues Chaparro described, which included employees' absence from the building at times other than their lunch breaks. Rather, in a retaliation case, the Board must merely examine the motivation behind the employer's action. Here there is simply nothing in the record, other than pure speculation, to indicate that the policy was established due to anti-union animus stemming from the filing of a grievance. *See COBA*, 65 OCB 19, at 9 (BCB 2000) ("Such a speculative and conclusory assumption does not provide the necessary causal link between the grievant's union

⁴ The City did not challenge the element of temporal proximity, and therefore, we need not determine whether it is established under these particular facts.

activity and the actions of the [employer].”) Rather, Chaparro’s unrebutted testimony established that the motivation behind her decision to impose the fixed lunch hour was to be aware of employees’ availability during the workday.⁵ Consequently, we find that the Union has not established a *prima facie* case of retaliation, and we dismiss the petition.⁶

⁵ Moreover, we note that Chaparro’s request that employees provide their preferred lunch hours, along with the fact that she granted employees’ requests for a change in their daily work hours on this same date, further undermine the Union’s claim that Chaparro’s actions were motivated by anti-union animus.

⁶ Having made this finding, we need not analyze whether a fixed lunch hour, under these circumstances, constitutes an adverse action under the NYCCBL.

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, docketed as BCB-4442-21, filed by the Social Service Employees Union, Local 371, hereby is dismissed in its entirety.

Dated: August 3, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER