Local 371, 1 OCB2d 25 (BCB 2008)

(IP) (Docket No. BCB-2647-07).

Summary of Decision: The Union claims that the Department of Homeless Services improperly denied an employee a promotion and failed to restore his name to the certified list for the promotional title because the employee had appealed an unfavorable Step II disposition. The City claims that the petition should be dismissed as untimely because the employee knew or should have known that his name did not appear on the certified list and was never restored to said list more than four months prior to the Union's filing of the instant improper practice petition. Additionally, the City maintains that the denial of the promotion was not based upon the employee's appeal of the disciplinary action, and in any event, the denial of the promotion fell within the scope of the agency's managerial prerogative. The Board found that the Union's claim regarding the denial of the employee's promotion was untimely. The Board further found that the refusal to restore the employee's name to the certified list was not motivated by the employee's union activity. Accordingly, the Board 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-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371 and PAUL OJENI

Petitioners,

-and-

THE CITY OF NEW YORK and THE
NEW YORK CITY DEPARTMENT
OF HOMELESS SERVICES,

Respondents.

DECISION AND ORDER

On September 6, 2007, Social Service Employees Union, Local 371 ("Union" or "Local 371") and its member Paul Ojeni filed a verified improper practice petition against the City of New

York ("City") and the New York City Department of Homeless Services ("DHS") alleging that DHS violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3). The Union claims that the denial of Ojeni's appointment to the Assistant Superintendent for Welfare Shelters title ("ASW") by the New York City Human Resources Administration ("HRA") and DHS's refusal to restore him to the DHS certified list was in retaliation for Ojeni's decision to appeal an unfavorable disposition of disciplinary charges. The City maintains that the instant improper practice petition should be dismissed as untimely because any claim the Union and/or Ojeni had accrued outside the four month statute of limitations period set forth in the NYCCBL. The City also maintains denying Ojeni's promotion was not based upon his decision to appeal the disciplinary action. Rather, the denial was based upon Ojeni's disciplinary record. In any event, the City claims that the decision to rescind Ojeni's promotion and to refuse to restore his name to the certified list falls under the managerial prerogative of HRA and DHS, respectively. We find that the Union's claim concerning HRA's denial of Ojeni's appointment to ASW was untimely. We further find that the evidence did not establish a causal connection between DHS's decision not to restore Ojeni's name to the DHS certified list for ASWs and Ojeni's protected union activity. Accordingly, the petition is dismissed in its entirety.

BACKGROUND

Two days of hearings were conducted in the instant matter. The Trial Examiner found that the totality of the record established the relevant background facts to be as follows:

On December 14, 1986, Ojeni was hired by HRA into the civil service title Caseworker.[1] In 1999, Ojeni became a full time Caseworker for DHS, which is the agency responsible for providing safe shelter and outreach services, and helping individuals and families transition to permanent housing.

According to Ojeni's disciplinary record, on July 23, 2002, DHS commenced an investigation into an incident in which Ojeni allegedly threatened a co-worker. On October 2, 2002, after completing its investigation, DHS served Ojeni with disciplinary charges. An Informal Conference was held on October 11, 2002, and the hearing officer issued a determination on October 22, 2002 finding Ojeni used obscene language toward a co-worker. A Step II hearing was held on November 26, 2002, and a decision was issued on December 16, 2002, finding that the disciplinary charges against Ojeni were meritorious. This Step II determination was not contested.

In January 2004, Ojeni took the civil service exam number 3057 for ASWs ("Exam No. 3057"). According to the City, this was an "education and experience examination," which simply requires a candidate to fill out an application that lists one's credentials. Each candidate's score is based upon their respective background, level of education, and job experience. (Ans. ¶ 42).[2]

On November 29, 2004, Ojeni was served with another set of disciplinary charges for threatening a client. According to these charges, Ojeni had a physical confrontation with a client requesting services from him. DHS charged Ojeni with attempting to strike another person, threatening another person, using offensive language, failing to be courteous, and failing to conduct

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[1] In 1993, DHS was created but did not become an independent mayoral agency until 1999. Prior to 1999, the services now provided by DHS were performed by HRA.

[2] This test does not involve answering any type of "multiple choice questions," like most other civil service exams. (Ans. ¶ 41).

oneself in a disciplined manner. (Pet., Ex. B).

On December 13, 2004, an Informal Conference was held regarding these charges, and on December 29, 2004, a decision was issued finding Ojeni guilty of all of the disciplinary charges contained in the November 2004 set of disciplinary charges. On January 4, 2005, Ojeni refused to accept the Informal Conference decision, waived his rights under New York Civil Service Law §75, and authorized the Union to process this dispute using the grievance procedures.

On January 24, 2005, Ojeni was promoted from Caseworker to the civil service title of Senior Community Liaison, on a provisional basis.

On January 26, 2005, DCAS issued an open, competitive list from Exam No. 3057, and Ojeni did not appear on this list because DCAS determined that Ojeni "was not qualified" for the position. (Tr. 35). Ojeni appealed DCAS's determination, won this appeal and was placed at list number "4.5," which placed Ojeni behind only four other employees (Tr. 16). On March 7, 2005, DCAS issued a certified list, which was derived from the open, competitive list from Exam No. 3057, in anticipation of a hiring pool that was to be conducted by DHS on March 17, 2005.[3]

At DHS's March 17, 2005 hiring pool for ASWs, Yvonne Ballard, the then-Shelter Director of the 30th Street Men's Shelter, was one of five shelter directors who were interviewing candidates for DHS at that hiring pool, which included Ojeni. She testified that, upon arriving at the hiring pool, she received a file on each prospective candidate containing *inter alia*, their resumes, their current salary level, their previous experience, any criminal history, but no disciplinary history. (Tr.

[3] The record reflects that open competitive lists can be used by any New York City agency that utilizes a particular title. From these types of lists, an agency-specific certified list is created and sent to the specific agency for use in their agency-specific hiring pools. (Tr. 109). Certified lists only "have a life span of thirty days or so." (Tr. 113).

149-150). Shelter Director Ballard testified that, during these interviews, she was looking for candidates who could "tour [the shelter] with an objective eye" and "be able to write grammatically correct." (Tr. 149). She recalled that Ojeni did not interview well because she believed Ojeni was not "answering [the questions] truthfully," rather Ojeni was "telling [the interviewers] what they want[ed] to hear." (Tr. 154).

Based upon the list disposition sheet from this hiring pool, Ojeni was considered three times and not selected, and thus, was labeled "CNS . . . considered/not selected" on the list disposition sheet. (Tr. 106). According to the testimony of Martha Pierre, who is the Director of Certification at DCAS, the March 17, 2005 hiring pool was conducted in accordance with all relevant rules, practices and procedures, including the one-in-three rule because, if such compliance had not occurred, the list disposition sheet would have been rejected by the computer program that manages the certification of public employees throughout the City of New York. (Tr. 105).[4]

According to the testimony of Director Pierre, if an employee receives the CNS designation, he is "off-sided" for that particular agency. (Tr. 105). For an "off-sided" employee to be considered again by that particular agency, that employee "must request in writing for that agency to restore the name" because "only the agency [not DCAS] can restore that person to that list," and the decision to restore the name "is solely at the discretion of the agency." (Tr. 106).

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[4] New York City Personnel Rules and Regulations § 4.7.1, which codified the commonly-referred to one-in-three rule, states, in pertinent part:

> Appointment or promotion from an established eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the commissioner of citywide administrative services or the head of the certifying agency . . . as standing highest on such established list who are qualified and willing to accept such appointment or promotion.

On April 13, 2005, a Step II hearing was held regarding the disciplinary charges levied against Ojeni in November 2004.

On April 19, 2005, another certified list from Exam No. 3057 was issued by DCAS in anticipation of another hiring pool to be conducted by DHS later that month. This list did not contain Ojeni's name and list number 4.5 was not contained therein. (Union Ex. 4). According to Yvette Pilgrim, Deputy Director of Employment Services for DHS, the reason Ojeni's name did not appear on this version of the list was because Ojeni received "his three considerations at [the March 17, 2005] pool." (Tr. 95).[5] To date, the record demonstrates that Ojeni's name has not appeared on any other DHS certified list for ASWs.

On May 23, 2005, a Step II determination was issued and found that DHS substantiated all of the charges against Ojeni. This determination made note of Ojeni's previous disciplinary issue, where he was found guilty of threatening a co-worker, and stated that Ojeni's penalty was upheld because DHS "place[d] substantial amount of gravity on death threats and has zero tolerance for [such] behavior." (Pet., Ex. E).

On June 2, 2005, Ojeni was called to appear at a hiring pool for selection of candidates off a HRA certified list for ASWs. On June 6, 2005, Ojeni was selected by HRA to fill one of the vacancies that agency had in this title, effective June 20, 2005.[6] (Pet., Ex. F). On June 8, 2005,

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[5] According to Director Pierre, once any employee receives the "considered/not selected" designation during a hiring pool, that employee is "dropped off" the list, and is "no longer part of the consideration [for that pool]." (Tr. 104). Deputy Director Pilgrim, in her testimony, corroborates this practice, stating that once a candidate at a hiring pool is "considered, not selected" at the pool, that candidate is removed from that list. (Tr. 96).

[6] According to Cecile Noel, who is the Deputy Commissioner of Domestic Violence and Emergency Intervention Unit with HRA, hiring for her unit, which is the only unit within HRA that (continued...)

Deputy Director Pilgrim received a request from Elena Holmes, the Manager of the Employment Processing Unit for HRA, for information concerning Ojeni's disciplinary record. (Union Ex. 6).

According to Holmes, Ojeni was placed under administrative review by HRA, pending the review of Ojeni's disciplinary record. Holmes further testified that "candidates [who] indicate on the application that they were terminated, . . . arrested or convicted, . . . resigned in lieu of termination, or . . . ever [had] any disciplinary charges against them" are "placed under administrative review." (Tr. 50). Holmes testified that when this occurs the Deputy Commissioner overseeing the specific unit hiring the candidate must decide on a case-by-case basis whether to deny the appointment or allow it to stand. Holmes stated that administrative review can be done prior to, during or subsequent to the hiring pool and/or appointment by the agency. (Tr. 53).

Shortly thereafter, on June 15, 2005, Ojeni received an email from Tina Johnson of DHS congratulating him on his new position with HRA and providing him instruction on how to move from one agency to another. However, according to Ojeni, as of June 20, 2005, he had not received a definitive start date, or specific contact person at HRA with whom to deal on his first day with that agency. So, Ojeni called Deputy Director Pilgrim to ascertain whether she had been contacted by HRA with that information, but she informed him that "she had not heard anything from HRA." (Tr. 19).

On June 21, 2005, Assistant Deputy Commissioner of the Domestic Violence and Emergency Intervention Unit with HRA, Candida Carcana, wrote to the Deputy Commissioner Noel, and informed her that Ojeni's disciplinary record indicated that he received "two disciplinary actions"

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[6](...continued)
uses ASWs, is done at the hiring pools by her Assistant Deputy Commissioners, and she merely "signs off on whatever necessary paperwork for supervisory purposes." (Tr. 118).

related to "threatening a coworker in 2002" and "threatening a client in 2004." (Union Ex. 6). Deputy Commissioner Noel testified that there is "no uniform policy regarding non-hiring of applicants with pending disciplinary cases," but each applicant who has pending disciplinary charges against them and who has been appointed to a position in her unit, is evaluated on a "case-by-case basis." (Tr. 120). Nevertheless, on June 22, 2005, Deputy Commissioner Noel, via a memorandum, informed Assistant Deputy Commissioner Carcana that "based upon the information received from [DHS], we do not want to proceed with the hiring of Paul Ojeni." (Union Ex. 6). Deputy Commissioner Noel further testified that Ojeni "was not a suitable candidate for the position" because of the nature of the disciplinary charges in 2002 and 2004 and the negative Step II disposition of the 2002 disciplinary charges. (Tr. 124).

According to Deputy Director Pilgrim, the memorandum from Deputy Commissioner Noel to Assistant Deputy Commissioner Carcana denying Ojeni's appointment would have been forwarded to DHS. Deputy Director Pilgrim further testified that the June 22, 2005 memorandum would have been the only contact between HRA and DHS concerning Ojeni's appointment and its subsequent denial.

As a result of HRA's determination, on June 24, 2005, Holmes, via a letter, informed Ojeni "that his appointment was denied." (Pet., Ex. H). It further stated that Ojeni would "no longer be eligible for consideration for appointment to a position with [HRA] from this [ASW] civil service list," but Ojeni would "remain on the Civil Service list and [would] be eligible for consideration for appointment from all other city agencies that use this list." (*Id.*). According to Holmes's testimony, the disposition regarding the review is relayed to the interviewer, and they generate the letter, which is then "signed off" by Holmes. (Tr. 54).

On June 28, 2005, Ojeni contacted Deputy Director Pilgrim emailing her a request for her assistance. Deputy Director Pilgrim responded with "I have not heard anything from them [HRA]. I will follow-up tomorrow." (Union Ex. 1). According to Ojeni, he spoke with Holmes, who informed Ojeni that the reason that HRA had denied his appointment was because he "had prior disciplinary charges." (Tr. 19). However, Holmes denied that she ever spoke with Ojeni concerning the denial of his appointment, since that "communication takes place via . . . letter." (Tr. 55). Then, on June 30, 3005, Deputy Director Pilgrim sent Ojeni an email stating "[w]e [DHS] have not heard from HRA concerning your appointment. You may want to follow-up with them." (Union Ex. 2).

Ojeni testified that in July 2005, Ojeni called Deputy Director Pilgrim on at least three occasions to have his name restored to the eligibility list. According to Ojeni,

> [Deputy Director Pilgrim] told me, well, that they [DHS] had not determined to put me back on the list. She had promised many times that she was going to put me back on the list.
>
> After some period of time, I called again and she told me that they [DHS] had not decided or determined to put me back on the list.

(Tr. 24).

On January 31, 2007, an expedited award in the matter docketed as A-11403-05 was issued concerning Ojeni's disciplinary charges from November 2004.[7] The arbitrator sustained the Union's grievance filed on behalf of Ojeni, dismissed all charges against him, and ordered the expungement of the incident from Ojeni's personnel file. (Pet., Ex. I).

On May 22, 2007, DHS held a hiring pool, and Ojeni's name did not appear on this list nor

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[7] Expedited arbitration hearings were scheduled for February 14, October 26, and November 9, 2006, however, on all three occasions, DHS's primary witness failed to appear. Therefore, on the last scheduled hearing day, the arbitrator conducted a hearing. The evidence received at this final hearing day provided the basis for the arbitrator's award.

was he officially notified of this pool. (Tr. 113). According to Ojeni, DHS held hiring pools for ASWs in April and May of 2007 and he was not "called to any of these [DHS hiring] pools." (Tr. 25).

Ojeni testified that from July 2005 to June 2007 he called Deputy Director Pilgrim in order to ascertain whether his name had been restored to the DHS certified list for ASWs. He stated that, on each instance he actually spoke with Deputy Director Pilgrim, she informed him that DHS had not decided whether to restore his name. Then, on June 18, 2007, Ojeni went to DCAS, and spoke with Marie Paul, who verified that Ojeni's name was still absent from the DHS certified list for ASWs, and that he would need to contact DHS to ascertain why his name had not been restored.[8] On July 10, 2007, he again called Deputy Director Pilgrim to inquire why his name had not been restored and why he had not been called to the April and May 2007 hiring pools. He testified that Deputy Director Pilgrim stated "that they [DHS] had not deemed to [*sic*] put me back on the list." (Tr. 33).

According to Deputy Director Pilgrim, she recalls informing Ojeni that his appointment had been denied by HRA. She further recalled in her testimony that she spoke with Ojeni about having his name restored to the DHS certified list for ASWs, but informed him that DHS has a long-standing, general practice not "to perform restorations for candidates named on an open, competitive

[8] During cross-examination, Ojeni asserted that he previously visited DCAS regarding failure to secure a position as an ASW with either DHS or HRA in the Summer of 2005. At no other point in the record, other than this testimony, is this visit to DCAS in the Summer of 2005 mentioned. Nevertheless, Ojeni did admit during cross-examination that DCAS informed him in the Summer of 2005 that he was not on the certified list for either DHS or HRA for ASW.

list."[9] (Tr. 88). However, Deputy Director Pilgrim could not recall whether these conversations with Ojeni occurred in 2005, in 2007 or both.

On September 6, 2007, Local 371 and Ojeni filed the improper practice petition alleging that the denial of his promotion to HRA and the refusal to reinstate him to the DHS certified list for ASWs was discriminatory conduct. He seeks as a remedy in the instant matter an order directing DHS: to cease and desist from retaliating against Ojeni, to restore Ojeni to the DHS certified list for ASWs, to appoint Ojeni to ASW, and to pay Ojeni the salary difference between his current position and ASW.

POSITION OF THE PARTIES

Union's Position

The Union contends that DHS violated NYCCBL § 12-306(a)(1) and (3) by denying his promotion to ASW by HRA and by refusing to restore Ojeni's name to the DHS certified list for that title.[10] DHS's actions were motivated by Ojeni's decision to appeal the unfavorable disposition to

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[9] According to Deputy Director Pilgrim, restoring a candidate to an open, competitive list after being considered/not selected would have required DHS to change this agency-wide policy and obtain the approval of the Assistant Commissioner of DHS.

[10] NYCCBL § 12-306(a)(1) 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 relevant part:
Public employees shall have the right to self-organization, to form, join or assist public
(continued...)

disciplinary charges that had been levied against him, which resulted in the arbitrator dismissing all charges against him and ordered the expungement of the incident from Ojeni's personnel file. As such, DHS's actions were in retaliation to Ojeni's protected union activity.

With regard to the City's argument that the instant petition is untimely, Local 371 contends that Ojeni did not have actual or constructive notice that his name was not on the DHS certified list for ASW until June 2007, which, since the instant petition was filed on September 6, 2007, would place the filing of this claim within the four month statute of limitations prescribed by NYCCBL § 12-306(e) and the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") § 1-07(b)(4).[11]

City's Position

The City argues that the instant petition should be dismissed because it is untimely.

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[10](...continued)
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.

[11] NYCCBL § 12-306(e) provides, in pertinent part:

A petition alleging that a public employer 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 or of the date the petitioner knew or should have known of said occurrence. . . .

OCB Rule § 1-07(b)(4) provides:

One or more public employees or any public employee organization acting on their behalf or a public employer may file 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 § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

Specifically, Ojeni knew of HRA's denial of his appointment to ASW in June 2005 and knew or should have known that his name was not restored to the DHS certified list for ASWs, at the latest, July 2005. Therefore, the Union did not file the instant petition within the four month statute of limitations set forth in the NYCCBL and the OCB Rules.

Assuming *arguendo* that Local 371's petition in this case is timely, the City further avers that the Union failed to set forth a *prima facie* claim of retaliation. Though the City recognizes that Ojeni's appeal of the disciplinary disposition may be construed to be protected union activity, the Union failed to establish a casual connection between Ojeni's protected union activity and HRA's denial of his appointment to ASW and DHS's refusal to restore Ojeni to the DHS certified list for ASW. No probative evidence was advanced by the Union that would establish that these actions were taken in retaliation for Ojeni's decision to appeal the disciplinary charges to arbitration.

Finally, the City contends that, even if the Board found that Local 371 demonstrated a *prima facie* case against DHS for retaliation, the decisions to deny Ojeni's appointment to ASW by HRA and to not restore Ojeni to the DHS certified list for ASWs were based on legitimate business reasons, thereby exculpating DHS of any violation of the NYCCBL. The decision to deny Ojeni's appointment was based upon his prior disciplinary record, which, in addition to the November 2004 disciplinary charges, included a finding of guilt that Ojeni threatened a co-worker in 2002. HRA's initial appointment of Ojeni to ASW was contingent upon HRA's review of his disciplinary record, which that agency found to be damning enough to deny his permanent appointment. Additionally, DHS's decision to not restore Ojeni to the DHS certified list for ASWs was based upon the agency's long-standing practice that DHS does not restore candidates to these lists.

DISCUSSION

As a preliminary matter, we must determine whether Local 371 filed the instant claim in a timely manner. Based upon the evidence in the record presented herein, we find that the Union's claim concerning HRA's denial of Ojeni's promotion is untimely and, thus, should be dismissed. However, the Union's claim with regard to DHS's refusal to reinstate Ojeni to the DHS certified list for ASWs is timely, as it is an action that has persisted from 2005 until the present and, therefore, survives this standard's scrutiny.

According to § 12-306(e) of the NYCCBL and § 1-07(b)(4) of the OCB Rules, an improper practice petition must be filed within four months from the time the party filing the petition knew or should have known about the acts alleged to constitute the improper practice. "When a claim arises more than four months prior to the filing of the petition . . ., the petition will be dismissed as untimely." *CEA*, 79 OCB 42, at 7 (BCB 2007); *DC 37, Local 1508*, 79 OCB 21, at 18 (BCB 2007) ("[w]here a claim relies solely on factual allegations taking place more than four months prior to the filing of the petition, the petition will be dismissed as untimely"); s*ee also DC 37*, 47 OCB 61, at 7 (BCB 1991).

With regard to Local 371's claim that the City violated the NYCCBL by denying Ojeni's appointment to ASW, we find that this claim is clearly untimely. HRA interviewed, temporarily appointed, and ultimately denied Ojeni's appointment all in June 2005. HRA notified Ojeni that his appointment had been denied by memorandum from Holmes to Ojeni, dated June 24, 2005. On September 6, 2007, more than two years later, the Union filed the instant improper practice petition. Given that the applicable time period for timely alleged violative acts of the NYCCBL ran from May 6, 2007 to the September 6, 2007, we find that this particular claim was filed in an untimely manner

and, therefore, dismiss it.

Concerning the Union's claim that DHS discriminated and/or retaliated against Ojeni for his protected union activity when this agency refused to restore his name to the DHS certified list for ASWs, we find that the Union has set forth sufficient evidence that the claim was, at least in part, timely. At DHS's March 17, 2005 hiring pool for ASWs, DHS considered Ojeni three times, but did not select him. As such, he was "considered/not selected" and then "off-sided" from any future DHS certified list for ASWs. Nevertheless, from July 2005 to June 2007, Ojeni credibly testified that he requested several times that his name be restored to the DHS certified list for ASWs. The City offered no evidence to contradict Ojeni's testimony that DHS responded to these requests by informing him that no decision had been made concerning his name restoration requests, and that this prompted Ojeni to continue his effort. Finally, during the four month period preceding the filing of the instant improper practice petition, we find that Ojeni spoke with Marie Paul from DCAS on June 18, 2007 and Deputy Director Pilgrim on July 10, 2007, to determine whether his request to be restored to the DHS certified list for ASWs had been approved. Again, neither Deputy Director Pilgrim nor Marie Paul from DCAS definitively denied his requests to have his name restored to the DHS certified list for ASWs. Accordingly, Ojeni's most recent attempts to be restored to the DHS certified list for ASWs, to which DHS failed to respond, involve timely allegations, and therefore, this claim is timely under the NYCCBL's statute of limitations.

Now, we turn to the substantive issue of this timely claim using this Board's applicable standard. In 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 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." *DC 37*, 1 OCB2d 5, at 64 (BCB 2008) citing *SBA*, 75 OCB 22, at 22 (BCB 2005); *see also CEU, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

We find that the Union has satisfied the first element of the *Salamanca* test, in that Ojeni was engaged in protected union activity when he invoked and participated in the grievance procedure by taking his dispute with DHS concerning the disciplinary action taken against him to arbitration. *See Edwards*, 1 OCB2d 22, at 17 (BCB 2008) (participation in the grievance procedure has been considered protected union activity); *DC 37*, 1 OCB2d 5, at 65 (filing grievances on behalf of himself as well as other employees at his work location sufficiently satisfied the first prong of the *Salamanca* standard). In January 2005, Ojeni appealed the Step II determination finding him guilty of threatening a client, thereby forgoing his statutory rights under § 75 of the New York Civil Service Law and taking the instant matter to arbitration. As such, DHS was well aware of Ojeni's appeal under the grievance procedures. Furthermore, in 2006, Ojeni appeared at three expedited arbitration hearing dates and participated in the November 9, 2006 date. We find Ojeni's activity in the instant matter and DHS's knowledge of that activity sufficient to satisfy the first prong of the *Salamanca*

test.

Regarding the second prong of the *Salamanca* 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." *Burton*, 77 OCB 15, at 26 (BCB 2006); *see also CEU, Local 237,* 67 OCB 13, at 9 (BCB 2001); *CWA, Local 1180*, 43 OCB 17, at 13 (BCB 1989). "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." *Edwards*, 1 OCB2d 22, at 17; *see also SSEU, Local 371*, 77 OCB 35, at 15 (BCB 2006). 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, Local 371*, 77 OCB 35, at 18; *see also Lamberti*, 77 OCB 21, at 17 (BCB 2006).

In the instant matter, we find no evidence of anti-union animus. The Union contends that DHS exhibited anti-union animus when it refused to restore Ojeni to the DHS certified list for ASWs because he appealed his Step II determination, grieved the discipline levied against him, and was successful in arbitration. However, we find that no causal connection exists between Ojeni's protected union activity and DHS's refusal to restore him to the list for ASWs. The record is devoid of any credible evidence illustrating that Deputy Director Pilgrim or Marie Paul from DCAS refused to restore Ojeni's name to DHS's certified list for ASWs because of his appeal of the Step II determination and/or his participation in the grievance procedure. *See CEU, Local 237, IBT*, 77 OCB 24, at 19-20 (BCB 2006) (petitioner's challenging of an employer's action, without more, "is not a sufficient basis for a finding that an employer acted with improper motive"); *see also Sicular*,

79 OCB 33, at 20 (BCB 2007) (employee provided no factual allegations which would link his protected union activity with the agency's decisions to discipline, and ultimately, terminate him; rather the employee's admissions regarding his repeated incidents of lateness buttress the agency's ground for termination).

Ojeni's decision to appeal the Step II determination occurred in January 2005 and his participation in the grievance process occurred in 2006, which precedes the instant matter by at least one year. Even the issuance of the expedited arbitration award pre-dates the improper practice petition filed in this case by nine months. *See Lamberti*, 77 OCB 27, at 14 (where an employee filed a grievance in 2003, submitted to a random drug test in 2004, and the employer's decision not to promote the employee occurred in 2005, the Board found no temporal proximity among these events); c*ompare SBA*, 75 OCB 22, at 24 (finding that the two month period between the sergeants's meeting with the chief to complain about the captain's behavior and the captain's refusal to permit the sergeant to attend a voluntary training program was sufficient to establish temporal proximity, and, along with other factors, established anti-union animus). Accordingly, in the instant matter, we find no temporal proximity between Ojeni's protected union activity and DHS's act that allegedly violated the NYCCBL.

In addition, we find that Deputy Director Pilgrim credibly testified that DHS had a long-standing, general practice not to restore names to certified lists. Since there is no credible evidence in the record rebutting this contention, we further find that DHS treated Ojeni as it would any other employee who had been "off-sided" from the DHS certified list for ASWs. This similar treatment belies the Union's contention that Ojeni was treated differently due to his protected union activity. *See Howe*, 77 OCB 32, at 23 (BCB 2006) (removal of the employee's printer, which he installed

himself, was not violative of the NYCCBL, in part, because the employer's policy prohibiting such installations was designed to avoid corruption of the agency's computer network); *compare DC 37, Local 376*, 79 OCB 38, at 20 (BCB 2007) (finding that the supervisor's active role in processing the disciplinary charges against a shop steward, such as personally signing off on the charges and hand delivering them to the deputy chief, deviated from the normal procedure, and as such, was clear indicia of anti-union animus). Therefore, we find that no credible evidence in the record establishing a causal connection between Ojeni's protected union activity and DHS's decision to keep Ojeni off the DHS certified list for ASWs. Thus, we dismiss Local 371's claim concerning DHS's actions with regard to its refusal to restore Ojeni's name to the agency's list for ASWs.

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 Social Service Employees Union, Local 371 and Paul Ojeni, docketed as BCB-2647-07 be, and the same hereby is, dismissed.

Dated: New York, New York
July 30, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER