Feder, 1 OCB2d 27 (BCB 2008)

(IP) (Docket No. BCB-2680-08).

Summary of Decision: Petitioner alleges that NYCHA interfered with his rights as a Union official and discriminated against him, in violation of the NYCCBL, by delaying a Step II decision on an out-of-title grievance that he filed because he was a publicized and vocal union activist in the midst of a re-election campaign. The Board found that even though Petitioner's claim was timely, not moot, and should not be deferred to arbitration, the facts as pled did not state a claim that NYCHA violated either NYCCBL § 12-306(a)(1), (2), 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 January 1, 2008, Mitchell Feder, *pro se*, filed a verified improper practice petition against the New York City Housing Authority ("NYCHA") and the NYCHA 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)(3) by delaying a Step II decision on an out-of-title grievance that he filed because he was a publicized and vocal Union official and activist, and in order to interfere with his campaign for re-election as a Union official.

NYCHA argues that many of Petitioner's claims are untimely, that the claim regarding his Step II decision is now moot, that this matter should be deferred to arbitration, and that Petitioner has not alleged facts sufficient to show that NYCHA retaliated against him. The Board finds that Petitioner's claim is timely, not moot, and should not be deferred to arbitration, however, the facts as pleaded do not state a claim that NYCHA violated either NYCCBL § 12-306(a)(1), (2), or (3), and, accordingly, dismisses the petition in its entirety.

BACKGROUND

Petitioner began his employment at NYCHA in 1992 in the Department of Design. He claims that in 2004, during a reorganization, he was forcibly transferred out of the Department of Design to the Department of Development. In early December 2006, Petitioner claims he was again forcibly transferred to the Finance/Budget Department, and again transferred eight days later to the Office of Business and Revenue Development ("Office") at NYCHA.[1]

Petitioner is an officer of 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 currently serving his second three-year term as Chapter President 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, and which were published by *The Chief,*

[1] Petitioner filed a grievance, without the Union's assistance, regarding the first December 2006 transfer, which was denied through Step III. Petitioner claims that he filed for arbitration of the grievance, only to find out that he filed too late because he was improperly advised.

Civil Service Leader newspaper. These criticisms varied in scope and ranged from what he characterized as exposing cost overruns and budget problems at NYCHA to expressing concern over instances of what he perceives as corruption at other City agencies. He also criticized the stances of Union officials on certain issues.

On August 10, 2007, Petitioner filed a grievance at Step I without the Union's assistance, alleging that he was working out-of-title in his current position at the Office. The grievance was denied. On August 27, 2007, Petitioner requested that his grievance proceed to Step II of the grievance procedure. On September 6, 2007, a Step II conference was held, and the NYCHA Chief of Classification reviewed the grievance by conducting a desk audit.

On December 4, 2007, Petitioner sent an email to the Chief of Classification inquiring about the status of his grievance. On the same day, the Chief of Classification responded via email, and wrote that he conferred with the Labor Relations Division and confirmed that the matter was still under review. He also wrote that Petitioner could expect an answer shortly. At some point in December 2007, the Union held an election and Petitioner was re-elected as Chapter 25 President.

On January 4, 2008, Petitioner filed the instant improper practice petition. On January 7, 2008, Petitioner received a letter from the Director of Human Resources, which stated, in part, "This matter was carefully and thoroughly reviewed. Effective the date of this letter, the duties of the position to which you are assigned in the [Office] shall be inclusive of those on the attachment hereto." A one page document was attached to the letter, which specified the duties that he was expected to perform in detail.

On January 11, 2008, Petitioner appealed the Step II decision, which found that the duties assigned to him from August 10, 2007 through January 6, 2008, and on February 21, 2008, were

substantially different from those in his job specification. He also claimed that the duties assigned to him beginning on January 7, 2008, were substantially different from those in his job specification.

The Director of Labor Relations responded to Petitioner via letter dated February 21, 2008. She wrote that although the Step II appeal of the first issue he had raised may have been properly filed, the second issue that he raised regarding his duties after January 6, 2008, should have been filed in a separate grievance at Step I. She continued:

> However, in the interests of sound labor relations and to expedite resolution of these issues, [NYCHA] is prepared to do the following:
>
> As to issue 1, NYCHA waives the Step 3 requirement and will not object if the matter is pursued at Step IV provided that any subsequent filing is in accordance with the requirements of the [NYCCBL] and Article 23 of the [Union's] collective bargaining agreement . . . for arbitration at Step 4. Time shall run from the date of delivery of this response.
>
> As to issue 2, NYCHA waives its objections to the improper filing of this allegation, will treat the Step 2 appeal as if it were properly filed at Step 1, and will not object to it being pursued at Step 4, provided that any subsequent filing is in accordance with the requirements of the [NYCCBL] and Article 23 of the Agreement.

As a remedy for the claimed improper practice, Petitioner asks that the Board hold a hearing to determine whether or not NYCHA violated his rights under the NYCCBL and New York Civil Service Law and, if so, mandate that they never replicate the same action against him, and order NYCHA to reassign him to: his original hired position or to either the Department for Development Capital Projects Division, in a capacity and position that is commensurate with his civil service title. Furthermore, Petitioner asks that the Board order NYCHA to pay him $ 15,000.00 as an out-of-title work and salary settlement for working above his civil service title's responsibilities.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that NYCHA interfered with his rights as a Union officer and discriminated against him by not adjudicating the Step II grievance in a timely manner because NYCHA is well aware that he is currently working out-of-title according to the tasks and standards and his job description. He asserts that NYCHA knew that Chapter 25 elections were to take place in December 2007 and that an expedited decision at Step II, finding for him, would benefit his re-election campaign. NYCHA's actions constitute "union-busting" because it wants to replace a strong vocal unionist with a Union employee who is not as capable in the position of Chapter President. Thus, there was a collective and colluded decision by NYCHA to prolong the decision until after the Chapter 25 election. Petitioner notes that NYCHA only issued its determination at Step II after he filed the instant improper practice petition.

In response to NYCHA's answer, Petitioner claims it was unnecessary for the Chief of Classification to confer with NYCHA's Labor Relations Division when Labor Relations has nothing to do with determining whether an employee is working within one's civil service title. He also claims the Chief of Classification did not perform a "desk audit" as claimed, since he did not observe Petitioner working at his desk. Instead, the Chief of Classification merely held a conference where Petitioner was questioned about what he did in his position. Additionally, Petitioner claims it is disingenuous for NYCHA to assert that the decision took so long to render due to the fact that his position is unique and research had to be done before reaching any decision on his duties, because there is at least one other person at NYCHA with his exact title and 13 other employees in his direct title line. He also argues that his prior out-of-title grievance in early 2007 was processed in a timely

manner.

Although Petitioner believes that his forced transfers were in retaliation for Union activity, and were intended to hinder his ability to interact with his members at a time when he was in the middle of the Union's run-off election between him and the Union's incumbent President, he is referring to these transfers as background to his current claim regarding the length of time to adjudicate his grievance, and is not including them as part of this petition. However, he notes that, under the guise of a 2004 reorganization and/or legitimate business reasons, he was transferred to positions that were not even in the same units or on the same floor of the building in which he and his members all work, thus limiting his contact with them. Petitioner claims that these transfers were to undermine his ability to get re-elected, since he was out of sight of his members, and he notes that he was replaced by less-qualified people.

Petitioner claims that further background evidence of animus may be found in that, during an August 15, 2007, DC 37 contract negotiation session, NYCHA Deputy Director of Labor Relations withdrew a proposal to grant the Chapter President (Petitioner) seven hours of paid Union release time per week, despite having agreed to include it in three prior negotiation sessions. DC 37 has yet to demand that the proposal be included in the agreement. As further background, Petitioner points to the Deputy Director's refusal to allow Petitioner to use release time to attend a New York City Council hearing on June 26, 2007 because of anti-Union animus, which was the subject of another improper practice petition.[2] Petitioner notes that the same Deputy Director who denied this

[2] The petition to which Petitioner refers, BCB-2663-07, was the subject of *Feder*, 1 OCB2d 23 (BCB 2008), which was filed on July 2, 2007. The Board found that Petitioner did not allege facts sufficient to support a claim of anti-union animus, and dismissed the petition in its entirety. The instant petition was filed prior to the Board's determination in that matter.

release time was also consulted on the Step II determination, which creates the appearance of impropriety.

Finally, Petitioner contends that his petition should not be deferred to arbitration because a claim of retaliation for anti-union animus is not one for contract interpretation, and a claim of anti-union animus, by its nature, cannot be moot.

NYCHA's Position

NYCHA contends that Petitioner included a number of actions that occurred more than four months prior to the filing date in his petition, and those should be dismissed. These actions include the reassignment of his title, his objection to not being in the same physical space as his members during his work day, and issues regarding exchanges between the parties while at the collective bargaining table, as well as other events. Additionally, the question of whether management violated contractual procedures when it took four months to issue a Step II determination is one of contract interpretation that should have been raised in a grievance.

NYCHA also argues that since it has fully complied with the mutually agreed-upon contractual grievance procedure, and Petitioner suffered no harm as a result of such, the petition is moot. Petitioner benefitted from NYCHA's actions since they have now expedited the remainder of the grievance process for him.

Should the Board determine that the petition should proceed, nothing NYCHA did or did not do interfered with Petitioner's ability to serve as Chapter President; therefore, the claims should be dismissed. It should be noted that Petitioner continued to be assigned to NYCHA's main office at 90 Church Street since before he filed his initial grievance and he has continued to report there. At all relevant times, a substantial number of Union members are stationed at that location or at 250

Broadway, which is a two-block walk from 90 Church Street, where Petitioner is stationed. There is no suggestion that any employee was deprived of Union assistance because he was reassigned.

NYCHA argues that there is nothing in the record to support the claim that the delay in the grievance process or the Step II decision somehow exemplified "union-busting." Both the Chief of Classifications and the Deputy Director of Labor Relations responded to the grievance in the normal course of their business.

Even if the Board were to find that NYCHA was motivated by "union-busting," NYCHA had legitimate business reasons for its actions. The review of Petitioner's grievance at Step II required significant effort because he serves in a title not usually employed by NYCHA and there were no other positions to which his could be compared, and NYCHA desired to assure that Petitioner's duties were appropriate to his title and the office to which he was assigned. Contrary to Petitioner's assertions, it is necessary for the grievance to be reviewed by the Deputy Director of Labor Relations and Classifications since the Chief of Classifications is supervised by the Deputy Director. A modification in the practice followed by either employee might have been problematic, but because NYCHA carried out its business as usual, the allegations should be dismissed. Furthermore, it was in NYCHA's best interest to move the grievance directly to arbitration because NYCHA believed that only a decision by a neutral would satisfy Petitioner, and not an in-house NYCHA review at Step III.

In response to the assertions that Petitioner made regarding disputes over release time and bargaining demands, which were background to this matter, NYCHA notes that it has granted almost every request for release time that Petitioner has made, even when the requests should have been denied, and the withdrawal of the demand about which Petitioner complains was not appropriate for

non-economic bargaining. Finally, the decision to transfer Petitioner is a management right that is reserved for NYCHA.

DISCUSSION

The first issue that this Board must address is whether the Board possesses jurisdiction over Petitioner's claims. NYCHA argues that the Petitioner's claims call for an interpretation of the parties' contract and must be dismissed, but 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. *Feder,* 1 OCB2d 23, at 12-13; *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 the instant matter, Petitioner alleges that NYCHA retaliated against him and interfered with his rights as a Union official when it delayed a Step II decision on an out-of-title grievance. Although the applicable collective bargaining agreement discusses the subject of grievances and outlines a procedure for their filing and processing, 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. The claims that Petitioner raises are independent statutory claims and 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 Petitioner's claim based upon lack of jurisdiction. *Feder,* 1 OCB2d 23 (BCB 2008)*;*

Local 1180, CWA, 69 OCB 28, at 8-9 (BCB 2002); *Schulyer-Chemung-Tioga Board of Coop. Educational Servs.*, 34 PERB ¶ 3019 (2001); *Connetquot Central School Dist.*, *supra*.

NYCHA's argument that this matter is moot because Petitioner has received his Step II decision and agreed to an expedited course towards arbitration must be rejected. An improper practice proceeding does not become moot merely because the acts that allegedly violated the law have ceased. *Cotov*, 53 OCB 16, at 15 (BCB 1994); *Cosentino*, 29 OCB 44, at 11 (BCB 1982); *compare PBA* 73 OCB 14 (BCB 2004) (after expounding on the subject of mootness, the Board found the dispute moot in light of substantially different facts). In such cases, the question of a remedy for a prior violation of law, and the matter of deterring future violations, remain open to consideration. *Cotov*, 53 OCB 16, at 15 (BCB 1994); *Cosentino*, 29 OCB 44, at 11 (BCB 1982). The New York State Public Employment Relations Board ("PERB"), consistent with the rulings of this Board, has further expanded on the subject of mootness when the issues of retaliation for union activity and interference are raised. PERB stated that:

> The doctrine of mootness prescribes that where an issue is purely academic, a consideration of the underlying merits of a charge or other allegation of wrongdoing shall not be undertaken. Hence, where there is no actual controversy to be determined, the matter is moot [citations omitted]. To the contrary, where it is alleged that a public employer has engaged in conduct motivated by union animus and with intent to interfere with union operations and protected rights, public policy and the principles of the Act require a finding even where intervening developments may limit the remedy. [citations omitted]. Indeed, violations of subsections (a), (b) and © of § 209-a.1 of the Act have a chilling effect on the exercise of protected rights. Although a decision at this point in time would not include an order to [reinstate petitioners to their original posts], it would offer a finding of violation and an order affecting future action by the District. The value of those remedies in a context of unlawful interference and/or retaliation is great. As such, the questions before me remain ripe for analysis and decision.

New York City Sch. Dist., UFT, 40 PERB ¶ 4550 at 14-15 (2007) citing *Southold Union Free Sch. Dist.*, 36 PERB 4508 (2003); *see also Plainedge Union Free Sch. Dist.*, 31 PERB ¶ 3063 (1998).

In the instant matter, even though Petitioner's Step II decision has been issued and NYCHA has agreed to an expedited path to arbitration, Petitioner claims that the delay in issuing that decision interfered with his rights as a Union official and was motivated by anti-union animus; therefore, public policy and the principles of the NYCCBL require this Board to make a finding. Even though a decision for Petitioner at this time would not include an order for NYCHA to issue the Step II determination, a remedy could include a finding of a violation and an order affecting future action by NYCHA. Therefore, we find that Petitioner's claims have not been made moot through NYCHA's issuance of a Step II determination.

NYCHA's argument that Petitioner's claim is untimely must also fail. 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. *Howe,* 77 OCB 32 at 16 (BCB 2006); *Castro*, 63 OCB 44 at 6 (BCB 1999). Nevertheless, untimely claims may be admissible as background information, *see PBA*, 77 OCB 10, at 13 (BCB 2006). Although Petitioner raises many issues that span a great length of time in his petition, he makes it clear in his reply that his claim is that NYCHA interfered with his rights as a Union officer and retaliated against him for Union activity by delaying his Step II determination and that the remainder of the information is offered as background to his claim. Therefore, since the instant petition, which alleged that NYCHA delayed his Step II decision on January 1, 2007, accrued within four months of the filing, we find that this claim is timely. *DC 37*, 1 OCB2d 21, at 10-11 (BCB 2008); *Lucchese*, 57 OCB 22, at 9-10 (BCB

1996) (general discussions of timeliness and accrual). We will consider the other allegations as background to this claim.

Now, we address the substance of Petitioner's claims. 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. *Feder,* 1 OCB2d 23, at 13; *D'Onofrio*, 79 OCB 3, at 20, n. 11 (BCB 2007). 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 primarily contends that NYCHA interfered with his rights as a Union officer and discriminated against him by not adjudicating his Step II grievance in a timely manner, thereby interfering with his re-election campaign as Chapter President. Whenever a Petitioner alleges that an employer interfered with his or her rights as a Union official, the Board must examine whether the employer's actions were violative of NYCCBL § 12-306(a)(1).

As we explained in *Feder*, 1 OCB 2d 23, at 13-16, 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. . . ." To determine if an independent violation of § 12-306(a)(1) has been established, this Board adopted the test stated in *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967) in *Assistant Deputy Wardens' Ass'n*, 55 OCB 19, at 27 (BCB 1995). *See also, Local 371, SSEU, DC 37,* 79 OCB 31, at 11 (BCB 2008); *Local 2627, DC 37*, 71 OCB 27, at 7-8 (BCB 2003).

In following these decisions, the Board first asks "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." *Feder*, 1 OCB2d 23, at 14; *Assistant Deputy Wardens' Ass'n*, 55 OCB 19, at 27. Next, "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." *Id.*

In order for an employer's actions 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; *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).

In *Local 376*, *DC 37,* 73 OCB 6 (BCB 2004), the Board found that DEP violated NYCCBL § 12-306(a)(1) by attempting to discourage and inhibit the members of the union from selecting the local's Vice President as a representative. In that matter, the DEP Director of Labor Relations engaged in a course of conduct that culminated in a Step II determination which included the statement that the union's membership "would be wise to discourage and inhibit such imprudent

conduct by its elected Vice President." *Id.*, at 11. The Board found that this Director not only repeatedly juxtaposed disapproval of the Vice President with praise for other representatives but also attempted to avoid dealing with the Vice President and appealed directly to the union's members in order to influence the selection of their representative. In holding that DEP had violated NYCCBL § 12-306(a)(1), we stated, "[r]egardless of what [the Director's] intentions may have been, the effect of her actions was to 'discourage and inhibit' the members of Local 376 from choosing [the Vice President] as a representative." *Id.*, at 11 (citing *Monticello Central Sch. Dist.,* 22 PERB ¶ 3002, at 3006 (1989)).

Relying solely upon Petitioner's account of the events in the instant matter, he has alleged no factual allegations which, if credited, would state a claim that NYCHA engaged in conduct that rose to the level of what would be considered "inherently destructive" of protected union activity, as we found in *Local 376, DC 37*. In contrast to that matter, where the Director's conduct, regardless of intent, had the effect of discouraging and inhibiting the union members from choosing a certain representative, here, Petitioner has not pleaded a claim which would show that a delay in his determination had a similar effect. The fact that there may have been a delay in the rendering of a Step II determination which coincided with the pendency of a Union election does not, without more, make out a violation of the NYCCBL. Thus, the instant matter more closely parallels the facts in *McAllan*, 33 OCB 3 (BCB 1984), in which the Board stated that after an employee who was a candidate for union office had an on-the-job accident, an investigation that was mandated by procedure and that resulted in charges filed against the employee the week before the union election did not, without more, establish a violation of the NYCCBL.

Petitioner's allegations, taken at face value, fail to indicate how the length of time NYCHA

took to render a Step II determination differentiates him from other employees based upon protected union activity. *McAllan*, 31 OCB 14, at 26. Although NYCHA rendered decisions in Petitioner's prior out-of title grievance in a speedier manner, he does not claim that the length of time to render that decision was any longer than for other employees. It is also unclear how this delay constituted a continuing obstacle that jeopardized the position of the union as bargaining agent or unambiguously penalized or deterred his protected activity to the requisite level. *Local 2627, DC 37*, 71 OCB 27, at 7-8. Therefore, NYCHA's actions, as related by Petitioner, lack the necessary foresight and far-reaching effects required by the standard to be considered inherently destructive.

Having failed to allege facts sufficient to state a claim 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, which is utilized in a context that does not involve inherently destructive behavior, but does involve an employer's motivation, 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).

While NYCHA was aware that Petitioner had filed a grievance, and even if we impute knowledge by NYCHA that Petitioner was actively involved in a campaign for re-election as a Union official during the relevant time period, Petitioner has not alleged facts sufficient to support a claim that NYCHA discriminated or retaliated against him for engaging in protected union activity. We have consistently held that the *prima facie* case as to "a causal relationship between protected activity and the complained of action may be proven through the use of circumstantial evidence, absent an outright admission." *Local 371, SSEU,* 79 OCB 34, at 11 (BCB 2007); *Burton*, 77 OCB 15 (BCB 2006). Additionally, we have expressed our "willingness to accept indirect evidence of wrongful intent," while requiring more than "mere assertion." *SSEU*, 77 OCB 35, at 15 (BCB 2006); citing *Local 983, D C 37*, 67 OCB 15, at 6 (BCB 2001). A petitioner must sufficiently ground his or her allegations of discrimination in specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion. *Id.*; citing *Lieutenants Benevolent Ass'n*, 61 OCB 49, at 6 (BCB 1998).

Even when this Board takes into account the entirety of the background information provided by Petitioner as circumstantial evidence, his claims rest on surmise and conjecture. In reviewing the record, we find only conclusory assertions that the delay in processing his grievance stemmed from NYCHA's improper motivation, and nothing that would provide a basis for a potential determination that NYCHA violated the NYCCBL. As noted above, Petitioner has not alleged how the time frame in which NYCHA decided his grievance differs from that in which other employees' grievances were treated, except for the one example of his own prior grievance.

Additionally, Petitioner initiated the grievance process by filing a Step I grievance on August 10, 2007, and the grievance was denied shortly thereafter. Both of these events occurred during the period preceding the December 2007 elections. That a Step II determination again denying the grievance followed after he filed his improper practice petition is not dispositive of anti-union animus. Although a "petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence," proximity alone does not establish a causal connection. *See Local 1180, CWA*, 77 OCB 20, at 14 (BCB 2006); *CSBA*, 73 OCB 17, at 18 (BCB 2004); *DC 37*, 43 OCB 52, at 9 (BCB 1989). Therefore, he has failed to assert facts sufficient to constitute a *prima facie* case that NYCHA violated NYCCBL § 12-306(a)(1) or (3), and, as such, there can be no additional derivative violation of § 12-306(a)(1). *Local 237*, *CEU*, 77 OCB 24, at 16 (BCB 2006).

Although Petitioner did not explicitly contend that NYCHA violated NYCCBL § 12-306(a)(2), in the interest of fully adjudicating all potential disputes, we shall construe the claim that NYCHA tried to interfere in a Union election as such, in addition to his other asserted violations. Domination or interference within the meaning of § 12-306(a)(2) has been found in situations in which there is preferential treatment of one union over another, interference with the formation or administration of the union, or assistance to the union to such an extent that the union must be looked at as the employer's creation. As an example of such conduct, in *Local 237, IBT*, 67 OCB 12 (BCB 2001), the Board found that an employer violated § 12-306(a)(2) when a manager repeatedly met with groups of employees to discuss internal union matters, such as elections, union by-laws, and collective bargaining agreements. 67 OCB 12, at 9-10; *see District Council 37*, 51 OCB 36, at 18 (BCB 1993). We do not find that such domination existed here. As a result, we find

that a claim under § 12-306(a)(2) must necessarily fail along with his other claims, and, accordingly, we dismiss the 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-2680-08 be, and the same hereby is, dismissed in all respects.

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