Feder, 1 OCB2d 23 (BCB 2008)

(IP) (Docket No. BCB-2663-07).

Summary of Decision: Petitioner alleges that his supervisors at NYCHA delayed and obfuscated written approval of his leave request to testify before City Council, causing him to miss the Council session at which he was to appear. Petitioner alleges that this act interfered with his rights as a Union representative in violation of NYCCBL § 12-306(a)(1), and that NYCHA discriminated against him by trying to discourage his participation in Union activity, in violation of § 12-306(a)(3). The Board found that, even if we were to draw all permissible inferences in favor of Petitioner from the pleadings, he failed to establish that NYCHA violated either NYCCBL § 12-306(a)(1) or (3), and dismissed the petition in its entirety. ***(Official Decision Follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

MITCHELL FEDER,

Petitioner,

-and-

NEW YORK CITY HOUSING AUTHORITY,
***et anon.*,**

Respondents.

DECISION AND ORDER

On July 2, 2007, Mitchell Feder, *pro se*, filed a verified improper practice petition against the New York City Housing Authority ("NYCHA") and the Assistant Counsel for Labor and Employment, alleging that NYCHA violated New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3) by delaying

and obfuscating written approval of his leave request to testify before the New York City Council ("City Council"), causing him to miss the session at which he was to appear. Petitioner alleges that this act interfered with his rights as a Union representative, in violation of NYCCBL § 12-306(a)(1), and that NYCHA discriminated against him by trying to discourage his participation in Union activity, in violation of § 12-306(a)(3). NYCHA argues that this matter is one of contract interpretation that should be deferred to arbitration. NYCHA also contends that his request for leave to engage in Union activity had been granted orally, days earlier, immediately upon his request, and that any delay in providing written approval to Petitioner for this leave was not discriminatory in any way. The Board finds that even if we were to draw all permissible inferences in favor of Petitioner from the pleadings, he failed to establish that NYCHA violated either NYCCBL § 12-306(a)(1) or (3), and dismissed the petition in its entirety.

BACKGROUND

In December 2006, Petitioner was assigned to the Office of Business and Revenue Development ("Office") at NYCHA. Petitioner reports to the Office's Assistant Director, and the Assistant Director reports directly to the Deputy Director. There is only one other employee in the Office.

Petitioner has official status within Local 375, Civil Service Technical Guild, DC 37 ("Union"). Petitioner claims that he is the duly elected President of Chapter 25, and NYCHA understands that he has official status within the Union. According to Petitioner, he is serving his second three-year term and represents the Union in Labor/Management meetings and Unit Agreement bargaining sessions. He is a frequent critic of NYCHA and the City, as evidenced by

a substantial number of articles submitted by Petitioner, dating back to January 6, 2006, from *The Chief, Civil Service Leader* newspaper. These criticisms were varied in scope and ranged from what he viewed as exposing cost overruns and budget problems at NYCHA to expressed concern over what he perceives as corruption at other City agencies. He also criticized the stances of Union officials on certain issues.

During his time at NYCHA, Petitioner has regularly qualified for release time as an *ad hoc* Union representative. NYCHA's Human Resources Manual Chapter X ¶ 14 pertains to absences for employee representatives. It reads in pertinent part:

> a. Regularly Designated Representatives
>
> Absence with pay shall be granted for labor-management activities of employee representatives, duly designated by certified bargaining organizations (unions) operating under the Mayor's Executive Order No. 75 . . . acting on matters related to the employees in their respective unions. . . .
>
> b. Ad Hoc Representatives
>
> Those unions which have been granted exclusive bargaining rights may, with the approval of the Department Director, designate other employee representatives, on an ad hoc basis, to handle grievances and engage in activities referred to below. Division Chiefs and Managers will be notified when one of their employees has been so designated. . . .
>
> * * *
>
> The employee representative must give at least 24 hours notice, in writing to his/her supervisor, including the following information:
>
> The date and hour when he/she is to be released
> The approximate duration involved
> The time when he/she expects to return to regular duty
> A brief resume of the subject involved and the employees or officials with whom the matter is to be discussed
>
> * * *
>
> The Manager/Division chief may excuse the employee representative

> on less than 24 hours notice where there is sufficient reason for so doing.
>
> c. Time Off Without Pay
>
> Subject to the approval of the Manager/Division Chief, employee representatives may be permitted during normal working hours, to have time off for the following types of activity, which time shall either be without pay, or chargeable to their annual leave allowances.
>
> * * *
>
> The employee must be given at least 24 hours advance notice, in writing, and must secure written authorizations of the Manager/Chief.
>
> * * *

In addition to receiving *ad hoc* release time, Petitioner asserts that it has been the "long-standing policy and practice of [NYCHA] to allow me to perform union related business during working hours that is credited to my annual leave" even when the Union has not authorized him for *ad hoc* release time. Petitioner supplied copies of a number of approved leave of absence requests dating from September 18, 2006, forward, which indicate the reason for his absence as union business. NYCHA likewise asserts that when Petitioner requested personal annual leave and specifies that it is for Union-related business that has not been requested, authorized, or approved by the Union, such leave requests were usually, if not always, approved. In addition to approving Petitioner's leaves of absence for Union business, NYCHA also has allowed him to work split shifts in order to accommodate the meetings that he schedules or events that he attends.

It is undisputed that in June 2007, the Assistant Director verbally approved a request by Petitioner that he take leave on the mid-morning of June 26, 2007, to conduct "union related business," as Petitioner states it. (Pet. ¶ 5). It is also undisputed that on June 25, Petitioner informed both the Assistant and Deputy Director that he would need to take leave on the morning of June 26, 2007, for "union related work" and that neither the Assistant nor Deputy Director denied this request.

(*Id.*).

At 9:01 a.m. on June 26, Petitioner emailed the Assistant Director with his time and attendance needs for that week. The first of three listed needs was for that day. It read, in part, "I will need to take excused time starting at 10 a.m. under Executive Order 75 (Union Related) and will return later in the day (I will swipe out and in upon return)." (Pet. Ex. 3). It is undisputed that at some time during the morning, Petitioner informed one or both of his supervisors that he would "be attending a City Council hearing on the NYCHA," that his Assistant Director gave approval for him to work the requested split shift, and passed final approval on to the Deputy Director. The City Council hearing was to be held at 10:00 a.m.

Petitioner claims that instead of "rubber stamping" his request as had been done in the past, the Deputy Director contacted the NYCHA Deputy Director of Labor Relations for "direction and approval or disapproval of requested split-shift/personal release time." (Pet. ¶ 8). NYCHA does not dispute this and adds that the Deputy Director also tried to contact the Chief of Labor Relations regarding Petitioner's release.

The Office's Deputy Director, in an affidavit, states that he did not object to Petitioner's verbal request for leave based upon the impression that Petitioner was taking it for one of his own regularly scheduled union-related meetings. According to the Deputy Director, when Petitioner characterized his initial leave request as for the purpose of attending to union business without elaborating, the Deputy Director understood the request to encompass one of the standard meetings that Petitioner scheduled with his members, a request which he had approved many times before and was sure that it constituted Union activity.

However, the Deputy Director claims that when Petitioner suddenly changed the nature of

his request that morning from attending to union business to attending a City Council hearing pursuant to his rights granted in Executive Order 75 ("EO 75"), the entire matter became unclear to him as to whether this constituted union activity for several reasons. The Deputy Director stated that because he was somewhat new in his position, he was not familiar with anything beyond the basics of release time and that he had never before seen EO 75, so he did not know if EO 75 applied to the situation.

The Deputy Director also stated that the way Petitioner characterized his request that morning made it unclear to him whether Petitioner was attending the hearing as a representative of his members or as a representative of NYCHA, and that at that time, he believed that if any employee was to testify on behalf of NYCHA, NYCHA had to give prior approval. As a result, he stated that he immediately called the Deputy Director of Labor Relations and the Chief of Labor Relations for clarification and advice, but was not able to reach either of them because, as he later found out, they were both in back-to-back meetings. He also stated that he contacted the Department of Public and Community Relations to ascertain whether Petitioner needed approval to speak on behalf of NYCHA at the City Council hearing. Petitioner refutes the assertion that the Deputy Director was inexperienced as a manager, claiming that the Deputy Director had been a mid-level manager at other departments.

The Chief of Labor Relations submitted an affidavit which stated that early in the morning he had been told that the Office's Deputy Director attempted to contact him regarding Petitioner's request to leave work in order to testify before the City Council. He stated that he could not be contacted directly because he was in a meeting. The Chief of Labor Relations claims that he called the Union and spoke to the Vice President. He asked if the Union had requested or intended to

request an *ad hoc* release for Petitioner that day for any purpose and was told that the Union had not made any request and that it had no knowledge of a reason for such a release on that date.

At 11:02 a.m., Petitioner sent an email to the Deputy Director of Labor Relations and asked him to expedite his request for release time under EO 75 to "conduct city related business at the City Council; this time can be either excused or personal leave. Being that a hearing is now in session, I respectfully request an expedited response." (Resp. Ex. 5). He copied the Office's Assistant and Deputy Director on this email. Petitioner called the Deputy Director of Labor Relations after waiting for some time to pass, but there was no answer, so he left a voice message.

At 11:29 a.m., the Office's Deputy Director sent the Deputy Director of Labor Relations an email that asked if Petitioner had the right to attend the hearing based upon EO 75, as Petitioner claimed, and asked for advice on whether the request must be granted or was at the discretion of his supervisor. He added that when Petitioner asked for the time during the prior week, Petitioner did not indicate that it was to attend a City Council hearing. The Office's Deputy Director then stated that Petitioner had "been requested to remain" until the matter could be resolved. (*Id.*).

At 12:00 p.m., Petitioner sent an email to the Office's Deputy Director, with copies to the Assistant Director, the Deputy Director of Labor Relations, and one other person. It stated, in part:

> I do not understand why HR Dept., [the Deputy Director of Labor Relations], has yet to authorize my release under Executive Order 75, but I believe this should be a simple formality. At this point, I believe the Authority (not you) is purposely interfering with my designated rights in representing more than 300 members of the Civil Service Technical Guild, Chapter 25, at NYCHA. This dragging out of a simple formality has caused me undue stress. Therefore, I will be taking off the remainder of the day as 'sick leave.'

Petitioner then swiped out, and states that, "prior to commuting home to relieve my stress, I

attempted to attend the City Council Hearing which adjourned just minutes prior to my arrival where I missed giving testimony." (Pet. ¶14).

On June 27, 2007, Petitioner submitted a leave request which asked that one hour of June 26, 2007, be charged to lunch and the remaining three hours of his shift be charged to sick leave. The request was approved, but marked as personal time by the Office's Deputy Director.

The Deputy Director later received guidance from Labor Relations and as a follow-up to these events, Petitioner and the Chief of Labor Relations emailed each other to clarify the procedures under which Petitioner could request release time. NYCHA asserts that as a follow-up the Office's Deputy Director also sent an email to staff, advising them that all leave requests except for those in an emergency must be submitted in writing before the expected absence, with sufficient time to permit the supervisor to provide written authorization for that leave, even if the request and approval had been given verbally.

The Petitioner submitted a number of copies of leave requests to engage in Union-related business submitted after June 26, 2007. All of them were approved by NYCHA.

As a remedy, Petitioner asks that the Board hold a hearing to determine whether or not NYCHA violated his rights under the NYCCBL and, if so, order NYCHA to never replicate the same action against him.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that NYCHA violated the NYCCBL because he was not allowed to leave work to conduct union-related business as had been the practice, both before and since, and because

this particular Union-associated business related to giving testimony before City Council. He argues that NYCHA's refusal to approve his request to take personal leave to conduct Union business and failure to authorize him to swipe out to conduct a split shift work day infringed on his legal rights to represent his members and himself before City Council. NYCHA violated NYCCBL § 12-306(a)(1) by interfering with and restraining a public employee union representative in the exercise of his rights granted under NYCCBL § 12-305. Additionally, NYCHA violated NYCCBL § 12-306(a)(3) when it discriminated against him by delaying and obfuscating its response to his leave request to testify before City Council.[1]

Petitioner contends that he complied with the requirement that he give 24 hours notice of his need to take leave. Even though his release may not have been at the direct request of the Union, NYCHA violated the spirit of their own Human Resources Manual because he verbally gave his supervisors at least one week's prior notice. He also argues that by not approving his personal leave,

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[1] 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;
* * *
NYCCBL § 12-305 provides in pertinent part:
Rights of public employees and certified employee organizations. 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. . . . A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

NYCHA also violated the spirit of EO 75, Labor Management Joint Activities, ¶ 1(d) based on the technicality that the Union did not request that he be given release time to give testimony before City Council. Since it has been NYCHA's policy to allow him to perform split shifts to conduct chapter meetings, which fall under EO 75, the Taylor Law, and the NYCCBL, NYCHA's failure to allow him to testify before City Council on June 26 violates the principles of all of these laws, statutes, and Executive Orders.

Furthermore, Petitioner contends that NYCHA's assertion that, on June 26, he asked to stay on the job until the matter could be resolved is incorrect. He argues that he had been directed to remain by the Deputy Director, as the Deputy Director's email of 11:29 a.m. on June 26 shows. In his reply to NYCHA's Answer, Petitioner contends that any concern regarding the capacity in which he was testifying before City Council is absurd, since he made it very clear that he was going to engage in union-related business on that date. Additionally, that NYCHA claims his supervisor was ignorant of the law or the rules governing *ad hoc* release time and/or unpaid personal release time is no excuse or defense for their actions.

NYCHA's Position

NYCHA argues that Petitioner's complaints are really a disagreement with NYCHA over how it applies release time rules that are contained in its Human Resources Manual and the requirements applicable to annual leave. These questions are only appropriately addressed through the grievance process and, therefore, should be deferred to arbitration.

In the alternative, NYCHA argues that the petition fails to allege facts sufficient to support a claim of improper practice under NYCCBL § 12-306(a)(1) and (3) and that the petition must be dismissed in its entirety. NYCHA argues that this is not a matter of a supervisor denying leave for

Union activity, since Petitioner had already been approved for leave for such activity days before June 26. Rather, this dispute concerns a Petitioner not agreeing with long-standing rules related to Union-related release time and failing to understand how his actions caused what was a simple situation to escalate.

NYCHA contends that, although testifying before City Council could be union activity, here, the Union never requested release for Petitioner for any purpose, and certainly not for the purpose of testifying before City Council on June 26. Therefore, under these facts, Petitioner was not engaged in any protected activity. Furthermore, the relatively new Deputy Director did not know that testifying before City Council could be considered a union activity under certain circumstances.[2] What the Deputy Director did know about NYCHA's rules caused him concern because he believed that both he and Petitioner may violate NYCHA rules if Petitioner testified before City Council without NYCHA authorization. Therefore, he sought advice from Labor Relations and the Media office under extreme time limitations and did so immediately. Under these circumstances, the Deputy Director could not be considered to know of or be aware of any Union activity, as he was unsure if Petitioner was even engaged in protected Union activity in the first place.

As far as NYCHA's motives are concerned, the Deputy Director pre-approved Petitioner's Union-related personal leave as he had done many times before and only expressed concern when he learned on the day of the hearing what Petitioner's intentions were and it became unclear whether Petitioner was to testify on behalf of the Union or NYCHA. The Deputy Director made every attempt to immediately ascertain under what circumstances Petitioner could be authorized to testify

[2] NYCHA asserts that EO 75 does not even apply to NYCHA, as NYCHA has its own release time policy as stated in the Human Resources Manual.

and/or whether he should be granted release time in the absence of a Union request. NYCHA also notes that even though Petitioner claimed that he was sick when he swiped out that day, he was well enough to promptly go to City Council and attempt to testify, and NYCHA still approved his leave as personal time. This entire set of circumstances could have been avoided if Petitioner had just taken this leave for Union activity, as had already been approved by two different supervisors, had not raised these plans the day of the hearing, and made an issue of it as he was preparing to leave. NYCHA notes that it was Petitioner who asked to remain until the issue could be resolved.

NYCHA argues that it had legitimate and permissible business motives for all of its actions in that it granted Petitioner's requested leave for Union activity, sought guidance when the manager did not have the knowledge to make an independent judgment, and approved his leave when finally submitted in written form after the fact. Therefore, for all of the reasons above, the petition should be dismissed in its entirety.

DISCUSSION

As a preliminary matter, we find that this Board has jurisdiction over Petitioner's claims. Although NYCHA argues that the Petitioner's claims sound in contract and must be dismissed, this Board may exercise jurisdiction over actions that encompass an alleged breach of a collective bargaining agreement when the acts constituting the breach also constitute an independent improper practice under the NYCCBL. *Local 1322, DC 37*, 1 OCB2d 4, at 9 (BCB 2008); *SBA*, 75 OCB 32, at 8 (BCB 2005); *Local 371, SSEU, DC 37,* 71 OCB 31, at 9-10 (BCB 2003); *see Connetquot Central School Dist.*, 19 PERB ¶ 3045 (1986) (jurisdiction asserted over claim that a unilateral change in a contract term was inherently destructive of employees' protected rights.)

In examining the instant petition, Petitioner alleges that NYCHA delayed and obfuscated written approval of his leave request, causing him to miss the City Council session at which he was to appear. Although the collective bargaining agreement discusses leave time for union representatives, the resolution of this issue does not require interpretation of the contract, and the outcome of the grievance process would not resolve the instant dispute. Petitioner raises independent statutory claims, not simply breach of contract claims, since the allegations encompass interference with union activity and discrimination that may violate either NYCCBL § 12-306(a)(1) or (3) or both. Therefore, we will not dismiss the Union's claim based upon lack of jurisdiction. *Local 371, SSEU, DC 37,* 79 OCB 31, at 10-11 (BCB 2007); *Local 1180, CWA*, 69 OCB 28, at 8-9 (BCB 2002); *Schulyer-Chemung-Tioga Board of Cooperative Educational Servs.*, 34 PERB ¶ 3019 (2001); *Connetquot Central School Dist.*, *supra*.

Moving to the substance of Petitioner's claims, we note that in reviewing the sufficiency of the allegations in the pleadings, we will draw all permissible inferences in favor of Petitioner and assume *arguendo* that the factual allegations are true. *Seale*, 79 OCB 30, at 6-7 (BCB 2007); *D'Onofrio*, 79 OCB 3 (BCB 2007), at 20, n. 11. Moreover, because Petitioner is *pro se* in this proceeding, we are especially cognizant that such review should be exercised with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and not define such claims only by the form of words used by Petitioner. *Id.; see also, Castro v. City of New York,* 2007 U.S.Dist. LEXIS 77878, at 31-32 (S.D.N.Y. October 10, 2007).

Petitioner's primary allegation is that NYCHA's actions were violative of NYCCBL § 12-306(a)(1). NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights

granted in section 12-305 of this chapter. . . ." Those rights encompass the "right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their choosing." NYCCBL § 12-305. In *Assistant Deputy Wardens' Ass'n*, 55 OCB 19, at 27 (BCB 1995), this Board adopted the test stated in *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967) to determine if an independent violation of § 12-306(a)(1) has been established. *Local 371, SSEU, DC 37,* 79 OCB 31, at 11 (BCB 2008); s*ee generally Local 2627, DC 37*, 71 OCB 27, at 7-8 (BCB 2003). In following these decisions, the Board applies the following inquiry:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

55 OCB 19, at 27.

As the Supreme Court stated in *Great Dane* and the Board has also stated, in order to be found "inherently destructive," thus obviating the need for proof of an improper motive, the employer's conduct must carry "'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" 388 U.S. at 33 (citations omitted); *McAllan*, 31 OCB 14, at 26 (BCB 1983). The Board has further described inherently destructive conduct as that "with far reaching effects which would hinder future bargaining, or conduct which discriminated solely upon the basis of participating in strikes or union

activity." *Committee of Interns and Residents*, 51 OCB 26, at 42-43 (BCB 1993), *enforced sub nom. Committee of Interns and Residents v. Dinkins*, No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993) (citations omitted).

For example, in *PBA*, 73 OCB 13 (BCB 2004), an employer denied union representatives access to a particular precinct in order to apprise their members of an ongoing retaliation claim involving a police officer at that precinct. In addition, certain management officials refused to discuss union matters with these union representatives. *Id.* In *Local 376, DC 37*, 73 OCB 6 (BCB 2004), the union proved that the employer admonished a particular union official's behavior and techniques when representing the membership and avoided dealing with the official. In *Committee of Interns and Residents*, cited above, a hospital's department chair distributed copies of a resident's grievance, advised other residents of management's opinion of the grievance, and held up the grievance papers during a rare appearance at a residents' meeting to discuss goals of the program. *Committee of Interns and Residents*, 51 OCB 26. All of the above actions were found by the Board to constitute inherently destructive conduct on behalf of the employer.

Comparing the instant matter to the enunciated standard and the decisions discussed above, and relying solely upon Petitioner's account of the events, we find that he has presented no facts to demonstrate that NYCHA engaged in conduct that rose to the level of what would be considered "inherently destructive" of protected union activity. As Petitioner attests, his frequent requests for leave for both *ad hoc* release time sanctioned by his Union and those meetings that he scheduled without his Union's request were approved on a routine basis. It is undisputed that NYCHA regularly approved these leave requests for Union activity of some sort or another, even though, as indicated in Petitioner's submissions of newspaper articles, he was a frequent and vociferous critic

of NYCHA and the City.

Under the circumstances presented here, NYCHA's one-time delay on the morning of the hearing falls short of the conduct necessary to constitute inherently destructive behavior. In contrast to the above-referenced cases, this single incident neither constituted a continuing obstacle that jeopardizes the position of the union as bargaining agent nor unambiguously penalized or deterred protected activity to the requisite level. *Local 2627, DC 37*, 71 OCB 27, at 7-8 (BCB 2003). NYCHA's actions, as related by Petitioner, lack the necessary foresight and far-reaching effects required by the standard. Additionally, the record reveals no evidence of any action by NYCHA which differentiates between employees based upon their involvement in protected activity. *McAllan*, 31 OCB 14, at 26.

Having failed to show that NYCHA's actions were inherently destructive, this Board will look to the second test of *Great Dane*, which was elaborated on by the National Labor Relations Board in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), restated by the Public Employment Relations Board in *City of Salamanca*, 18 PERB ¶ 3012, and adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). Under this test, to establish interference and discrimination in violation of NYCCBL § 12-306(a)(1) and (3), 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 16-17; *see also DC 37*, 1 OCB2d 6, at 27 (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 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. *See UFA,* 1 OCB2d 10, at 20 (BCB 2008)*; Local 237, CSBA,* 71 OCB 5, at 9 (BCB 2003).

Even if testifying before City Council under these circumstances could be considered protected activity, we find that Petitioner has failed to establish that NYCHA violated NYCCBL § 12-306(a)(3) because Petitioner's claims do not establish anti-union motivation. As Petitioner asserts, until the morning of June 26, he had characterized the nature of the activity which necessitated his leave time to his supervisors as "union related business" or "union related work." As Petitioner asserts, the first time he requested leave, it was verbally approved, and the second time, he deemed it tacitly approved. Thus, at least once before the morning of June 26, Petitioner had secured explicit verbal approval to engage in "union related business" on that date. He did not submit a written request until 9:01 a.m. that morning, which was when Executive Order 75 was first mentioned in this discourse. 9:01 a.m. was less than an hour before testimony was to begin, as purported by Petitioner. Also, it was not until that morning that he told his supervisor that he "would be attending a City Council hearing on the NYCHA." At 11:02 a.m., one hour after testimony was to begin, Petitioner, for the first time characterized the actual nature of his "union related business" in detail and in writing, as required by NYCHA's Personnel Rules. He described his actions as conducting "city related business at the City Council." These contradictory requests were confusing at best, considering his prior characterization of the reason for his leave as for union activity. Moreover, Petitioner's statement that he was to "appear before City Council" to conduct "city related business" only added to that confusion, since it reasonably led the Deputy Director to question whether Petitioner was intending to testify on behalf of NYCHA.

Additionally, it is not clear why, after having obtained prior verbal permission to engage in union activity on June 26 from his supervisor, as he had done in the past, and after reminding both of his supervisors of his union leave needs the day prior, Petitioner did not depart as scheduled on June 26. Petitioner's own allegations of fact fail to show that NYCHA's delay in its approval of his leave time was motivated by fear of public criticism while he was engaged in Union activity. In the past, both before and after this incident, Petitioner had been regularly released for Union activity despite NYCHA's knowledge of the public nature of his many criticisms, including a critical article in a newspaper that appeared afterward regarding this incident. Since NYCHA had already given its approval for Petitioner to engage in protected activity on that date, and given the belated manner in which NYCHA was notified of the differently-stated reason for his request, we find no evidence that NYCHA's decisions that morning were made based upon the desire to discriminate against Petitioner for engaging in protected Union activity.

In reviewing the record, and in giving every benefit to Petitioner, we find no factual allegations sufficient to establish that NYCHA acted with improper motivation in this matter. Petitioner has failed to make out a *prima facie* case that NYCHA violated NYCCBL § 12-306(a)(3), and, as such, there can be no derivative violation of § 12-306(a)(1). *Local 237*, *City Employees Union*, 77 OCB 24, at 16 (BCB 2006). Accordingly, we dismiss the Petitioners' petition 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 improper practice petition filed by Mitchell Feder in the matter docketed as BCB-2663-07 be, and the same hereby is, dismissed in all respects.

Dated: New York, New York
June 9, 2008

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER