Finer, 1 OCB 2d 13 (BCB 2008)

(IP) (Docket No. BCB-2675-07).

Summary of Decision*:* Petitioners alleged that the Union breached its duty of fair representation when it negotiated a pay differential in a collective bargaining agreement that applied to members of the bargaining unit in other titles but not to the positions to which the Petitioners were assigned, which they argued were equally deserving. The Board found that, even were the allegations of the petition to be true, the Union's alleged conduct consisted in balancing the divergent interests of its membership, and choosing to forgo benefits for one class of employees in exchange for benefits to other employees. The Board further held that such conduct did not, absent allegations sufficient to establish bad faith, suffice to state a claim of a breach of the duty of fair representation, and it dismissed the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

MICHAEL FINER, JAMES DALTON, LOUIS GUZZO, JOHN STARK, RICHARD JOHNSON, JAMES ZODKOWIC, THOMAS PIAMBINO, JOSEPH DiLORENZO, JOHN DRURY, ROBERT ORLOFF, PETER FARENKOPF, JAMES McCABE, and TIMOTHY MALONEY,

Petitioners,

-and-

THE CITY OF NEW YORK, OFFICE OF LABOR RELATIONS, and THE UNIFORMED FIRE OFFICERS ASSOCIATION,

Respondents.

DECISION AND ORDER

On December 3, 2007, petitioners Michael Finer, James Dalton, Louis Guzzo, John Stark, Richard Johnson, James Zodkowic, Thomas Piambino, Joseph DiLorenzo, John Drury, Robert Orloff, Peter Farenkopf, James McCabe, and Timothy Maloney (collectively, "Petitioners"), filed

the instant petition alleging that the Uniformed Fire Officers Association ("UFOA" or "Union"), of which they are members, and its president, John McDonnell, breached what Petitioners characterize as the "fiduciary" duty of fair representation in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] Petitioners, who hold the ranks of lieutenant, captain, and battalion chief in the Marine Division of the Special Operations Command ("SOC") of the Fire Department of the City of New York ("FDNY"), contend that the Union and its president violated the NYCCBL when the Union failed to press for and obtain in collective bargaining with the City of New York ("City") an assignment pay-differential for hazardous duty applicable to Petitioners. As negotiated, the differential was obtained as to employees in certain other positions, but not made applicable to Petitioners. The Union denies that its conduct in collective bargaining violated any duty to bargain and avers that it actually sought to have the differential apply to Petitioners as well to as other members of the bargaining unit but that when the City refused to extend the differential to all members, the Union decided that it was reasonable to accept it as offered by the City on a "take it or leave it" basis and, in future bargaining, attempt to extend the differential to all members of the bargaining unit. Petitioners also allege that the City acted arbitrarily in the negotiations. The City denies Petitioners' claims as to it or to the Union. The Union and the City each move to dismiss the

[1]The Petitioners have filed a complaint asserting a plenary action for breach of fiduciary duty in the Supreme Court, New York County, a copy of which is annexed to the City's motion to dismiss the petition as Exhibit "A." Subsequent to the filing of the motions the Supreme Court granted motions by the City and the Union to dismiss the action. *Finer v. City of New York*, Index No. 1124042/07 (March 6, 2008). We grant the Union's request that this Board take administrative notice of the arguments presented by it before Supreme Court, and consider them in support of its motion herein. *See CWA, Local 1180*, 1 OCB2d 2, at 2, n. 1 (BCB 2008); *City Empls. Union*, 67 OCB 13, at 11 (BCB 2001).

petition. The Board of Collective Bargaining ("Board") finds that Petitioners' claims, even if taken as true, are not sufficient to state a breach of the duty of fair representation and, therefore, dismisses the petition. Likewise, the claim that the City retaliated against three of the Petitioners is likewise insufficient, in that Petitioners have failed to allege management was aware of acts that constituted protected activity, and to allege facts sufficient to suggest a causal relationship between such knowledge and the alleged retaliatory conduct.

BACKGROUND

The SOC consists of tactical divisions known as Rescue, Hazardous Materials ("HazMat"), and Marine units. The members of these divisions engage in the same firefighting activities as other members of the Department but, in addition, they are trained in the detection and suppression of fire and explosive incidents involving chemical, biological, radiological, and nuclear hazardous materials. As members of the Marine unit, Petitioners are represented by the Union for purposes of collective bargaining.

Between May 11, 2007 and July 18, 2007, representatives of the Union and the City took part in negotiations for a successor to a prior collective bargaining agreement. The negotiations addressed demands for a general salary increase as well as a pay differential for individuals in certain assignments ("assignment differential"). On July 18, 2007, the Union and the City entered into a Memorandum of Agreement ("MOA") covering the period from March 20, 2007 through March 19, 2011 which, by means of a side agreement also dated July 18, 2007, provided for payment of an assignment differential for work performed by unit members in certain specified assignments.

The terms of the MOA and side agreement followed the pattern of bargaining set in

negotiations between the City and the Uniformed Firefighters Association ("UFA") which, on March 2, 2007, concluded in a collective bargaining agreement ("UFA Contract") with an assignment differential which paralleled that in the UFOA's side agreement. The UFA Contract was ratified on or about May 10, 2007.

The assignment differential in the UFA contract was a 12 percent differential payable to firefighters assigned to the following companies: Haz-mat, Haz-mat Battalion, Rescue, Squads, and Haz-tech Engines. The UFA contract excludes the Marine Division from the units to be included in the assignment differential. During the UFOA negotiations, Peter Gorman, then-president of the Union, inquired at the bargaining session held on May 10, 2007, whether the City intended to propose an assignment differential similar to that included in the UFA Contract. At a subsequent bargaining session, May 25, 2007, the City proposed an assignment differential precisely patterned on the one in the UFA Contract and applicable to the same units to which the UFA Contract differential was applicable, thus excluding the employees in the Marine Division. The Union asserts that the City offered the differential on a "take it or leave it" basis. Between that session and a subsequent one on July 10, 2007, McDonnell had been elected president of the Union and the UFOA Executive Board developed a formal counter-offer which would have extended an assignment differential, albeit a smaller one, to all members including those in the Marine Division.

At a bargaining session on July 18, 2007, the UFOA formally submitted the counter-offer. It would have given a six percent differential to the UFOA members whom the City's proposal contemplated covering but also would have extended a two percent differential to UFOA members excluded from the City's proposal, such as superior officers in the Marine Division. The City rejected the UFOA proposal both as to reducing the percentages and as to extending the differential

to a larger group of recipients. In an affidavit in support of the instant motion, McDonnell stated that the president of the UFA had told him that the UFA had also attempted to introduce a counter-proposal to the City's offer similar to the one the UFOA suggested but it was likewise rejected by the City.

The UFOA asserts that its Executive Board determined that the City's position was immutable on this point and, rather than risk the City's rejection of a differential, which previously had not been an element of any UFOA collective bargaining agreement, the Executive Board agreed in good faith to the City's offer in the hope that future negotiations would permit extension of the differential to a wider class of members. In fact, the side agreement dated July 18, 2007 affirmatively states that the parties will convene a labor-management meeting to discuss implementation of this differential "as well as to discuss the potential inclusion of other units in this program." (Union Motion Ex. B, at 5).

The MOA was presented to the Union's membership, and on or about August 10, 2007 was ratified by an affirmative vote of 81 percent of those who returned ballots. The differential, effective September 1, 2007, is payable in four steps over three years to lieutenants, captains, and battalion chiefs assigned or long-term detailed to special assignments in the Haz-mat, Haz-mat Battalion, Rescue, SOC (Rescue) Battalion, Squads, and Haz-Tech Engine companies, as well as to covering officers assigned to SOC.

On September 5, 2007, Petitioners filed an action in Supreme Court, New York County, alleging that the Union breached what they call its "fiduciary duty" to represent its members and to obtain for them appropriate employment conditions, compensation, and pension benefits. On December 3, 2007, Petitioners filed the instant improper practice petition seeking, as relief, a finding

that the Union violated the duty of fair representation towards Petitioners and "remand to the contracting parties."

Petitioners contend that, "upon learning of the Petitioners' position," the Department made a decision to bar three of them from classes which they contend are required for SOC assignments. The Union and the City both filed motions to dismiss the instant petition, the City on January 18, 2008, the Union on February 7, 2008. Petitioners have not, to date, responded to these motions.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners argue that, in violation of NYCCBL § 12-306(b)(3), the Union breached its "fiduciary" duty of fair representation by failing to negotiate a provision that would have entitled them to an assignment differential to which certain other members are entitled.[2] Petitioners argue, in essence, that the Union's following the pattern of bargaining set by the earlier UFA contract is no defense to their claim. Regardless of whether the UFA forgot to include its own members in the Marine division in the assignment differential provision or did so intentionally, Petitioners contend that the agreement between the UFA and the City provides no basis for the UFOA to exclude Marine Division officers from the differential applicable to other specified UFOA members.

Petitioners allege but do not elaborate that "upon learning of the Petitioners' position," FDNY made a decision to bar three of them from classes which they contend are required for SOC

[2] Section 12-306(b) of the NYCCBL provides that "[i]t shall be an improper practice for a public employee organization or its agents . . . (3) to breach its duty of fair representation to public employees under this chapter.

assignments.[3] Petitioners cite no section of the NYCCBL as having been violated by this alleged action.

In response to the motion to dismiss, Petitioners make several arguments. First, they assert that the decision dismissing the Supreme Court action renders moot the City's request that this Board delay resolution of this case pending the outcome of that action. Second, they annex certain documents filed by themselves and by the Union in Supreme Court, and request that this Board take administrative notice of the factual allegations and admissions within these documents. The only fact alleged in the additional documents not included in the petition is the claim that the Union declined to process a grievance on the part of the petitioners challenging their exclusion from the differential at issue here.

Union's Position

The Union argues that the claim characterized by Petitioners as the "fiduciary" duty of fair representation is not legally cognizable. The Union contends that the only duty a union owes its members is the duty of fair representation and, in that regard, Petitioners have failed to plead and prove that the Union's conduct in negotiating the MOA at issue was founded in bad faith. Pattern bargaining which the Union followed in reaching this MOA has been the standard in municipal collective bargaining for more than 40 years. Moreover, presented by the City with a "take it or leave it" offer, the Union exercised its judgment reasonably and in good faith to "take it" for the immediate benefit of some members and for the potential benefit to all members in future bargaining. Its decision in that regard is well supported by case law. Further, the Union contends

[3] Petitioners reference certain exhibits to the petition which are not specified or attached. However, the omission of these documents is not determinative of the question at issue.

that its president is not a proper party to the instant petition against the Union and as to him, the petition must be dismissed.

As Petitioners have stated no cognizable claim under the NYCCBL, no relief can be granted even taking as true the facts which they allege. Moreover, the Union contends that Petitioners have no basis to seek to overturn the terms of the MOA reached in good faith between its negotiators and those of the City. The Union notes that the MOA has already been ratified by 81 percent of its members. The Union moves to dismiss the petition.

City's Position

The City argues that Petitioners have failed to assert sufficient factual allegations supporting their claim that the Union has breached its duty of fair representation. Specifically, the City contends that no names, dates, or places have been cited to support their contention other than that the Union entered into the MOA on August 10, 2007, with which Petitioners take issue as being inadequate for their purposes. The City points to Petitioners' failure to attach documents to which the instant petition refers. Moreover, no legal authority is cited to support Petitioners' conclusory assertions. Thus, the petition is insufficient on its face, and the City moves to dismiss it.

Even if their conclusory assertions are deemed true, the City argues, Petitioners have failed to meet their burden of pleading and proving that the Union engaged in prohibited conduct in the negotiation of the MOA. In short, Petitioners' complaint amounts to a disagreement with the Union's negotiating tactics or dissatisfaction with the outcome of the bargaining which ultimately resulted in overwhelming ratification by Union members. Therefore, any derivative claim against the City must also fail. Finally, the City asks that, if, *arguendo*, this Board finds the petition

sufficient on its face, action on it be stayed until Petitioners withdraw their fair representation claim from the proceeding pending in Supreme Court, as the relief requested therein is identical to that requested in the instant improper practice proceeding.

DISCUSSION

Before addressing the merits of the motions to dismiss, we must address the City's request that this Board should be stayed pending resolution of the similar claims pressed by the Petitioners in a plenary action before the Supreme Court of the State of New York, County of New York. Subsequent to the filing of the instant motions, the Supreme Court granted the motions to dismiss the plenary action on the ground that the NYCCBL "confers exclusive, non-delegable jurisdiction upon the BCB and removes original subject matter jurisdiction from the Supreme Court." *Finer v. City of New York*, Index No. 11204/07 (Sup. Ct. N.Y. Co. March 6, 2008)(Smith J.) (quoting *Matter of Patrolmen's Benev. Assn. v. City of New York*, 293 A.D.2d 253 (1st Dept. 2002) (editing and quotation marks omitted)). Thus, the request that this matter be stayed has been rendered moot, as Petitioners assert.

In deciding a motion to dismiss a claim, "the facts alleged by the petitioner must be deemed to be true, and the only question presented for adjudication is whether, taking the facts as alleged by petitioner, a cause of action within the meaning of the NYCCBL has been stated." *James-Reid*, 77 OCB 29, at 11 (BCB 2006), quoting *McAllan*, 29 OCB 25, at 6 (BCB 1981); *see also Melisi*, 57 OCB 52 at 3 (BCB 1996). Moreover, in "ruling on a motion to dismiss, we will accord the petition every favorable inference and will construe it to allege whatever may be implied from its statements by reasonable and fair intendment." *James-Reid*, *supra*, at 11-12, quoting *DC 37,* 49 OCB 37, at 12-

13. However, a petitioner still has the burden of sufficiently pleading facts which, if proven, would suffice to state a cause of action under the NYCCBL. *Seale*, 79 OCB 33, at 6-7 (BCB 2007); *D'Onofrio*, 79 OCB 26, at 11 (BCB 2007). We find that the Petitioners have failed to plead such facts, and that, accordingly, the petition must be dismissed. *Id.*[4]

With respect to the claims presented, the Petitioners characterize the duty of fair representation as a "fiduciary" duty, a term of art that has come to denote an enhanced standard of care beyond that ordinarily applicable to civil actions in general. *See generally Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 118 (1986); *Morris v. Crawford*, 304 A.D.2d 1018 (3d Dep't 2003); *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 57-58 (1st Dept. 1988); *Constantin Assocs. v. Kapetas*, 17 Misc.3d 1137A, 2007 N.Y. Misc. LEXIS 8257 (Sup. Ct. N.Y. Co. Dec. 6, 2007). However, it is well settled that, in the context of a labor union's acting in its representative capacity, the scope of its "fiduciary duty" is defined by the contours of the duty of fair representation. *Arizaga v. NYC Health & Hosp. Corp.* 96 A.D.2d 457, 457-458 (1st Dept. 1983); *see generally Gorga v. Amityville Teachers Assn.*, 9 Misc3d 112a, 808 N.Y.S.2d 817 (Sup. Ct. Suff. Co. 2005) (citing cases).

This Board, in interpreting NYCCBL § 12-306(b)(3), has "long held that the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Okorie-Ama*, 79 OCB2d 5, 14 (BCB 2007), citing J*ames-Reid*, 77 OCB2d 29, at 16-17 (BCB 2006); *Samuels,* 77

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[4] Additionally, while a public employee organization may be held responsible for the acts of its agents, an individual cannot commit an improper practice in his or her personal capacity. *See* NYCCBL § 12-306; *Fabbricante*, 71 OCB 3 at 2 (BCB 2003). The proper party to this proceeding is the Union, not McDonnell, the named individual.

OCB 17, at 12 (BCB 2006)*; Del Rio,* 75 OCB 6, at 12 (BCB 2005); *Whaley,* 59 OCB 41, at 12 (BCB 1997) 12; *see also Transport Workers Union, Local 100 (Brockington),* 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employment Relations Board); *see generally Vaca v. Sipes,* 386 U.S. 171, 177 (1967) (same standard under federal National Labor Relations Act).

In the instant case, petitioners have not pleaded facts which, if credited, are sufficient to state a cause of action sounding in a breach of the duty of fair representation. The allegations of the petition plead, essentially, that:

> Although the [collective bargaining agreement] did obtain for members of the Rescue and HazMat units a Special Operations hazardous duty payment of 12% pay component over and above the new salary provisions for its members, the Respondent UFOA and its officers failed or neglected to provide the same hazardous SOC duty specialty pay to the Petitioners as superior officers filling the thirteen superior officer lines of the Marine Division exposed to the same or even higher dangerous duties expected of other members of SOC as set forth herein.

(Pet at 2, ¶ 6).

The petition goes on to assert three grounds for the exclusion of Petitioners: First, "the exclusion was based on the actions of the [UFA] which negotiated a collective bargaining agreement which provided for Rescue and HazMat SOC members to receive the hazardous pay increment but not firefighters in the Marine Division." (Pet. at 3, ¶ 8). Alternatively, the Petitioners claim that the Union "either forgot to include" the Petitioner "or did so under some real or imagined aspect of its contract perceived to provide more or different benefits to its marine division members irrespective of [the dangers] faced by the Marine Division." (*Id.* at ¶ 9).

None of the three grounds for its action ascribed by the Petitioners to the Union would if proven suffice to establish, absent more, that the entering into a collective bargaining agreement that

failed to award them a hazardous pay differential breached the duty of fair representation. The first alleged ground, that the duty owed to the Petitioners is inconsistent with "following what another union did," disregards our past holding that the employment of "pattern bargaining" as a tactic in order to gain the advantage of other unions' negotiations does not, absent some other improper motivation, violate the duty of fair representation. *See, e.g., Astuto*, 51 OCB 22, at 7 (BCB 1993).

We have long held in cases in which union members claim that negotiation tactics in reaching a collective bargaining agreement constitute a breach of the duty of fair representation, that we "will not place ourselves in the position of questioning a union's bargaining tactics and strategy unless it has been shown, which it has not, that the conduct is arbitrary, discriminatory, or in bad faith." *Astuto*, 51 OCB 22, at 7 (BCB 1993); *Brengel*, 65 OCB 10, at 9-10 (BCB 2000), citing *Shaprio*, 37 OCB 9, at 17 (BCB 1986); *see also Walker*, 79 OCB 2, at 15 (BCB 2007). Even were the Petitioners to establish that the Union had somehow neglected to demand the hazardous pay differential on their behalf–an allegation which has been denied under oath by the Union's president–such an allegation of mere negligence does not state grounds for a finding of a breach of the duty of fair representation. *See, e.g., Sicular*, 79 OCB 33, at 16 (BCB 2007); *Astuto*, *supra*. Nor yet again does the claim that certain members received greater benefit than others suffice of its own weight to make out a claim.

Because the collective bargaining representative is allowed "considerable latitude" in prioritizing between desirable ends, we explained in *Shapiro*, "absent a showing of intentional and hostile discrimination, a union does not breach its duty of fair representation simply because a negotiated bargain favors one group of employees over another or because all the employees in the unit are not satisfied with the outcome." 37 OCB 9, at 17; *see Miller*, 53 OCB 21, at 13-14 (BCB 1994) (negotiation of a step plan that granted different salary increases based on seniority did not

breach the duty of fair representation); *see also County of Erie*, 27 PERB ¶ 3081 (1994) (Public Employment Relations Board ("PERB") dismissed claim contending, absent any showing of discriminatory intent or malice, that a union had breached its duty by entering into a wage agreement favoring certain employees over others); *Rooney v. CSEA*, 20 PERB ¶ 3062 at 5 (1987) (union's exclusion of seasonal employees from grievance-arbitration procedures did not breach duty of fair representation because unions are allowed to reach "agreements in negotiations that are more favorable to some unit employees than to others" and because "[t]he bargaining agent must be given broad discretion in balancing the interests of the unit").

Our holdings and those of PERB to this effect are consistent with those of the courts which have found that, where "the union undertakes a good-faith balancing of the divergent interests of its membership, and chooses to forgo benefits for one class of employees in exchange for benefits to other employees, such accommodation does not, of necessity, violate the union's duty of fair representation." *Matter of Civil Serv. Bar Assn. v. City of New York*, 64 N.Y.2d 188, 197 (1984) (no breach of the duty of fair representation in union waiving arbitration award in return for concessions in collective bargaining agreement to benefit of other classes of employee); *Cunningham v. Local 30, Int'l Union of Op. Eng.*, 234 F. Supp.2d 383, 383, 393 (S.D.N.Y. 2002) (following *Civil Serv. Bar Assn.*); *see also Hoerger v. Bd. of Educ. Great Neck Union Free Sch. Dist*., 215 A.D.2d 728, 729 (2d Dept. 1995); *Baker v. Bd. of Educ., Hoosick Falls Cent. Sch. Dist*., 3 A.D.3d 678, 681 (3d Dept. 2004) (upholding PERB's dismissal of claimed breach).

In the instant case, the Petitioners have failed to plead facts which, if proven, would establish a breach of the duty of fair representation. Under any of the three possible scenarios projected in the petition, the Union's actions did not constitute a breach of the duty of fair representation. Likewise,

the derivative claims against the City are dismissed. *D'Onofrio*, 79 OCB 26, at 12-13. Accordingly, the Union's motion to dismiss the petition against it, and the City's motion to dismiss the derivative claim against it are granted. *D'Onofrio*, 79 OCB 26, at 11; *Astuto*, 51 OCB at 22.

Likewise, the claim, made for the first time in opposing the motion to dismiss the petition, that the Union breached the duty of fair representation by declining to process a grievance on the part of Petitioners against their exclusion from the pay differential contained within the collective bargaining agreement also fails to state a claim, even if we were to treat it as an amended claim; such a grievance would have been without merit, as the collective bargaining agreement, by Petitioners' own assertion, excluded them from receiving the differential, and thus cannot form the basis for a claim of the breach of duty of fair representation. *See, e.g., D'Onofrio*, 79 OCB 3, at 19-20 (BCB 2007) (citing cases).

As to the claims that the City denied three of the Petitioners' requests to attend classes pertinent to their jobs, such a claim sounds in alleged violation of NYCCBL § 12-306(a)(1) and (3). To determine if an employer's 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 this Board in *Bowman*, 39 OCB 51 (BCB 1987). Under this test, 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.

Id. at 15; *Howe*, 77 OCB 32, at 22, (BCB 2006); *see also UFA*, 1 OCB2d 5, at 20 (BCB 2008).

If "a petitioner alleges sufficient facts concerning these two elements to make out 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." *UFA*, 1 OCB2d 5 at 20*.; see also Local 237, CEU,* 77 OCB 24, at 19 (BCB 2006).

With respect to the first prong of the *Salamanca-Bowman* test, we "have long stated that an activity that the Board would deem to fall within the protection of NYCCBL § 12-305 must be related, if only indirectly, to the employment relationship between the City and bargaining unit employees." *Id.* at 20-21*;* citing *SSEU*, 79 OCB 34, at 9 (BCB 2007); *COBA*, 53 OCB 17, at 11 (BCB 1994), citing *McNabb*, 41 OCB 48, at 13 (BCB 1988), quoting *Bd. of Educ. of Deer Park Union Free Sch. Dist.*, 10 PERB ¶ 4594, at 4689 (1977), *aff'd*, 11 PERB ¶ 3043 (1978). The conduct in question must "at least be in furtherance of the collective welfare of employees, as distinguished from the welfare of an individual." *Id.*

In the instant case, no concrete action on the part of the Petitioners has been alleged to have been the predicate for the City's action, whether for the collective welfare of the employees, or for their own benefit. Moreover, the allegation that management became aware of these employees' "position" is entirely conclusory in nature and contains no factual allegations either to establish how management would become aware of the Petitioner's views, or to establish a causal nexus between the knowledge and the action taken. Such conclusory, vague pleading is insufficient to state a cause of action under the NYCCBL. *See DEA*, 79 OCB 40, at 23 (BCB 2007), quoting *Collella*, 79 OCB 27, at 54 (BCB 2007) ("allegations of improper motivation must be based on specific, probative facts")(citing cases).

Moreover, even were we to assume *arguendo* management's knowledge of the Petitioner's "position" that the Union should have been negotiating for a pay differential on their behalf,

constitutes the requisite knowledge of protected activity, the Petitioners have not pleaded facts sufficient to establish a claim. As pleaded, the alleged action on the part of the City "was based on a loss/benefit ratio designed to address the financial concerns of the Petitioners. . ." (Pet. at 4). By asserting that a non-retaliatory, financially-based reason was the motivation for the complained-of decision, the petition negates any claim that retaliation for protected activity motivated the decision. *DEA*, 79 OCB 40, at 22-23 (where allegations do not establish causal link between protected activity and retaliatory action, no claim is stated). Accordingly, the City's motion to dismiss the non-derivative claims against it is also granted.

For the reasons above stated, the petition is dismissed in its entirety.

ORDER

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

ORDERED, that the motions to dismiss, filed by the Union and the City, in the proceeding docketed as BCB-2675-07, be and the same hereby are, granted, and it is further

ORDERED, that the improper practice petition docketed as BCB-2675-07, be and the same hereby is, dismissed in its entirety.

Dated: April 29, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

PETER PEPPER
MEMBER