Edwards, 1 OCB2d 22 (BCB 2008)

(IP) (Docket No. BCB-2683-08).

Summary of Decision: Petitioner claimed that her employer, the New York City Health and Hospitals Corporation, interfered with her statutory rights under the NYCCBL, violated her *Weingarten* rights, and retaliated against her by demoting her. Petitioner further claimed that the Union, International Brotherhood of Teamsters, Local 237, interfered with her statutory rights under the NYCCBL and violated its duty of fair representation by failing to prosecute her grievances. The Board held that the alleged acts of discrimination and harassment by HHC were not motivated by anti-union animus. Furthermore, the Board held that the Petitioner's claim concerning *Weingarten* rights was unfounded because, objectively, there was no reasonable basis for Petitioner to believe that discipline would arise therefrom. The Board also held that Petitioner failed to allege sufficient facts demonstrating the Union interfered with her statutory rights or violated its duty of fair representation. Accordingly, the petition is dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

VERA EDWARDS,

Petitioner,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 237,

Respondents.

DECISION AND ORDER

On January 24, 2008, Vera Edwards, an employee of the New York City Health and Hospitals Corporation ("HHC") and a member of the International Brotherhood of Teamsters, Local

237 ("Union" or "Local 237"), filed an improper practice petition, *pro se*, against HHC and Local 237 alleging violations of New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3) and § 12-306(b)(1) and (3). According to Petitioner, HCC interfered with her statutory rights under the NYCCBL, violated her *Weingarten* rights by refusing her request to have representation during a meeting with her supervisors, discriminated against her through harassing behavior, and retaliated against her by demoting her. Furthermore, Petitioner alleges the Union interfered with her statutory rights under the NYCCBL and violated its duty of fair representation by failing to prosecute her grievances.

HHC contends that most of Petitioner's claims are outside the four month statute of limitations, that Petitioner fails to establish a *prima facie* claim of retaliation and/or discrimination, and that Petitioner has not demonstrated that the Union violated its duty of fair representation. Local 237 argues that its actions taken with respect to Petitioner's grievances satisfied its duty of fair representation, that the Union did not act in an arbitrary or capricious manner, that it never interfered with Petitioner's statutory rights, and that Petitioner's allegations are insufficient to set forth a *prima facie* violation of the NYCCBL.

This Board finds that the alleged acts of discrimination and harassment by HHC were not motivated by anti-union animus. Additionally, Petitioner's claim concerning *Weingarten* rights was unfounded because, objectively, there was no reasonable basis for Petitioner to believe that discipline would arise therefrom. We also hold that Petitioner did not allege any facts indicating that the Union interfered with her statutory rights under § 12-305 of the NYCCBL, and that Petitioner failed to demonstrate that the Union acted arbitrarily or capriciously, thereby violating the Union's duty of fair representation. Accordingly, the petition is dismissed.

BACKGROUND

HHC provides medical, mental health and substance abuse services through its eleven acute care hospitals, four nursing facilities, six diagnostic and treatment centers, and more than eighty community-based clinics. Each hospital, diagnostic and treatment center, and clinic has hospital police assigned to it. Hospital police employees serve in the civil service titles Special Officer, Senior Special Officer, and Hospital Security Officer. Within HHC, Special Officers have the in-house title of Officers; Senior Special Officers have in-house titles of Sergeants or Lieutenants; and Hospital Security Officers have in-house titles of Captains.[1] According to the Position Description for the Officers, these employees are responsible for ensuring "physical security" and safety, and to prevent loss and "maintain order" in a particular hospital, center or clinic by routinely "patrol[ling] the public areas" of the buildings, ejecting "loiterers and disorderly persons," reporting "security incidents," and maintaining "records of people entering and leaving buildings." (HHC Ans., Ex. 1). According to the Position Description for Senior Special Officers, these employees direct "a unit of security personnel on a specific tour of duty in an assigned area" by instructing subordinate security personnel, preparing work schedules, assigning security staff, making inspections, investigating "serious and unusual incidents," interpreting "policy directives," and keeping "appropriate records regarding patrols, demonstrations, arrests and other incidents." (HHC Ans., Ex. 2).

On May 19, 1997, Petitioner was appointed to the position of Special Officer for HHC and began working at the Lincoln Medical and Mental Health Center ("Lincoln"). On December 10, 2005, Petitioner and her direct supervisor, Diana Hogan, among others, took the civil service exam

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[1] Due to the circumstances involved in this case, the civil service titles and in-house titles will be used interchangeably, as the core dispute in this matter involves this hierarchy.

for the title Senior Special Officer. The record demonstrates that Diana Hogan had been serving in the civil service title of Senior Special Officer as a provisional employee, first as a Sergeant in September 2001 and then as a Lieutenant in January 2007. When the civil service list of eligible candidates was published, Petitioner was listed as number 38, and Lieutenant Hogan was listed as number 101.[2]

From April 2007 to July 2007, Petitioner claims that she was engaged in concerted activity with and on behalf of other HHC employees, in that she filed reports ordered by supervisors; filed complaints with HHC's Equal Employment Opportunity office and HHC's Inspector General office regarding the activities of various lieutenants, captains and directors; participated in and being selected during a hiring pool for the Senior Special Officer promotion; and met with supervisors concerning the actions and behavior of Lieutenant Hogan.[3] According to Petitioner, as a result of these actions, she was subjected to "unfair treatment, such as . . . angry stares, . . . [and] unfair write-ups." (Rep., p. 2).

Also during this period of time, Petitioner was called off the eligibility list for promotion into the Senior Special Office title. According to Petitioner, during the interviewing process, she was

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[2] According to HHC, an employee's rank on the certified list of eligible candidates merely establishes "when an employee will be called into a civil service pool" and "does not guarantee a promotion." (HHC Ans. ¶ 20). Furthermore, for an Officer to be selected off of this list, the candidate must select a facility where he/she would like to work, interview with and be chosen by the selection committee from that particular facility, and complete the requisite training and 12 month probationary period.

[3] The initial improper practice petition in the instant manner contains no mention of concerted and/or Union activity. However, in Petitioner's Reply, she inserts numerous recitations of undated incidents in which Petitioner, acting on behalf of the Union and other HHC employees, complained about the harassing and abusive behavior of several supervisors, including Lieutenant Hogan.

"harassed" and feared "retaliation" because she was a "black female" and "single mother of five." (Rep., Ex. L1). In July 2007, a HHC Captain informed Petitioner that she received the promotion from Officer to Sergeant however, due to the change in title, Petitioner's shift was changed to the overnight tour, from 11:15 p.m. to 7:45 a.m. Petitioner, even before her promotion became effective, sent a memorandum to Lydia Perez, Director of HHC's police unit for Harlem Hospital Center. Petitioner requested that, since she was a single mother of five children, two of whom had "medical conditions" that required her "presence and supervision," her shift be moved to the "day tour," from 7:30 a.m. to 4:00 p.m. (Rep., Ex. N).

From July 23 through July 27, 2007, Petitioner received supervisory training from HHC. HHC contends that Petitioner's training regimen was consistent with the training regimen received by all Special Officers for their promotion to Senior Special Officers, and consisted of education relating to HHC policy, procedures, schedules, evaluations, profiles, time sheets, overtime assignments, and disciplinary processes, and was "tailored to help Petitioner transition" from a Special Officer to a Senior Special Officer. (Ans. ¶26).[4] According to Petitioner, she only received one week of training, even though she should have received two weeks, because HHC refused to pay for the other week. Petitioner was instructed by her trainers that the remaining training would be handled by her supervisors at Lincoln.

On August 6, 2007, Petitioner's promotion from Officer to Sergeant at Lincoln became effective, and the applicable probationary period began. Also on this day, Director Perez held a

[4] Additionally, HHC contends that Lieutenant Hogan offered Petitioner personal assistance and provided daily feedback on the manner in which Petitioner routinely performed her duties and responsibilities, however Petitioner "was resistant to the training" and refused "to accept additional help." (Ans. ¶ 27).

meeting with Petitioner, Union Trustee Noreen Hollingsworth, a representative from HHC's Equal Employment Opportunity office, and the Director of HHC's police unit at Lincoln, Guillermo Magdelano, to discuss Petitioner's request to change tours. Shortly thereafter, on August 9, 2007, Director Perez issued Petitioner a memorandum memorializing their meeting. Also in this memorandum, Director Perez granted a "three-month extension" to Petitioner allowing her to remain on the day tour, provided that she "provide [HHC] with a plan of action to address the progress of the childcare issue" and that Petitioner seek the assistance of both the union and social services to remedy [the childcare] issue." (Rep., Ex. O). According to this memorandum, HHC has been supportive of Petitioner's "ongoing childcare issues, which have been presented numerous times . . . and are well documented," but Petitioner, during her promotional interview, represented that she was willing and able to work all three tours. (*Id*.).

On October 15, 2007, Lieutenant Hogan issued a Notice to Report for Counseling/Warning Session to Petitioner for allegedly engaging in an unauthorized investigation, failing to inform her supervisors of such investigation, and failing to follow an order to cease such investigation. This notice scheduled a counseling session for October 26, 2007; however, this meeting was rescheduled at the behest of the Union for October 30, 2007, so that a representative from Local 237 could be present.

On October 16, 2007, Petitioner filed a complaint with Director Magdelano alleging that Lieutenant Hogan, *inter alia*, abused her authority by acting unprofessional toward Petitioner, refused to call Petitioner by her rank of Sergeant, falsified entries in Petitioner's "memo book and profile," refused to train Petitioner regarding her new position as Sergeant, "creat[ed] a hostile work environment," used a disparaging tone when speaking to Petitioner, and unfairly disciplined

Petitioner. (Pet., Ex A). [5] Also in this complaint, Petitioner enunciated a "conflict of interest" between Lieutenant Hogan's duties to train and supervise Petitioner and Lieutenant Hogan's own desire to be permanently promoted to Senior Special Officer. (Pet. ¶ 3 and Pet., Ex. A). Petitioner further contended that once the eligibility list for Senior Special Officers was published and Petitioner had significantly outscored Lieutenant Hogan, Lieutenant Hogan began this "unfair treatment" because Lieutenant Hogan wanted to be permanently promoted. (Pet. ¶ 3).

On October 23, 2007, Petitioner filed a complaint with HHC's Equal Employment Opportunity office alleging that she had been the victim of discrimination due to retaliation by Lieutenant Hogan. On October 30, 2007, the counseling session originally scheduled for October 26, 2008 was held and attended by Petitioner, Lieutenant Hogan, and Union Trustee Hollingsworth.[6]

Also on October 30, 3007, later that day, another meeting was held involving Petitioner, Director Magdelano, and Lieutenant Hogan to discuss Petitioner's allegations against Lieutenant Hogan contained in Petitioner's October 16, 2007 complaint to Director Magdelano. According to Petitioner, prior to this meeting, she contacted these two supervisors, requested Union representation, and stated that being unrepresented would violate her *Weingarten* rights. Petitioner contends that her request for Union representation was denied, that she was required to attend the meeting, and that she would have been brought up on disciplinary charges had she not attended. According to HHC, Petitioner never made a request for Union representation and was never threatened with discipline at anytime either prior to or during the meeting. The record demonstrates that Director Magdelano

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[5] That same day, Petitioner also filed a grievance with the Union against HHC alleging that Lieutenant Hogan, *inter alia*, abused her authority, failed to supervise, created a hostile work environment, and retaliated against Petitioner.

[6] Neither party indicated what transpired at the counseling session.

insisted that Lieutenant Hogan be present at the meeting because Petitioner's complaint dealt exclusively with Lieutenant Hogan and that Lieutenant Hogan was instructed not to speak during the meeting. The record further shows that Director Magdelano questioned Petitioner about her claims against Lieutenant Hogan and requested specific examples, including names of witnesses and documentation. According to Petitioner, she "answered some of his [Director Magdelano] questions in fear of my job." (Pet. ¶ 5). Petitioner has not been served with any disciplinary charges stemming from this meeting.

On November 6, 2007, three months from the date of Petitioner's promotion to Sergeant, Lieutenant Hogan completed Petitioner's "Criteria-Based Performance Evaluation." (Pet., Ex. G). According to this document, Petitioner was rated on her knowledge of the job, the quality and quantity of her work, her judgment and decision-making ability, and her ability to work with others. (*Id*.). Petitioner received "satisfactory/standard" and "needs improvement" ratings in all of the above-stated categories. Though Petitioner did not receive any "unsatisfactory" ratings, she also did not receive any "outstanding" or "satisfactory/above standard" ratings. (*Id*.). Lieutenant Hogan explained her evaluation of Petitioner as follows: "[Petitioner] was rated above because her failure to follow the chain of command, and follow the directive being given. She has demonstrated that she will not be a team player by not including herself in decision making, etc." (*Id*.). Additionally, Lieutenant Hogan wrote that despite the personal efforts of two Captains and herself to provide additional training, Petitioner "has not been able to grasp the training." (*Id*.).

On November 19, 2007, Director Magdelano issued a memorandum to Petitioner entitled "Response to Complaint dated October 16, 2007." (Pet., Ex. D). This memorandum memorializes the details of the meeting between Petitioner, Director Magdelano and Lieutenant Hogan, and

contains Director Magdelano's "findings and final decision regarding [Petitioner's] written complaint." (*Id.*). Director Magdelano found most of Petitioner's allegations to be "unsubstantiated," but stated that "Lieutenant Hogan was given a verbal warning" by Assistant Director of HHC's police unit at Lincoln to refrain from referring to Petitioner by her former rank of Officer, as it showed a lack of respect. This memorandum makes no mention of whether Petitioner requested Union representation at the meeting, and if so, whether the request was granted or denied.

According to Petitioner, on December 5, 2007, Petitioner received her three month evaluation but refused to sign it. (Pet., Ex. G). Instead, Petitioner wrote an optional "Employee Rebuttal," reiterating her previous complaints about the harassing and unfair treatment by Lieutenant Hogan and Director Magdelano that was designed to portray Petitioner as a bad employee to jeopardize Petitioner's status as a Sergeant and to increase the odds that Lieutenant Hogan would be promoted off the Senior Special Officer eligibility list. (Rep., Ex. Z).

According to Petitioner, on December 25, 2007, an Officer told Petitioner that he had been informed by a Sergeant that Petitioner was going to be demoted. When Petitioner next reported to work on December 27, 2007, Petitioner received a demotion letter, dated December 24, 2007 informing Petitioner that she "had not satisfactorily completed [her] probationary period . . . [and] therefore her services as a Senior Special Officer [were] no longer required." (Pet., Ex. F). Petitioner returned to the title of Special Officer. Petitioner contends that the demotion was based upon "fabricated" profile entries and evaluations submitted by Lieutenant Hogan. According to Petitioner, her failure to remain in the title of Senior Special Officer would improve Lieutenant Hogan's chances of being selected from the eligibility list. (Pet. ¶¶ 9-10). According to HHC, "as

a result of Petitioner's evaluation and overall observation by [Lincoln] police supervisors, Petitioner was deemed to have failed her probation" and was returned to her former title of Special Officer. (Ans. ¶ 36).

On December 27, 2007, Petitioner filed a grievance with Local 237 alleging that, *inter alia*, Lieutenant Hogan had "fabricated" profile entries and performance evaluations, treated Petitioner in an unfair and discriminatory manner, and denied Petitioner "Union representation when meeting with [her]." (Pet., Ex. J). The following day, on December 28, 2007, Petitioner filed another grievance with Local 237 alleging that, *inter alia*, Petitioner's demotion was improperly executed as HHC "publically displayed" her demotion letter even prior to serving on Petitioner and improperly changed Petitioner's shift to the night tour to inconvenience her. (Pet., Ex. K).

On December 31, 2007, Petitioner filed a "Crime and Incident Report" with HHC's police unit at Lincoln alleging that at approximately 1:30 a.m. she received three "harassing phone calls" at her posts from an "unknown" female stating that Petitioner was "nothing but an officer" and that the caller "got your spot now." (Pet., Ex. K). Petitioner reported these incidents to central operations, made the appropriate log book entry, and completed the Crime and Incident Report.

On January 4, 2008, Union Trustee Hollingsworth forwarded Petitioner's December 2007 grievances to the Assistant Personnel Director at Lincoln stating that these grievances cite to "discrimination and unfair treatment." (Pet., Ex. J). However, Union Trustee Hollingsworth stated that the grievance did not "speak to a contractual violation," but requested that this matter be investigated because "there may be some Equal Employment Opportunity ramifications." (*Id.*).

On January 15, 2008, *The Chief Leader* newspaper ran an article about Petitioner which contained the same allegations made in her grievances and the instant improper practice petition.

In the section of the article, entitled "237 Head Intervenes," the President of Local 237 indicated that "he was making some phone calls on [Petitioner's] behalf," and faulted HHC for allowing "two people of the same civil servant rank supervising one another." (Pet., Ex. H).

At the time Petitioner filed the instant improper practice petition, Lieutenant Hogan had not been selected from the eligibility list for Senior Special Officer. However, shortly thereafter, HHC probationarily promoted Lieutenant Hogan and seven other Special Officers at the end of January 2008.

On January 24, 2008, Petitioner filed the instant improper practice petition alleging that Lieutenant "Hogan has bullied me by using the union that we both share. HHC management such as EEO . . . several supervisory staff also abused their authority violating 12-306a sections 1 and 3 . . . [and] 12-306b sections 1 and 3[.]" (Pet. ¶ 15). No specific request for relief, such as reinstatement to her position as a Sergeant, was requested by Petitioner.

POSITION OF THE PARTIES

Petitioner's Position

Petitioner argues that HHC violated NYCCBL § 12-306(a)(1) and (3) by discriminating against her.[7] HHC's tacit approval of the abusive, disparaging, and humiliating behavior toward

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[7] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

(continued...)

Petitioner exhibited by Lieutenant Hogan and Director Magdelano, as well as others, was in retaliation for Petitioner's Union activities, such as filing reports ordered by supervisors, filing complaints with HHC's Equal Employment Opportunity office, participating in and being selected in a hiring pool, and meeting with supervisors concerning the actions of Lieutenant Hogan. In further support of her position, Petitioner points to the issuance of the eligibility list, wherein Petitioner was ranked nearly eighty places above Lieutenant Hogan, as the beginning of her mistreatment by HHC.

Petitioner also contends that HHC independently violated her *Weingarten* rights when it refused Petitioner's request to have Union representation present during a meeting in which discipline could have reasonably occurred as a result thereof. At the second meeting on October 30, 2007, Petitioner met with Lieutenant Hogan and Director Magdelano to discuss her memorandum listing complaints against Lieutenant Hogan. Even though Petitioner requested representation and her request was denied, Director Magdelano refused to postpone the meeting and insisted that Petitioner participate in this meeting, or be subject to discipline.

Additionally, Petitioner contends that the Union violated NYCCBL § 12-306(b)(1) and (3) because Local 237 interfered with Petitioner's exercise of her statutory rights under the NYCCBL

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[7](...continued)

Further, § 12-305 of the NYCCBL provides, in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

and violated its duty of fair representation.[8] The Union did not adequately prosecute her grievances against HHC, failed to properly advocate for her rights, and allowed HHC to place Petitioner in the untenable position of being trained and evaluated by a supervisor who sought the same permanent civil service title promotion as Petitioner. In sum, Local 237 allowed this inherent conflict of interest to continue unabated. Furthermore, the Union's failure to advocate for Petitioner's rights in this situation prevented her from freely exercising her rights under the NYCCBL.

HHC's Position

Initially, HHC argues that many of Petitioner's allegations are untimely under NYCCBL § 12-306(e).[9] Based on the filing date of the instant petition, which was January 24, 2008, any acts which allegedly violate the NYCCBL that pre-date September 24, 2007 are untimely.

With regard to the alleged violations of NYCCBL § 12-306(a)(1) and (3), HHC argues that Petitioner failed to set forth a *prima facie* claim against HHC for interference with Petitioner's rights protected by NYCCBL § 12-305 or for discrimination and retaliation for Union activity. Petitioner fails to enunciate any concerted protected activity that would satisfy the first prong of the standard utilized by the Board. Additionally, Petitioner's claims clearly assert that the alleged catalyst for the

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[8] NYCCBL § 12-306(b) provides in pertinent part:
It shall be an improper practice for a public employee organization or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter, or to cause or attempt to cause, a public employer to do so;

* * *

(3) to breach its duty of fair representation to public employees under this chapter.

[9] NYCCBL § 12-306(e) provides, in pertinent part:
A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice . . . .

alleged misbehavior of Lieutenant Hogan was the rankings contained in the eligibility list for Senior Special Officer promotion. Even if Petitioner's allegations against Lieutenant Hogan and Director Magdelano were true, the impetus for these actions would have been Petitioner's higher ranking on the eligibility list and apparent personality conflict with these two individuals, and not protected union activity. Moreover, most of Petitioner's grievances post-date Petitioner's alleged unfair performance evaluations and demotion, thus, HHC's activities regarding these two actions cannot be linked to Petitioner's filing of grievances.

Assuming *arguendo* that Petitioner set forth a *prima facie* claim against HHC for interference, discrimination, and/or retaliation, HHC had a legitimate business reason for acting in such a fashion, and, as such, is protected by NYCCBL § 12-307(b).[10] Petitioner, as a condition of her promotion from Officer to Sergeant, was required to complete a one year probationary period, during which, her performance would be evaluated. As set forth in Petitioner's "Criteria-Based Performance Evaluation," Petitioner received less than exemplary ratings on all categories and, accordingly, was determined to be an unsuitable candidate for permanent promotion to Sergeant.

With regard to Petitioner's claim that her *Weingarten* rights were violated at the October 30, 2007 meeting, HHC contends that, based upon the objective facts, there was no reasonable expectation that discipline would result from this meeting. In fact, this meeting was called and conducted by Director Magdelano in order to address Petitioner's complaints against Lieutenant Hogan and, at no time during the meeting or afterward, was Petitioner threatened with or receive

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[10] NYCCBL § 12-307(b) provides, in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, . . . to maintain the efficiency of governmental operations, . . . and exercise complete control and discretion over its organization . . . .

discipline.

Finally, HHC avers that Petitioner failed to set forth a *prima facie* claim against the Union for violating its duty of fair representation. As argued above by the Union, in order to establish a violation of the duty of fair representation, one must demonstrate that the bargaining representative acted in an arbitrary, capricious, or bad faith manner in order to substantiate a claim that a breach of the duty of fair representation occurred.

Union's Position

The Union contends that Petitioner failed to allege a *prima facie* claim that it violated its duty of fair representation because Petitioner did not demonstrate that the Union's actions were arbitrary, capricious, or performed in bad faith. The Union enjoys a level of discretion as to which complaints it chooses to pursue and the manner in which it chooses to pursue them.

The Union further argues that, in the instant matter, it satisfied its duty of fair representation. The Union filed grievances on her behalf concerning Lieutenant Hogan's behavior and attended meetings on Petitioner's behalf. However, since Petitioner's complaints sounded in employment discrimination, and not contractual interpretation, Local 237 made the decision to refer the matter to HHC's Assistant Personnel Director at Lincoln to address any Equal Employment Opportunity ramifications.

In addition, the Union mimicked HHC's contention that many of Petitioner's allegations are untimely under NYCCBL § 12-306(e), as they alleged violation occurred prior to September 24, 2007, and therefore, are untimely.

DISCUSSION

As an initial matter, the Board finds that many of Petitioner's allegations contained in the instant petition are untimely. As set forth by NYCCBL § 12-306(e), the statute of limitations for filing an improper practice petition is four months from the accrual of the claim. Failure to file a petition within this time period renders the claims untimely, and this Board will not consider the substantive merits of those claims. *See Castro*, 63 OCB 44, at 6 (BCB 1999). Nevertheless, untimely claims may be admissible as background information, *see Patrolmen's Benevolent Ass'n*, 77 OCB 10, at 13 (BCB 2006).[11]

In the instant matter, Petitioner claims that HHC violated § 12-306(a)(1) and (3) of the NYCCBL. She claims that Lieutenant Hogan and Director Magdelano engaged in abusive and humiliating behavior toward Petitioner, that her demotion from Sergeant to Officer was motivated by anti-union animus, that she received unfair performance evaluations from Lieutenant Hogan, and that the tour change and disciplinary counseling she received was improper. In these instances, this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny such as *State of New York* 36 PERB ¶ 4521 (2003), which was adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). 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 DC 37*, 1 OCB2d 5, at 63 (BCB 2008).

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[11] Petitioner's factual allegations that occurred prior to September 24, 2007 are considered by this Board for background material, but not as remediable allegations of violations of the NYCCBL, as these factual allegations occurred outside the four month statute of limitations.

"If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute 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." *DC 37*, 1 OCB2d 6, at 27; *see also SBA*, 75 OCB 22, at 22 (BCB 2005). Regarding the second prong of this test, which addresses the motivation behind the employment action in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *DC 37*, 1 OCB2d 5, at 65; *see also Burton*, 77 OCB 15, at 26 (BCB 2006). "At the same time, petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22 at 22. Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001). If a *prima facie* case is established, "then the employer may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU*, 77 OCB 35, at 18 (BCB 2006).

Here, we find that Petitioner has shown that she was engaged in protected activity, as she filed grievances against HHC on three separate occasions. *See DC 37*, 1 OCB2d 5, at 28; *DC 37*, 1 OCB2d 6, at 64 (filing grievances deemed sufficient to constitute protected union activity in satisfaction of the *Salamanca* test). However, we find that Petitioner failed to demonstrate that her protected union activity was the impetus for the alleged harassing behavior of Lieutenant Hogan and Director Magdelano, the disciplinary charges against Petitioner and the demotion from Sergeant.

Petitioner's grievances and complaints to supervisors that Lieutenant Hogan and Director Magdelano engaged in harassing and discriminatory behavior toward her clearly indicate that the motivation for this alleged behavior was not connected to Petitioner's filing of grievances.

Petitioner's own pleadings established that she has been subjected to this alleged mistreatment "because [Lieutenant Hogan] is upset that I [Petitioner] received the civil service sergeant position and feels threatened by my promotion." (Rep., Ex. P). Petitioner further stated that "[Lieutenant] Hogan frequently stated she did not see me as a supervisor she [*sic*] only saw me as an officer and she could not wait until I was demoted back to Officer . . . [and that] she [Lieutenant Hogan] informed the administration to get rid of me [Petitioner] so they could pick her." (Pet. ¶ 8).

Based upon the pleadings and the exhibits annexed thereto, we find that the personality conflict between Petitioner and Lieutenant Hogan does not constitute improper motivation under the NYCCBL, as defined by this Board's case law. *Warlick*, 29 OCB 1, at 3 and 7 (BCB 1982) ("personality conflict with one of his superiors" does not fall within the prohibited conduct contemplated by the NYCCBL and thus, this Board cannot remedy such a complaint); *Norwich City School Dist.*, 26 PERB ¶ 4533 (1993) (union's charge of retaliation was dismissed where evidence showed that employer was motivated by employee's insubordinate conduct in context of personality conflict with a supervisor); *State of New York (Dept. of Transp.)*, 29 PERB ¶ 3011; *see generally, Hale*, 37 OCB 8, at 6 (BCB 1986).

Furthermore, any adverse action which was allegedly retaliatory and/or discriminatory that occurred prior to her filing a grievance on October 16, 2007 cannot violate the NYCCBL because they predate the protected union activity. *See DEA*, 79 OCB 40, at 22 (BCB 2007) ("adverse actions cannot be persuasively shown to have been retaliatory in nature simply because they *antedated* the protected activity"); *Wilson v. New York City Housing Auth.*, 2007 U.S. Dist. LEXIS 25258 at * 30 (S.D.N.Y. April 2, 2007) ("Where the decision to take adverse employment action is reached prior to a plaintiff's protected activity, the causal connection necessary to link the adverse action to that

protected activity is lacking"); *see also City Emply. Union, Local 237*, 69 OCB 12, at 8 (BCB 2002). Therefore, based upon the foregoing, any of the allegations made by Petitioner against her supervisors which allegedly constituted a discrimination and/or retaliation, as defined by the NYCCBL, are dismissed.

In addition to the allegations against HHC involving NYCCBL § 12-306(a)(1) and (3), Petitioner also claims that HHC violated her *Weingarten* rights, as codified by New York Civil Service Law § 209-a(1)(g), when HHC allegedly refused Petitioner's request to have Union representation present during a meeting in which discipline could have reasonably occurred as a result thereof.[12] The standard used by this Board when analyzing potential violations of an employee's *Weingarten* rights, which is memorialized in the language of the statute, is that an employee must have a reasonable belief that during a meeting he/she could be subjected to discipline as a result of that meeting. *See DC 37, Local 1113* 75 OCB 25, at 12 (BCB 2006) (when examining this issue, "NLRB, PERB and the courts have applied an objective test, that is, examining all the external evidence and excluding an individual employee's subjective feelings").

In the instant matter, we find that Petitioner objectively could not reasonably believe that she would be subjected to discipline at the October 30, 2007 meeting with Director Magdelano and Lieutenant Hogan. First, Petitioner already had a meeting that day regarding a disciplinary action, a counseling session, which was attended by Union Trustee Hollingsworth but not attended by

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[12] N.Y. Civil Service Law § 209-a(1)(g) states, in pertinent part:
It shall be an improper practice for a public employer or its agents deliberately . . . (g) to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be subject of a potential disciplinary action.

Director Magdelano. Next, the reason for the second meeting was to discuss Petitioner's complaints against Lieutenant Hogan, who was present at the meeting but did not speak during this meeting. Furthermore, both Petitioner and HHC state that the only topics discussed during the meeting were the complaints lodged by Petitioner against Lieutenant Hogan. Finally, as a result of this meeting, HHC did not levy any disciplinary charges against Petitioner. Therefore, based upon these objective facts, we find that no violation of Petitioner's *Weingarten* rights occurred. As such, we dismiss Petitioner's allegations concerning this claim.

With regard to Petitioner's claims against the Union, we find that Petitioner has failed to set forth a *prima facie* violation of NYCCBL § 12-306(b)(1) and (3). Petitioner's allegations against the Union interfering with her statutory rights are unclear and vague. A thorough review of the record reveals that Petitioner failed to set forth any allegations that the Union interfered with, restrained or coerced Petitioner from exercising her statutory rights under the NYCCBL, or caused HHC to do so. Therefore, Petitioner's contention that Local 237 violated NYCCBL § 12-306(b)(1) is dismissed.

We have recently had occasion to reaffirm that 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." *Finer*, 1 OCB2d 13, at 10-11 (BCB 2008) (quoting *Okorie-Ama*, 79 OCB2d 5, 14 (BCB 2007))(quotation marks omitted); *see also* J*ames-Reid*, 77 OCB2d 29, at 16-17 (BCB 2006); *Samuels,* 77 OCB 17, at 12 (BCB 2006)*; Del Rio,* 75 OCB 6, at 12 (BCB 2005); *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 applied by the National Labor Relations Board). Arbitrarily ignoring a meritorious grievance or processing such a grievance in a perfunctory fashion constitutes a violation of the duty of fair representation. Sicular, 79 OCB 33, at 13 (BCB 2007), citing *Watkins*, 75 OCB 23, at 12 (BCB 2005); *Hassay*, 71 OCB 2, at 10-11 (BCB 2003) at 10-11.

A union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Sicular*, 79 OCB 33, at 13, quoting *Wooten*, 53 OCB 23, at 15 (BCB 1994); citing *Page*,53 OCB 31, at 11 (BCB 1994). As we explained in *Sicular*, the "union has the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious and to evaluate the degree of prosecution to which it is entitled." *Id*., citing *Hug*, 45 OCB 51, at 16 (BCB 1990). A union "does not breach the fair representation duty merely because the outcome of a union's good faith efforts to resolve a member's complaint does not satisfy the member." *Id.*, citing *Howe*, 77 OCB 32, at 17 (BCB 2006); *Del Rio*, 75 OCB 6, at 13 (BCB 2005); *Hassay*, 71 OCB 2, at 11 (BCB 2003). Accordingly, the Board "will not substitute its judgment for that of a union or evaluate its strategic determinations." *Id.;* citing *Grace*, 55 OCB 8, at 8 (BCB 1995).

In the instant case, the petition contains only an isolated reference to the duty of fair representation. The majority of the factual allegations comprising the petition do not address the actions of the Union, but rather concern the acts of HHC. As we have previously noted, the "principle that claims arise out of the facts asserted and not a petitioner's statutory citations is particularly salient with respect to a *pro se* petitioner." *Seale*, 79 OCB 30, at 7 (BCB 2007), citing *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) ("liberal pleading principles do not permit dismissal for failure in a complaint to cite a statute, or to cite the correct one . . . factual allegations

alone are what matters"); *Northrop v. Hoffman of Simsbury,* 134 F.3d 41, 46 (2d Cir. 1997) ("appellant's failure to cite the correct section of the [applicable statute] does not require us to affirm the dismissal of her complaint so long as she has alleged facts sufficient to support a meritorious legal claim."); *see also Lupski v. County of Nassau*, 32 A.D.3d 997 (2d Dept. 2006). The facts asserted in the petition simply do not allege acts or omissions on the part of the Union to support a breach of the duty of fair representation. Based upon allegations contained in the Reply and the exhibits annexed thereto, Petitioner contends that the Union did not adequately prosecute her grievances against HHC and properly advocate for her rights. These contentions are unsupported by the record and, based upon our case law, do not constitute violations of the duty of fair representation.

Local 237 did not arbitrarily ignore its obligation to represent Petitioner, and in fact, represented Petitioner at the August 6, 2007 meeting to discuss Petitioner's request for a tour change and at the October 30, 2007 counseling session with Lieutenant Hogan, which was rescheduled by the Union to allow for Union Trustee Hollingsworth to attend. Furthermore, Local 237, after receipt of Petitioner's grievances, reviewed them and determined that Petitioner's complaints were not based upon contract violations, but did forward Petitioner's complaints regarding Lieutenant Hogan to HHC's Assistant Personnel Director, advising them that Petitioner raised some employment discrimination issues in her grievances. Based upon these facts, we find that Local 237 did not process Petitioner's grievances in a perfunctory manner, especially in light of the wide latitude to which unions are entitled in handling grievances. Here the Union made a fair and reasonable judgment about whether Petitioner's particular complaints were meritorious, and how best to proceed

with these matters.[13]

In addition, Petitioner contends that the Union's silent concession to HHC's placement of Petitioner in the untenable position of being trained and evaluated by a supervisor who sought the same permanent civil service title promotion constituted a violation of the duty of fair representation. To the extent that this claim references HHC's initial decision to place Petitioner under Lieutenant Hogan, we find that the Union cannot be held liable for violating its duty of fair representation when it had no knowledge of Petitioner's initial placement or that such placement was a problem, until Petitioner placed Local 237 on notice of such an issue. *See New York City Transit Auth. (Carpenter)*, 30 PERB ¶ 3043 (1997) (union did not commit an improper practice because it did not know of the alleged condition of which the employee was complaining); *see generally, CEA*, 79 OCB 39, at 14 (BCB 2007) (employer not liable for violations of the NYCCBL when the union failed to demonstrate that the employer had the requisite knowledge of the protected union activity); Viewed in a different light, if Petitioner's claim regarding the Union's silent concession to HHC's placement of Petitioner under the command and supervision of Lieutenant Hogan, as alluded to in her grievances references the Union's failure to properly process Petitioner's grievances, we again find that Local 237 adequately represented her throughout the grievance process.[14]

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[13] Since we find that the Union did not violate NYCCBL § 12-306(b)(3), its duty of fair representation, we also find that any derivative claim against HHC pursuant to NYCCBL § 12-306(d) must also be dismissed.

[14] To the extent that Petitioner's claim concerning the conflict between herself and Lieutenant Hogan violated another statute, such as the N.Y. State Civil Service Law, we find that "this Board has no jurisdiction over the administration or enforcement of statutes other than the NYCCBL." *DC 37*, 1 OCB2d 6, at 32 (BCB 2008); *see also DelRio*, 75 OCB 6, at 15 (BCB 2005).

ORDER

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

ORDERED, that the improper practice petition filed by Vera Edwards docketed as BCB-2683-08 be, and the same hereby is dismissed in its entirety.

Dated: New York, New York
June 9, 2008

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER