Tuesday with the ILR Students
Discipline and Protected Activity at the Fire Station

Derrick Stumblebum is the local president of the Massapequa FF Local 1036, a community of 75,000 citizens. Once overwhelmingly Italian, the community has seen a number of other ethnic groups moving into the city. Even though our local is overwhelmingly men, one of our lieutenants is a Jewish woman, Sandy Cohen-Hernandez, whose Hispanic husband is a cop. Our local has more than 90 folks, and we have a very political mayor, Ace Snodgrass, who has 3 used car lots in Massapequa, and one that he owns jointly further out on Long Island, where no one knows of his unsavory reputation. Our local includes all of our officers, including the assistant, but not deputy chiefs. We have six assistant and 3 deputy chiefs (DC). The assistant chief (AC) jobs are quite sought after as they come with as much overtime as an AC might want. Just now, there is both an AC and a DC opening.

AC's generally move up in a similar fashion, being eligible for the appointment after 3 years of being a captain, which usually follows 4 or more years as a lieutenant. We have had many of our local presidents move up to AC, but none of us expected Stumblebum to be "anointed" (and not just because of his stupid ass name, either), but in fact that was what occurred. Stumble bum has now been a captain for 4 years and had already passed the civil service test for the AC position. The DC position was one of will and pleasure, the chief's and the mayor's alone to make.

Chief Parmenter pulled Stumblebum aside in November of last year and said that the mayor wanted to see Stumblebum as an AC, and that the chief concurred. Stumblebum was flattered, thought about his union responsibilities for somewhere between 5 and 10 minutes, during which Chief Parmenter showed him how much AC Gazpacho made last year with overtime, and old Stumblebum said, where can I signup!

Meanwhile, our sneaky mayor had another matter up his sleeve. Seeing the demographic numbers changing, with the biggest increases being in the Jewish and Hispanic categories, he had been looking at his departments, and drew a circle around Sandy Cohen-Hernandez. She covered three of his bases, woman, Jewish, and Hispanic. Besides, he was pretty sure that there were almost no prior DC's that were women, and it goes w/o saying that if there were any, none were Jewish!!!

Here is where this case gets fuzzy. A few days after Stumblebum and Parmenter discussed the promotion of Stumblebum, the mayor's good friend, Doc Holliday, called Stumblebum and mentioned that he had heard that "that woman" (Sandy was one of 3 female fire fighters, and the only officer) might be heading up to DC as Marcello Lastinline was retiring just now. Stumblebum had heard of the retirement, but nothing about who would move up, although he expected it would be one of the AC's in his local union. A lieutenant had never leaped over the captains and the AC's and become a DC in the Department's history. Doc said the talk in the community, including with the president of City Council, lawyer Harvey Wasserstein (in case

you did not know, Harvey was a Jewish guy), was all positive, and that Doc's well to do neighbors were buzzing about making "history".

Well, Stumblebum is all for history, and, in fact, he has a daughter who studied at the ILR School at Cornell. She has given Stumblebum a lot of grief over the years about how few women are in the Department. Stumblebum explained to his daughter that she would understand why , later, but she wanted to know NOW, and she, too, had heard the buzz for Sandy's possible appointment, and Stumblebuum's daughter that her father join the mayor and make history.

But, he knew his guys would go nuts over this, and when Doc asked for his personal support for Sandy (apparently, this "moving up" of Sandy would be politically orchestrated through Harvey Wasserstein and the City Council), shockingly, Stumblebum hesitated, and then told Doc that he would get back to him. Later, Stumblebum told the union's lawyer that not only Doc, but two different community members calling for Harvey also pressured him about the appointment of Joan. In one of those conversations a city council talked about Stumblebum's and Sandy's promotions in a way that indicated they were clearly connected. During that conversation Stumblebum told this friend of Harvey's that he could not support Joan's appointment as there were no less than 15 other fire fighters who should be considered ahead of her for that appointment.

Stumblebum's opposition to the increasingly likely appointment of Joan intensified, and word of his opposition spread. Three weeks before Stumblebum's appointment was to be official to the position of AC, Chief Parmenter called him into the office and advised him that he had just learned of the fact that he had had two previously unreported citizen's complaints, one on an emergency call, and the other arising from an inexplicable accident in a non-emergency incident but with a fire truck. Parmenter said that the paper work, which had not reached him until now, showed that Stumblebum's AC had found him to be blame-worthy for each, but the incidents were never further reported up the chain. Both happened in the last year, just prior to the retirement of the AC whose vacated position was the one to be filled by Stumblebum. Chief said that these unreported incidents shed a "dark light" on Stumblebum's candidacy for AC, especially the citizen compliant, wherein Stumblebum, well known for his clumsy social skills, had called a disabled Hispanic woman, who was quite poor, a wetback, and a couple of other choice derogatory terms. Chief Parmenter never gave Stumblebum an opportunity to explain and simply said, "the offer for promotion to promote you is officially rescinded".

Stumblebum was crushed then angry, and the Local rallied behind him, as, after all, his opposition to Joan was based on Stumblebum's view of how promotions operate or should operate in the unionized fire service. He filed a discrimination charge at PERB, stating that his promotion was rescinded for illegal discrimination against him as the union president, and that his opposition to Joan's appointment was both protected and a gesture of concerted activity as well, within the meaning of the attached **Scotia** and "**I hate Teena** cases"

What do you think? How strong or weak is Stumblebum's case? What facts might you use to make your argument? Will the city or union president Stumblebum prevail? How far can a union president go in a situation like this? Be prepared to discuss this case in considerable detail in class on Tuesday.

(Two Cases)

In the Matter of Timothy MacFarlane, Petitioner,
v.
Village of Scotia, Respondent.
Supreme Court, Appellate Division, Third Department, New York
(July 3, 1997)

White, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Schenectady County) to review a determination of respondent which found petitioner guilty of misconduct and suspended him from his employment.

The implementation of the 911 emergency call system in Schenectady County had been the subject of heated public debate and continuing press coverage, which included publication of numerous letters to the editor authored by various union leaders, including petitioner, which were in opposition to the position taken by respondent's Mayor and Police Chief. Accordingly, respondent's Board of Trustees (hereinafter the Board) was considering several dispatch plans; one favored by the Scotia Police Benevolent Association (hereinafter PBA) called for respondent's Police Department to handle the 911 calls, while the plan the Board favored utilized the Town of Glenville's civilian dispatchers. On the eve of the Board's meeting at which it was to select a dispatch plan, a letter written by petitioner, the vice-president of the PBA, was delivered to each of the four trustees illuminating what petitioner perceived to be the deficiencies in the plan favored by the Board. Included in the letter was the following: "It is the Chief's letter to the editor I find more interesting. As president of the PBA when Paul Boyarin came to Scotia and current VP, I have made it very clear to our members that Chief Boyarin is a provisional Chief and as such is subject to the whim and pleasure of the Mayor. Until he becomes permanent (10/95?) and can speak freely he is a tool of the Mayor. With this in mind we have not said anything to, for, or against the Chief, and have kept him out of our comments about plan three etc. I was very surprised (as were many people I talked to) that the Chief of Police would jump into this political pot to publicly shaft his men and the P.B.A. and suck up to the Mayor in the same article. This was uncalled for and did harm to the Department and the Chief's image."

While critical of the Chief of Police and the Mayor, there was, notably, no public discredit of those officials or their office. Rather, it was the Mayor, a recipient of the letter, who publicized its contents. Shortly thereafter respondent, pursuant *575 to Civil Service Law § 75 (1), served a notice and statement of charges upon petitioner alleging 12 incidents of misconduct predicated upon the contents of his letter. The Board designated a Hearing Officer and, following an evidentiary hearing, she dismissed charge No. 7 and those portions of the other charges pertaining to the Mayor, but found petitioner guilty of the remaining charges. In light of her

findings, she recommended that petitioner be suspended without pay for two weeks. The Board, adopting the Hearing Officer's findings and recommendation, suspended petitioner without pay for 10 working days. This CPLR article 78 proceeding ensued.

Petitioner initially argues that he is entitled to 1st Amendment protection because his letter addresses a matter of public concern. We agree that petitioner spoke, as a citizen, upon a matter of public concern; nevertheless, respondent can justify its restriction of his speech if it can show that its interest in promoting the efficiency of the public services it performs through its employees outweighed petitioner's interest in commenting on a matter of public concern (*see,* *United States v National Treasury Empls. Union*, 513 US 454; *Pickering v Board of Educ.*, 391 US 563, 568; *Matter of Zaretsky v New York City Health & Hosps. Corp.*, 84 NY2d 140, 145). Because the government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs, its interest in achieving its goals as effectively and efficiently as possible is a significant one (*see,* *Waters v Churchill*, 511 US 661, 675; *Arnett v Kennedy*, 416 US 134, 168 [Powell, J., concurring]).

In balancing the competing interest, the overarching factor forming our determination is that a police force is a quasi-military organization demanding strict discipline (*see,* *Matter of Laspisa v Mahoney*, 198 AD2d 279). The proof shows that respondent's police force is a small one which mandates a close working relationship between its Chief of Police and officers if it is to operate efficiently and effectively. It is self-evident that this relationship was imperiled by the dissemination of petitioner's letter to the Board. Accordingly, we find that respondent's interests outweighed petitioner's interests and conclude that he is not entitled to the protection afforded by the 1st Amendment.

Petitioner next argues that the use of such terms as “discourteous”, “inconsiderate”, “harsh and insolent language”, “disrespect and incivility” and “abusive language and derogatory remarks” in the Rules of Conduct of the Police Department renders the regulations unconstitutionally vague. Again, *576 petitioner's argument fails because of his status as a government employee (*see, Waters v Churchill, supra,* at 673-674). For such employees, restrictions on their behavior are constitutionally sufficient against the charge of vagueness if an ordinary person exercising ordinary common sense can sufficiently understand and comply with them (*see, Arnett v Kennedy, supra,* at 159; *Civil Serv. Commn. v National Assn. of Letter Carriers*, 413 US 548, 578-579). In our view, the challenged rules meet this constitutional standard.

Addressing petitioner's substantial evidence argument, we must determine if the record contains “such relevant proof as a reasonable mind might accept as adequate to support a conclusion as ultimate fact” (*300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 180). Applying this standard, we find that charge No. 2 lacks evidentiary support as there is no proof that petitioner willfully or intentionally disregarded a lawful order (Black's Law Dictionary 1428 [6th ed 1990]). We reach the same conclusion with respect to charges Nos. 10 and 11 since the Chief of Police testified that a police officer would have no way of knowing when he or she was supposed to check with his superior before writing a letter to the Board. As to the remaining charges, we conclude that they are supported by substantial evidence since the letter's intemperate language easily falls within the proscribed conduct set forth in the charges.

To summarize, we shall confirm the finding of guilt relative to charge Nos. 1, 3, 4, 5, 6, 8, 9 and 12 and annul such finding as to charge Nos. 2, 10 and 11, and remit for reconsideration of the penalty. We do, however, note that the penalty imposed upon petitioner was unduly harsh. In light of his 16 years of exemplary, unblemished public service and, mindful that the offending conduct at issue did not flow from petitioner's performance of his police responsibilities but rather was attributable to his efforts to advance the PBA's agenda, suspension was clearly excessive. Moreover, petitioner did not publish the letter upon which these charges are grounded or attempt to foment dissension within the police force. Hence, we are of the opinion that a simple reprimand should have sufficed to put this entire matter to rest.

We have not considered petitioner's contention that respondent violated his Taylor Law rights (Civil Service Law § 200 *et seq.*) because that determination in the first instance must be *577 made by the Public Employment Relations Board (*see,* Civil Service Law § 205 [5] [d]).[FN*]

FN* By decision and order, dated November 26, 1996, the Public Employment Relation Board determined that respondent violated Civil Service Law § 209-a (1) (a) and (c). That determination is the subject of a separate CPLR article 78 proceeding.

Cardona, P. J., Peters, Spain and Carpinello, JJ., concur.

Adjudged that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of charge Nos. 2, 10 and 11; petition granted to that extent, said charges dismissed and matter remitted to respondent for reconsideration of the penalty; and, as so modified, confirmed.

N.Y.A.D.,1997.
Matter of MacFarlane v Village of Scotia
241 A.D.2d 574, 659 N.Y.S.2d 351, 1997 N.Y. Slip Op. 06335

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In the Matter of Village of Scotia, Petitioner,
v.
New York State Public Employment Relations Board et al., Respondents.
Supreme Court, Appellate Division, Third Department, New York
March 19, 1998

SUMMARY

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Third Judicial Department by order of the Supreme Court, entered in Albany

County) to review a determination of respondent Public Employment Relations Board which found that petitioner had committed an improper employment practice.

HEADNOTES

Civil Service--Disciplinary Punishment--Protected Concerted Union Activity

(1) The determination of respondent Public Employment Relations Board (PERB) finding that petitioner Village had committed an improper employment practice by disciplining a police sergeant, who was also the vice-president of the patrolmen's union, for having written a letter to petitioner's Board of Trustees complaining of the implementation of the Village's 911 emergency call system and containing intemperate language regarding the Chief of Police, should be confirmed, since PERB's determination that the sergeant's letter constituted protected concerted union activity (Civil Service Law § 209-a [1] [a], [c]) is supported by substantial evidence. In view of the union's prior outspoken opposition to the implementation of the 911 emergency call system, it is clear that the sergeant was expressing group concerns in his letter rather than his own purely personal complaints, notwithstanding that the letter bore no indication that it was endorsed or authorized by the union. Moreover, the letter did not transcend the bounds of protected activity since the sergeant's statements were not made directly to the Chief in the presence of other police officers nor did he send the letter to the media for publication. Rather, its distribution was limited to the Board in an effort to persuade that body not to take action which the union considered adverse to its interest. Furthermore, the sergeant's long association with the union and his advocacy of its agenda regarding the 911 dispatch plan dispels petitioner's argument that it lacked knowledge of the protected activity. In addition, the Chief's admission that the sergeant was demoted in response to the comments in his letter negates petitioner's claim that the sergeant would have been demoted in any event and petitioner has not shown that there were valid economic reasons for the sergeant's demotion. However, since PERB's remedial order directing that the aggrieved police officer be restored to his rank of sergeant with back pay would have the effect of converting his temporary appointment into a permanent one in violation of article V, § 6 of the State Constitution, the matter must be remitted to PERB for further consideration of this aspect of its order.

OPINION OF THE COURT

White, J.

The implementation of the 911 emergency call system in the Village of Scotia, Schenectady County, generated heated public debate. In the course of this debate, Timothy Macfarlane, a police officer employed by petitioner and the vice-president of respondent Scotia Patrolmen's Benevolent Association (hereinafter the PBA), authored a letter on April 11, 1995 which he distributed to petitioner's Board of Trustees. In this letter, that bore no indication that it was endorsed or authorized by the PBA, Macfarlane set forth what he considered were the deficiencies in the dispatch plan favored by the Board and included intemperate language regarding the Chief of petitioner's Police Department.[FN1]

FN1 The text of the letter may be found in our prior decision wherein we sustained several charges of misconduct against Macfarlane (*Matter of Macfarlane v Village of Scotia*, 241 AD2d 574, *appeal dismissed* 90 NY2d 1008).

Thereafter, petitioner, pursuant to Civil Service Law § 75 (1), filed disciplinary charges against Macfarlane predicated upon the contents of his letter. Paralleling the disciplinary proceeding, was an improper practice charge filed by the PBA against petitioner alleging that it violated the Taylor Law (Civil Service Law § 200 *et seq.*) when it demoted Macfarlane from the rank of sergeant to patrolman. The Administrative Law *31 Judge dismissed the charge;[FN2] however, respondent New York State Public Employment Relations Board (hereinafter PERB) reinstated the charge, finding that petitioner discriminated against Macfarlane for his exercise of protected Taylor Law rights and interfered with those rights (Civil Service Law § 209-a [1] [a], [c]). PERB's remedial order directed petitioner to, *inter alia,* restore Macfarlane to the rank of sergeant with back pay. This proceeding ensued.

FN2 The Administrative Law Judge also dismissed a charge under Civil Service Law § 209-a (1) (d). PERB affirmed the dismissal and that determination is not at issue in this proceeding.

We must sustain PERB's determination if there is substantial evidence supporting its finding that petitioner could not discipline Macfarlane because his April 11, 1995 letter constituted concerted activity protected by the Taylor Law (*see, Matter of Rosen v Public Empl. Relations Bd.*, 72 NY2d 42, 48; *Matter of De Vito v Kinsella*, 234 AD2d 640, 641). We note that, inasmuch as this matter falls within PERB's special competence, we must accord deference to its findings (*see, Matter of Newark Val. Cent. School Dist. v Public Empl. Relations Bd.,* 83 NY2d 315, 320).

Although the case law interpreting the National Labor Relations Act is not binding or controlling (Civil Service Law § 209-a[6]), we can refer to it to obtain guidance in defining the concepts of concerted activity and protected activity (*see, Matter of Rosen v Public Empl. Relations Bd., supra,* at 51). An employee's conduct is considered to be concerted activity when he or she acts with or on the authority of other employees and not solely on behalf of himself or herself (*see, Rockwell Intl. Corp. v National Labor Relations Bd.*, 814 F2d 1530, 1534; *see also,* Annotation, 107 ALR Fed 244, 250, § 2). Here, the record shows that the implementation of the 911 emergency call system was a matter of concern to the PBA. Consequently, beginning in April 1993, Macfarlane, who was serving on the PBA's dispatch discussion/911 committee, wrote several letters to petitioner's Mayor and Board of Trustees and spoke at several Board meetings espousing the PBA's position on this issue. In addition, he promoted the PBA's position in several letters to local newspapers. Prior to distributing his April 11, 1995 letter, Macfarlane discussed its contents with the PBA's secretary who agreed that the letter reflected the PBA's position on this issue. Given this background, it is clear that Macfarlane was expressing group concerns in his April 11, 1995 letter rather than his own purely personal complaints. Thus, *32 we find that there is substantial evidence supporting PERB's finding that Macfarlane was engaged in concerted activity.

The fact that an activity is concerted does not necessarily mean it is protected since employees can lose protection if they act in an abusive manner (*see, National Labor Relations Bd. v City Disposal Sys.*, 465 US 822, 837). Whether conduct transcends the bounds of protected activity greatly depends upon the context in which it occurs (*see, Earle Indus. v National Labor Relations Bd.*, 75 F3d 400, 406). Thus, offensive conduct may not lose its protected status if it occurred during a closed meeting, but may not be protected if it took place in public in defiance of the employer's authority (*see, id.*). As pointed out by PERB, Macfarlane's statements were not made directly to the Chief in the presence of other police officers nor did he send the letter to the

media for publication. Instead, its distribution was limited to the Board in an effort to persuade that body not to take action which the PBA considered adverse to its interest. Under these circumstances and mindful of our limited review powers, we cannot say that PERB's finding that the April 11, 1995 letter was protected is not supported by substantial evidence.

Petitioner's remaining arguments on the merits do not require detailed analysis. Macfarlane's long association with the PBA and his advocacy of its agenda regarding the 911 dispatch plan dispels petitioner's argument that it lacked knowledge of the protected activity. The Chief's admission that Macfarlane was demoted in response to the comments in his letter negates petitioner's claim that Macfarlane would have been demoted in any event. We reject petitioner's claim that it had a legitimate business reason for demoting Macfarlane as it has not shown there were valid economic reasons for taking such action (*see, Goldtex, Inc. v National Labor Relations Bd.,* 14 F3d 1008, 1012-1013).

Turning to PERB's remedial order, we are concerned with its direction to restore Macfarlane to the rank of sergeant. In January 1995, Sergeant John Pytlovany was given a provisional appointment to the position of Deputy Police Chief. Because the sergeant's position remained encumbered until Pytlovany's provisional appointment matured into a permanent one, Macfarlane, who was on the eligibility list, was given a temporary appointment to the sergeant's position. That position remained encumbered until August 30, 1995. In early September 1995 another officer was appointed from the new eligibility list to the sergeant's position. Significantly, Macfarlane was not on the new eligibility list.*33

Article V (6) of the State Constitution provides in pertinent part that "[a]ppointments and promotions in the civil service of the state and all of the civil divisions thereof ... shall be made according to merit and fitness". It is now well established that an appointment of an individual from a constitutionally valid expired list violates this constitutional mandate (*see, Matter of Altamore v Barrios-Paoli*, 90 NY2d 378, 384; *Matter of Deas v Levitt*, 73 NY2d 525, 531, *cert denied* 493 US 933). Since we cannot by judicial fiat convert a temporary appointment into a permanent one in the face of the applicable constitutional mandate (*see, Matter of Montero v Lum*, 68 NY2d 253, 259), PERB is likewise precluded from doing so. Accordingly, we shall annul that portion of its remedial order restoring Macfarlane to the sergeant's position with back pay and remit this matter to PERB for further consideration of this aspect of its order.

Cardona, P. J., Mercure, Peters and Carpinello, JJ., concur.

Adjudged that the determination is modified, without costs, by annulling so much thereof as restored Timothy Macfarlane to the rank of sergeant with back pay; matter remitted to respondent Public Employment Relations Board for further proceedings not inconsistent with this Court's decision; and, as so modified, confirmed.*34

44 PERB ¶ 3016, 44 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶ 3016, 2011 WL 2555315

New York Public Employment Relations Board

In the Matter of CIVIL SERVICE EMPLOYEES ASOSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, TIOGA COUNTY LOCAL 854, TIOGA COUNTY EMPLOYEES UNIT 8850, Charging Party, and COUNTY OF TIOGA, Respondent.

No. U-27939

May 27, 2011

Related Index Numbers

15.32 Administrative Service Employees, County
72.135 Interference/Coercion/Restraint, Benefits or Reprisals, Retaliatory Actions
72.318 Discrimination Related to Union Membership or Concerted Activity, Criteria for Determining Violation, Treatment of Similarly Situated Employees
72.323 Discrimination Related to Union Membership or Concerted Activity, Basis of Discrimination, Participation in Protected Concerted Activities
43 PERB 4521

Judge / Administrative Officer

JEROME LEFKOWITZ, Chairperson; and SHEILA COLE, Member;

Case Summary

PERB affirmed as modified an ALJ's decision, 43 PERB ¶ 4521 (2010), dismissing a union's improper practice charge regarding disciplinary actions taken against six unit members, including a local president and a shop steward. In its exceptions the union argued that the six employees engaged in protected activity when they wore pink ribbons at work to protest a perceived lack of response from the county to their repeated complaints about their supervisor, Teena Cargill. The Board concluded the facts and circumstances presented in the record supported the ALJs determination that the employees' membership in the "I hate Teena club," as represented by the wearing of pink ribbons, did not constitute employee organization activity. Rather, the Board found that the "symbolic speech was for the purpose of expressing only a shared personal animus regarding Cargill, a sign of camaraderie tied to that dislike and an expression of support for each other." Moreover, the Board found no evidence that the ribbon wearing was related to collective negotiations, a pending claim under the county's workplace violence policy, or part of a symbolic campaign against the county or Cargill. PERB similarly rejected the union's contention that the county retaliated against the union president and shop steward by meting out harsher discipline to them than the other four club members. The county's stated reason for the harsher penalties, the union officers' higher level of involvement in the "hate" group, was supported by evidence that the two individuals solicited coworkers to join the

group, and in the case of the shop steward, threatened an employee.

Full Text

Nancy E. Hoffman, General Counsel (Daren J. Rylewicz of counsel), for Charging Party

Hogan, Sarzynski, Lynch, Surowka & Dewind, LLP (Edward J. Sarzynski of counsel), for Respondent

Board Decision and Order

This case comes to the Board on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the County of Tioga (County) violated §§ 209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it disciplined six unit members, including the CSEA unit president and shop steward, for engaging in protected activity under the Act, and when it sought to discipline the unit president and shop steward more severely than the other four unit members.

Following a hearing, the ALJ issued a decision dismissing the charge, concluding that the at-issue activities of the six unit employees were not protected under the Act. In addition, the ALJ determined that the County had demonstrated legitimate nondiscriminatory reasons for seeking greater disciplinary penalties against the CSEA unit president and the shop steward. Finally, the ALJ credited the testimony of the County personnel director who testified that she was not aware that one of the six unit employees was a shop steward at the time that the County entered into settlement discussions with CSEA over the disciplinary claims against the six employees. [FN1]

Exceptions

In its exceptions, CSEA asserts that the ALJ erred in concluding that the at-issue activities of the six unit employees were not protected under the Act, in crediting the County personnel director's testimony that she was unaware of the shop steward's status when the parties commenced settlement discussions, and in finding that the unequal punishment of the unit president and shop steward did not violate §§ 209-a.1(a) and (c) of the Act. The County supports the decision of the ALJ, and asserts there are no legal or factual bases for reversing the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision, as modified herein.

Facts

Joan Kellogg (Kellogg) works for the County Health Department. She has been CSEA unit president for a county-wide unit since July 1, 2005. At all times relevant, Penny Sindoni (Sindoni) was a Health Department senior typist and a CSEA shop steward. In 2007, Kellogg sent an email to County Personnel Officer Bethany O'Rourke (O'Rourke) with a list of unit

employees who were shop stewards including Sindoni.

During her tenure as unit president, Kellogg processed a number of grievances including a class action grievance regarding the County's flexible schedule policy that was settled at arbitration. In addition, Kellogg discussed other concerns directly with County Personnel Officer O'Rourke, although regular labor-management meetings between the County and CSEA had been discontinued.

In late 2005, Kellogg began receiving verbal complaints from unit member Linda Cook (Cook) about alleged abusive workplace conduct by Cook's new immediate supervisor Christeenia A. Cargill (Cargill), the County Health Department Director of Children with Special Health Care Needs, who had been hired earlier in the year. A few months later, unit members Kimberly DeRouchie (DeRouchie) and Gail Barton (Barton) made similar verbal complaints to Kellogg about Cargill's alleged behavior. Cook, DeRouchie and Barton also complained to shop steward Sindoni that Cargill was verbally abusive and that she slammed doors and glared at people.

In August 2006, County Personnel Officer O'Rourke, County Health Department Director Johannes Peeters (Peeters) and County Director of Administrative Services Denis McCann (McCann) met with Kellogg and CSEA Labor Relations Specialist Shawn Lucas (Lucas) to discuss problems involving Kellogg's job performance. The meeting resulted in an agreement that Kellogg would meet more regularly with McCann to review her workload.

In the summer 2006, Kellogg scheduled a meeting with CSEA Labor Relations Specialist Lucas regarding complaints against Cargill. Present at the meeting were Kellogg and unit members Cook, DeRouchie and Barton. Following that meeting, CSEA participated in a series of meetings with County Personnel Officer O'Rourke and County Health Department Director Peeters regarding Cargill in late 2006 and 2007. Lucas or CSEA unit vice-president Lisa Baker (Baker) attended those meetings on behalf of CSEA along with Cook and DeRouchie. [FN2]Kellogg, Sindoni and Cargill did not attend the meetings.

O'Rourke and DeRouchie were the only participants at the County-CSEA meetings who testified before the ALJ. [FN3]They testified that at the meetings Cook and DeRouchie expressed frustration with Cargill's supervision and job performance. The issues discussed included Cargill's failure to return client telephone calls, her delays in completing Cook's evaluation and Cargill's allegation against Cook for breaching confidentiality. There is no evidence in the record that the CSEA representatives or the unit members complained at the meetings that Cargill had engaged in verbal abuse, slammed doors or that CSEA invoked the County's workplace violence policy prohibiting disruptive, menacing, threatening and abusive behavior. At one of the meetings with CSEA, O'Rourke referred to the complaints by DeRouchie and Cook as “childish” and between meetings County Health Department Director Peeters spoke with Cargill about her conduct toward them.

The result of the County-CSEA meetings was the County's adoption of CSEA's proposal that the County conduct a training session in conflict resolution for all Health Department employees. Consistent with that agreement, the County offered the conflict resolution training to unit members. [FN4]The record does not include any evidence that CSEA Labor Relations Specialist

Lucas and unit vice-president Baker took any further action with respect to the issues raised regarding Cargill following the County-CSEA meetings. Furthermore, there is no evidence that Lucas or Baker engaged in any further communications with DeRouchie and Cook or reported the results of the meetings to Kellogg and Sindoni.

In May 2007, DeRouchie, Cook, Sindoni and co-worker Lisa Schumacher (Schumacher) began wearing a pink ribbon at work. The pink ribbon was similar to the pink ribbon symbol worn for breast cancer awareness. The activity was originally proposed by DeRouchie to show symbolic support for her and Cook. During a disciplinary interrogation conducted by the County in August 2007, Sindoni stated that the ribbon wearing was intended to "show support for each other and we agreed we would do that because Kim [DeRouchie] was upset because Gail [Barton] quit." [FN5]

In May 2007, Kellogg, Sindoni, DeRouchie, Schumacher and Cook had dinner with their former co-worker Barton. At the time, Kellogg did not wear the pink ribbon. During the course of their dinner discussion, the phrase "I Hate Teena Club" was utilized to refer to those wearing the ribbon. Kellogg testified before the ALJ that DeRouchie, Cook and Barton expressed hatred for Cargill at the dinner, and that Kellogg viewed Cargill as stupid and incompetent. At some point, unit member Katie Searles (Searles), who was not present at the dinner, began wearing the ribbon at work as well.

On May 22, 2007, after Kellogg became upset over Cargill's conduct toward her and Sindoni, Kellogg made a personal complaint to County Director of Administrative Services Denis McCann (McCann). In addition, she began to wear the ribbon. Kellogg testified before the ALJ that she started wearing the ribbon "in support for everyone else because I hadn't taken a stand, I tried to stay clear of those issues." [FN6]At her interrogation in August 2007, however, Kellogg emphasized that the ribbon wearing had a symbolic personal purpose:

It was intended to give me support for myself because I felt very intimidated and very, it was for my, to make me feel better because I felt so terrible. [FN7]

On the same day Kellogg began to wear the pink ribbon, she spoke with County Administrative Assistant Barbara McCormick (McCormick) about her recent interaction with Cargill. During their conversation, Kellogg showed McCormick the ribbon and stated that it represented the "I Hate Teena Club." [FN8] McCormick testified that she declined Kellogg's offer to join the club, and "laughed it off." [FN9]Although Kellogg denied attempting to recruit McCormick, Kellogg admitted telling McCormick that she would also hate Cargill after working with her. McCormick reported Kellogg's comments about the "I Hate Teena Club" to County Director of Administrative Services McCann. McCann learned that other employees in the Health Department were aware of the existence of the so-called club.

After consulting with County Personnel Officer O'Rourke and County Health Department Director Peeters, County Director of Administrative Services McCann commenced an investigation on May 25, 2007. Over the next several months, McCann prepared a written statement for each employee he interviewed and forwarded the signed statements to O'Rourke. During the interviews, McCann asked each employee questions regarding their level of

knowledge about the "club," including which employees were members, whether they were solicited to join the club, and whether the ribbon was an indication of club membership.

McCann separately interviewed County employees Mary Gelatt (Gelatt), Nancy Dow (Dow) and Roxie Canavan (Canavan) on May 25, 2007; he interviewed McCormick and two other County employees during the following week. All of the employees interviewed by McCann stated that they knew about the club and the related ribbon wearing. McCormick informed McCann that Kellogg solicited her to join; Gelatt revealed that she had been solicited by Sindoni.

Over Memorial Day weekend, Kellogg learned that County employees were being questioned about the club and the ribbons. In response, she telephoned former CSEA unit president Kathleen McEwen (McEwen) to find out whether McEwen thought the six employees might be disciplined for their conduct. During the conversation, McEwen expressed her opinion that the employees might face discipline. [FN10]Kellogg also telephoned Labor Relations Specialist Lucas about the ribbons. Lucas recommended that the employees stop wearing them.

Based upon the advice received from McEwen and Lucas, Kellogg called Sindoni on May 29, 2007 to encourage her and the others to stop wearing the ribbons. Kellogg stated during her interrogation that she called only Sindoni "because I knew Linda [Cook] was not at work and Kim [DeRouchie] is frequently hard to get to. I don't know Lisa [Schumacher] or Katie's [Searles] numbers." [FN11]Thereafter, the ribbon wearing ceased.

In late June 2007, during a conversation with CSEA local president Lynn Wool (Wool) regarding an unrelated union matter, Cargill first learned of the existence of a "hate club." [FN12]Wool mentioned the so-called club in the context of inquiring about how Cargill was feeling. Thereafter, Cargill obtained additional information from a co-worker about the purpose of the ribbons that Cargill had previously observed being worn by DeRouchie, Cook, Schumacher, Searles and Sindoni. Cargill met with Peeters, who informed her that the County had been investigating the issue but delayed notifying her to avoid unnecessarily upsetting her. Cargill also telephoned former CSEA unit president McEwen to express her displeasure and fear over the conduct of the other employees.

In July 2007, Cargill prepared and submitted a threat summary to the County under its workplace violence policy. Following receipt of Cargill's complaint, the County Attorney and O'Rourke commenced their own investigation. The investigation included interviews with Cargill, McCormick, Gelatt and other County employees.

During her interview, McCormick reported that Kellogg hated Cargill and Cargill's predecessor, and repeated that Kellogg had asked her to join the club. She also stated that Sindoni described herself as vindictive and as someone who would retaliate against anyone who provided truthful information to McCann. McCormick also stated that she and her co-workers feared Sindoni because of Sindoni's anger and vindictiveness, a sentiment also expressed by Cargill in a separate interview. Gelatt repeated to O'Rourke and the County Attorney that Sindoni solicited her to join the club. She also reported that Sindoni became very angry when she learned that Gelatt had provided truthful information to McCann.

As part of the investigation, the County Attorney and O'Rourke interrogated Kellogg, Sindoni, DeRouchie, Cook, Schumacher and Searles on August 17, 2007. Following those interrogations, O'Rourke recommended that each employee be disciplined. The proposed punishments varied, however, based upon O'Rourke's judgment of each employee's specific conduct, cooperation during the investigation and expression of remorse.

Consistent with O'Rourke's recommendations, the County presented proposed disciplinary settlements to Lucas. The penalties proposed for Kellogg and Sindoni were the most severe: a four-week suspension and termination respectively. The County proposed letters of reprimand for Searles, Schumacher and DeRouchie, and a two-week suspension without pay for Cook. All of the employees would also be required to personally apologize to Cargill.

Following a request from Lucas, O'Rourke sent an email outlining the County's rationale for seeking different penalties. Among the stated reasons for seeking a more severe penalty against Kellogg was the allegation that Kellogg solicited others to join the club. The County subsequently modified its settlement offers by reducing the proposed suspension of Cook to one-week and increasing the proposed penalty of DeRouchie from a letter of reprimand to a one-week suspension.

DeRouchie, Cook, Schumacher and Searles accepted the settlement offers and, with CSEA's representation, entered into stipulations of settlement without the County filing disciplinary charges pursuant to Civil Service Law § 75. DeRouchie and Cook agreed to one-week suspensions for participating in the club, for wearing the ribbon and for creating a hostile work environment for Cargill. Searles and Schumacher accepted a letter of reprimand for being a club member and for wearing the ribbon.

After Kellogg refused to accept the County's settlement offer, she was served with Civil Service Law § 75 charges seeking her termination for creating a hostile work environment and violating the County's workplace violence policy. The charges included detailed allegations regarding the wide scope of Kellogg's involvement with the club and the ribbons. Furthermore, the specifications alleged that Kellogg misused the County's email system in July and August 2007 to send derogatory email regarding Cargill and Peeters. Kellogg was also charged with certain job performance deficiencies that had already been resolved with the County. Kellogg entered into a settlement of the disciplinary charges, which was negotiated by CSEA. Under the settlement terms, Kellogg accepted a suspension without pay from October 2, 2007 to October 31, 2007 for participating in the club, recruiting new members, wearing the ribbon and creating a hostile work environment for Cargill. As part of the settlement, Kellogg also agreed to a written warning regarding her job performance.

The County maintained its position that Sindoni should either resign or face disciplinary charges seeking her termination. According to O'Rourke's testimony, the severity of the proposed penalty was premised upon Sindoni having engaged in more serious acts of misconduct.

In late September 2007, the County issued Civil Service Law § 75 charges against Sindoni setting forth 16 specific acts of misconduct or incompetence, which the County alleged created a hostile work environment and violated its workplace violence policy. Among the 16

specifications were allegations that she participated in the club, wore the ribbon and recruited others to join. In addition, the charges alleged that she had a loud argument with Cargill, monitored Cargill's workplace errors, conversations and actions, retaliated against co-workers for speaking to the County about the club, expressed disappointment to a co-worker for failing to lie, and made threats that caused co-workers to fear retaliation from her for participating in the County's investigation.

After a hearing, the Civil Service Law § 75 hearing officer found Sindoni guilty of the charges and recommended her termination, which the County adopted. An Article 78 proceeding was filed challenging the termination, which resulted in the Appellate Division, Third Department upholding the termination. [FN13]

Discussion

To demonstrate that the County's disciplinary actions were improperly motivated in violation of §§ 209-a.1(a) and (c) of the Act, CSEA has the burden of demonstrating by a preponderance of evidence that: a) the affected unit employees engaged in a protected activity under the Act; b) such activity was known to the person or persons taking the adverse employment action; and c) the adverse employment action would not have been taken "but for" the protected activity. [FN14]

In its exceptions, CSEA asserts that the six unit employees engaged in protected activity under the Act when they wore pink ribbons at work. We disagree.

The scope of protected employee activities under §§ 202 and 203 of the Act is narrower than the scope of activities protected under § 7 of National Labor Relations Act (NLRA). [FN15]This difference in the scope of statutory protections emanates from the fact that unlike § 7 of the NLRA, the Act does not protect employees who engage in concerted activities for "mutual aid and protection." [FN16]Therefore, in order for conduct to be found to be a protected concerted activity for purposes of the Act, it must have some relationship with forming, joining or participating in an employee organization.

To determine whether a particular activity is protected under the Act we evaluate "the totality of all relevant circumstances, with a focus upon the purpose and effect of that activity." [FN17]As part of that evaluation, we must examine the content of the activity in the context of all relevant surrounding circumstances.

Employee statements and actions that are organized, prompted or encouraged by an employee organization will, in general, be found to be protected concerted activity for purposes of the Act. The wide scope of protected concerted activities under the Act includes statements and activities by a unit employee as part of an employee organizational activity, relates to an employee organization policy, involves employee organizational representation or stems from a dispute emanating from a collectively negotiated agreement. [FN18]In such contexts, the concerted wearing of ribbons and other symbolic forms of speech or protest by unit members will be generally protected under the Act, particularly when employees are permitted to wear ribbons or other emblems at work in support of other causes.

Based upon the facts and circumstances presented in this record, however, we conclude that the wearing of pink ribbons by the six unit employees is not protected concerted activity under the Act. The record evidence demonstrates that while the ribbon wearing was concerted, in the generic sense, it was unrelated to forming, joining or participating in an employee organization. Instead, the symbolic speech was for the purpose of expressing only a shared personal animus regarding Cargill, a sign of camaraderie tied to that dislike and an expression of support for each other.

The ribbon wearing commenced only after CSEA completed its meetings with the County, which resulted in the conflict resolution training. The activity was not related to any ongoing CSEA representation. It did not stem from the terms of the collectively negotiated agreement or a pending claim under the County's workplace violence policy. Nor was it part of a symbolic campaign against the County or Cargill for allegedly failing to comply with the County's policy.

In reaching our conclusions, we infer from CSEA's failure to call Labor Relations Specialist Lucas and unit vice president Baker as witnesses that they would have testified that they were unaware of the ribbon wearing until after the County commenced its investigation, that the activity was not related to their discussions with the County regarding unit employees' complaints and that in their judgment the conflict resolution training adequately resolved the employee complaints about Cargill's supervision. [FN19]

The evidence demonstrates that CSEA did not organize or encourage the symbolic conduct by the six unit members. While Kellogg and Sindoni hold CSEA offices, the context of their involvement demonstrates that they did not wear the ribbons, or encourage others to do so, in their union capacities. Rather, they wore the ribbons because of their strong personal dislike of Cargill. Kellogg began wearing the ribbon only after a direct incident with Cargill, which resulted in Kellogg filing a “personal complaint” [FN20]with McCann. During her interrogation, Sindoni candidly acknowledged her continued dislike for Cargill, which stemmed, in part, from a dress code complaint she made against Cargill. [FN21]Furthermore, we note that Kellogg and Sindoni did not cite to their CSEA titles, duties or activities during their respective interrogations or in their subsequent handwritten amendments to the interrogation transcripts.

We next turn to CSEA's exception challenging the ALJ's crediting of O'Rourke's testimony that she was unaware of Sindoni's shop steward status at the time that the County decided upon the disciplinary penalties it would seek including Sindoni's resignation or termination.

Credibility determinations by an ALJ are generally entitled to substantial deference by the Board. [FN22]In the present case, we find no objective evidence in the record to disturb the ALJ's credibility finding that O'Rourke did not recall Sindoni's shop steward status at the time that the County commenced settlement discussions with CSEA. While Kellogg may have included Sindoni on a list of shop stewards emailed to O'Rourke, it is quite plausible that O'Rourke may have forgotten the content of that email, particularly when Sindoni had no interactions with O'Rourke in her shop steward role and Sindoni did not mention her CSEA status during her interrogation. Based upon the foregoing, we deny CSEA's second exception.

Finally, we examine CSEA's exception seeking to overturn the ALJ's finding that the more severe disciplinary penalties sought against Kellogg and Sindoni were motivated by their status in CSEA in violation of §§ 209-a.1(a) and (c) of the Act.

Based upon our review of the record, we conclude that CSEA failed to demonstrate by a preponderance of the evidence that the disciplinary penalties were motivated by Kellogg and Sindoni's organizational status or activities.

With respect to Sindoni, CSEA failed to prove an essential element of its prima facie case: that the County was cognizant of her status as a shop steward at the time it decided to seek her resignation or discharge. Therefore, we affirm the ALJ's decision dismissing the amended charge as it relates to the disciplinary penalty against Sindoni.

Even if we were to reach a different conclusion on the issue of the County's knowledge, however, we would find that the respective punishments sought by the County were not improperly motivated.

The pursuit of more severe penalties against the two CSEA officers is not dispositive proof of improper motivation. [FN23]Those disparities, as well as the resurrection of other job performance issues regarding Kellogg, and Sindoni's prior work history constitute circumstantial evidence of improper motivation. [FN24]However, the County presented legitimate nondiscriminatory reasons for its actions demonstrating that Kellogg and Sindoni were not similarly situated to the other four unit members. The evidence reveals that the County sought harsher penalties against them because their alleged misconduct was of a greater magnitude than that committed by the other employees. Both were reported to have solicited others to participate and Sindoni was accused of making threats that created fear among her co-workers and engaging in other misconduct toward Cargill. The fact that Cargill may have feared both Sindoni and DeRouchie does not demonstrate that the County's reasons for seeking harsher penalties against Kellogg and Sindoni were pretextual.

Based upon the foregoing, the decision of the ALJ is affirmed as modified.

IT IS, THEREFORE, ORDERED that CSEA's exceptions are denied, and the charge is dismissed.