Kingsley, 1 OCB2d 31 (BCB 2008)

(IP) (Docket No. BCB-2692-08).

Summary of Decision: Petitioner alleges that the NYPD violated several Board orders by demanding that she provide additional medical documentation for her absences and inability to perform overtime. Petitioner's failure to provide such documentation resulted in discipline and negative performance evaluations. Petitioner also argues that she was retaliated against for filing a federal discrimination suit. The City moved to dismiss. The Board found that, even if all permissible inferences from the pleadings were drawn in favor of Petitioner, Petitioner failed to establish a violation of the NYCCBL. 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-

SONJA KINGSLEY,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT,
***et anon.*,**[1]

Respondents.

DECISION AND ORDER

On April 8, 2008, Sonja Kingsley filed a *pro se* verified improper practice petition against the New York City Police Department ("NYPD" or "Department") and the head of the NYPD's Communications Section, alleging that the NYPD violated several Board orders by demanding that

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[1] Although the petition does not name the City of New York ("City") as a party, the City was timely served, and we amend the petition *nunc pro tunc* and adjust the caption accordingly.

she provide additional medical documentation for her absences and inability to perform overtime.[2] Petitioner's failure to provide such documentation resulted in discipline and negative performance evaluations. Petitioner also argues that she was retaliated against for filing a federal discrimination suit. The New York City Office of Labor Relations ("OLR") on behalf of the City and the NYPD moved to dismiss the petition for insufficiency and for the failure to allege facts that establish a violation of the NYCCBL. The Board finds that even if we were to draw all permissible inferences in favor of Petitioner from the pleadings, Petitioner failed to establish that the NYPD violated the NYCCBL. Accordingly, we dismiss the petition in its entirety.

BACKGROUND

On a motion to dismiss, such as that filed by the City here, the Board accepts as true for the purposes of deciding the motion the facts alleged in the petition and draw all permissible inferences in favor of Petitioner from the pleadings. *James-Reid*, 77 OCB 6, at 11-12 (BCB 2006); *DC 37*, 49 OCB 37, at 12-13. (BCB 1992). Accordingly, for the purposes of this motion, we credit the allegations in the petition.

Petitioner was hired by the NYPD on February 13, 2004, and is currently a Police Communications Technician ("PCT") in the Communications Section. Prior to developing health problems, Petitioner had a good attendance record, worked almost all assigned overtime, and was ranked "Meets Standards" on her February 11, 2005, Performance Evaluation, covering the period June 12, 2004, through December 12, 2004. In 2006, Petitioner developed health problems which

[2] Petitioner supplemented her petition with additional material dated May 23, 2008, June 12, 2008, and August 27, 2008.

caused her to miss work.[3] Petitioner's absenteeism resulted in her being placed on Step IV sick status by July 2006.[4] On July 7, 2006, Petitioner received two command disciplines, one for failure to follow a supervisor's instructions and a second for failure to submit a doctor's note for Step IV sick status.

Petitioner subsequently documented her medical condition by submitting, among other medical documentation, eight letters from her treating physician between August 2006 and February 2008, six of which state that her work hours should be limited.[5] On or about August 14, 2006, Petitioner submitted to her Command the first letter from her treating physician detailing Petitioner's medical condition and noting that Petitioner "has difficulty working more than 8 hours a day." On or about October 6, 2006, Petitioner submitted the second letter to her Command from her treating physicians, which describes Petitioner medical condition and states "[s]he cannot work overtime."

On December 29 and 30, 2006, Petitioner was absent without leave for her entire tour. The NYPD Communications Section has a form entitled "Report of Violation" and one such report was

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[3] As, for this motion, Petitioner's medical condition is not in dispute, it is not detailed herein.

[4] The Board takes administrative notice of the NYPD Step Program, described in *DC 37*, 77 OCB 34 (BCB 2006):

> The NYPD has a "Step Program" wherein an employee with three undocumented absences in a six-month period is designated, generally speaking, as being assigned to Step I. Each additional undocumented absence leads to a subsequent step until, generally, a total of six undocumented absences are reached, at which point the employee reaches Step IV. Any further undocumented absences result in discipline in the form of a command discipline which, in turn, may result in loss of pay, loss of annual leave, or loss of compensatory time.

Id. at 5.

[5] The eight letters provided by Petitioner's doctors are dated August 14 and October 6, 2006, February 2 and 5, June 14, August 15, and December 13, 2007, and February 27, 2008.

subsequently made by her Command for each incident. The two reports, which were appended to the petition by Petitioner, however, are undated. The Report of Violation form includes the notification: "You are hereby notified that you have been derelict in your duties as described above. This report may result in disciplinary action being taken against you."

On or about February 2, 2007, Petitioner submitted to her Command the third letter from her physician stating that "[p]lease be advised that Ms. Kingsley is not to do any overtime until after her appointment on February 13, 2007 and she is re-evaluated." Petitioner underwent medical testing on February 5, 2007, and on or about that date, provided her Command with the fourth letter from her treating physician detailing her medical condition.

Petitioner was absent from June 8 through June 25, 2007. Petitioner took off work on Friday June 8, 2007, because she was weak and dizzy. Around 7:30 p.m. on Monday, June 11, 2007, Petitioner passed out while at a restaurant and an ambulance was called. Petitioner recovered, but went to the emergency room on 5:00 a.m. on June 12, 2007, and was admitted. Petitioner was discharged on June 13, 2007, and spent the next nine days recuperating at home. Petitioner submitted to her Command documentation from the hospital and a fifth letter from her physician, dated June 14, 2007, stating, in pertinent part, that Petitioner "has been feeling dizzy for 1 week and was admitted to the hospital after passing out on June 11th for . . . She was discharged on June 13th. . . She is not to work overtime or engage in any strenuous activity. She should be excused from work completely from June 9th to June 16th." Petitioner's Command rejected the submitted documentation as insufficient and her pay was docked $786.90. A Report of Violation for Petitioner's failure to provide medical documentation for her June absences was subsequently filed, a copy of which was appended to the petition. This report, however, is undated except for the

indication that Petitioner refused to sign it on January 8, 2008.

On June 29, 2007, Petitioner received a Notification of Ordered Overtime that she was required to perform overtime on Saturday, June 30, 2007, and that "[i]f you are sick and cannot perform this overtime, you will be required to submit a Doctor's note." Petitioner did not perform the ordered overtime or provide the required doctor's note. A Report of Violation due to Petitioner's failure to provide medical documentation for her failure to work the ordered overtime was subsequently filed against Petitioner. Like the report for the June absences, it is undated except for the indication that Petitioner refused to sign it on January 8, 2008.

On or about July 16, 2007, Petitioner provided her Command a U. S. Department of Labor form filled out by her treating physician that lists Petitioner as having a "serious health condition" that involves a "period of incapacity." Her physician referred to the Petitioner's admission to the hospital, noted a full recovery would take six months, and that surgery would be necessary. Further, her physician wrote that Petitioner "should not work any overtime" for six weeks, did not have a chronic condition, and "can perform some work." On or about August 15, 2007, Petitioner provided her Command with the sixth letter from her treating physician describing Petitioner's medical condition, stating that"she should be excused from work for this day . . . she should not work overtime or do any strenuous physical activity."

On August 22, 2007, Petitioner filed a discrimination lawsuit in federal court against the NYPD and her Commanding Officer. The suit alleges violations of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990, based largely on the same events alleged in the petition.

On October 11, 2007, Petitioner was instructed to report to the NYPD Medical Division on October 29, 2007, and instructed to bring with her "all physician notes including copies of results regarding your medical condition." On or about December 13, 2007, Petitioner provided her Command the seventh letter from her treating physician describing her medical conditions.

Appended to the instant petition, Petitioner submitted four performance evaluations covering September 16, 2005, through March 15, 2008, which Petitioner alleges she did not receive before December 2007.[6] The four performance evaluations rate Petitioner as "Below Standards" or "Well Below Standards" based solely on absences due to illness; and all four recommend termination.

On February 6, 2008, Petitioner had her eyes examined due to problems related to her medical condition. On or about February 11, 2008, Petitioner sought a reasonable accommodation from her Command, requesting that, until at least July 21, 2008, when she would next be evaluated by her doctor, she be assigned to the day shift and that she be assigned no more than four hours of overtime. The request for accommodation was denied. On or about February 27, 2008, Petitioner submitted to her Command the eighth letter from her physician, stating her Command should "limit her overtime shifts to 4 hours . . ."

On March 13, 2008, Charges and Specifications were filed against Petitioner alleging:

> 1. Said [PCT] Sonja Kingsley, assigned to the Communications Section, during the eighteen (18) month period begining September 16, 2006[,] to December 15, 2007, demonstrated her unfitness for service with the Department, to wit: she was excessively absent, reporting sick on 40 occasions for a total of 96 days and 4 hours, and such absences prevented her from performing her assigned duties on a regular basis.

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[6] The four Performance Evaluations are dated October 9, 2006 (covering September 16, 2005, through September 15, 2006); September 17, 2007 (covering September 16, 2006, through September 15, 2007); December 15, 2007 (covering September 16, 2007, through December 15, 2007); and March 15, 2008 (covering December 16, 2007, through March 15, 2008).

* * *

> 2. Said [PCT] Sonja Kingsley, assigned as indicated in Specification #1, was late for duty for said assignment on thirteen (13) occasions during the 18 month period from September 16, 2006 to December 15, 2007, for a total of 346 minutes.[7]

On March 25, 2008, the Commanding Officer of the Communications Section sent the First Deputy Commissioner a memorandum entitled "Circumstances surrounding Charges and Specifications against [PCT] Sonja Kingsley, Tax #[], Communications Section." The first section of the memorandum summarizes what it characterizes as Petitioner's "excessive absenteeism record" and "poor tardiness record." The second section of the memorandum states the overall rating of the September 2007 and December 2007 Performance Evaluations, which were both marked well below standards, and the sick and late days documented in those evaluations. The memorandum concludes:

> [PCT] Kingsley's extremely excessive absenteeism does not make her an asset in an emergency services Command such as the Communications Section where optimal service depends upon adequate staffing. The member is either unwilling or unable to correct her behavior and become a productive member of the Command. It is requested that [PCT] Sonja Kingsley be expeditiously terminated.

(emphasis in original deleted). On April 8, 2008, Petitioner filed the instant petition, seeking to have the negative performance evaluations removed from her file, her Step IV sick status rescinded, and her pay restored.

Petitioner appealed her last performance evaluation, dated March 15, 2008, covering the period December 16, 2007, through March 15, 2008. The appeal was heard on April 18, 2008, but did not follow the procedures stated in Interim Order #62, the subject of which is "Appeal of Evaluations – Civilian Members of Service" ("Interim Order #62"). Interim Order #62 states that

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[7] The Specifications list Petitioner as violating the following sections of the Patrol Guide: PG 203-03, pg. 1, ¶ 3: Compliance with Orders; PG 203-05, pg. 1, ¶ 1: Authorized Leave; and PG 203-09, pg. 1, ¶ 3: Compliance with Orders.

in cases of an appeal of a performance evaluation, the Commanding Officer will schedule an "interview with members concerned (rater and ratee), within thirty (30) days of appeal notice." In Petitioner's case, the interview was scheduled more than 30 days after she appealed; it was not held by the Commanding Officer but by another Captain; and only the Petitioner – the ratee – and not the rater was interviewed. Petitioner's appeal was denied, and her rating remained "Well Below Standards."

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner's Command repeatedly scheduled her for overtime, which Petitioner refused to perform. Command insisted she provide medical documentation for each instance in which she was absent or refused to perform overtime. Petitioner did not comply, based on her belief that the documentation she had submitted was sufficient, and that she should not be required to provide a letter from her doctor every week. The petition does not refer to any sections of the NYCCBL. Rather, Petitioner alleges "that these actions by the NYPD [are] in violation of previous collective bargaining decisions." (Pet., attachment at p. 2). The Petition cites four decisions – *DC 37*, 77 OCB 34 (BCB 2006), *DC 37*, 79 OCB 24 (BCB 2007), *DC 37*, 79 OCB 25 (BCB 2007), and *DEA*, 79 OCB 40 (BCB 2007). The first three cited decisions are related cases concerning unilateral changes by the NYPD in documentation procedures for leave taken under the Family Medical Leave Act ("FMLA") in violation of NYCCBL § 12-306(a) (1) and (4).[8] Petitioner describes her Commanding

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[8] *DC 37*, 77 OCB 34, is the initial decision requiring the rescission of the unilateral changes and the expungment of disciplinary records. *DC 37*, 79 OCB 24, modified the initial order to require expunging of sub-par performance evaluations and clarified that the decision applies to all PCTs and

Officer as "defiantly cancelling" sick leave after the issuance of these decisions. (Opposition to Motion to Dismiss, p. 1). Petitioner argues that the NYPD violated these Board orders by demanding that she provide additional medical documentation for her absences and her inability to perform overtime, disciplining her for failing to do so, and giving her negative performance evaluations.

The fourth decision cited by Petitioner, *DEA*, 79 OCB 40, concerns retaliation by means of a negative performance evaluation in violation of NYCCBL § 12-306(a) (1) and (3). Petitioner argues that she received negative performance evaluations, and her Commanding Officer had formal charges seeking termination filed against her, in retaliation for her filing a federal discrimination lawsuit against him individually and against the NYPD. Petitioner argues that the behavior described in her petition is "similar to the 'suspicious evaluations' in the [*DEA*, 79 OCB 40] decision, whereas the evaluations are a progressive retaliatory disciplinary tool to justify future termination of Petitioner." (Opposition to Motion to Dismiss, p. 2).

Supervising PCTs. In *DC 37*, 79 OCB 25, the Board found that a revision to the memorandum that formed the basis of the finding of unilateral changes in the first two decisions did not mitigate or resolve the improper practices found in those prior decisions. In these decisions, we ordered that the NYPD rescind the unilateral changes in documentation procedures, rescind and expunge any disciplinary records of any and all PCTs and Supervising PCTs pertaining to the Step Program to the extent that they relate to violations of the unilaterally changed documentation procedures, and expunge any sub-par performance evaluations of any and all PCTs and Supervising PCTs pertaining to the Step Program to the extent that they relate to violations of the unilaterally changed documentation procedures.

City's Position

The City argues that the petition is insufficient under § 1-07(c)(1) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").[9] Specifically, the petition does not provide specific citations to the NYCCBL or the Civil Service Law, does not provide a clear and concise statement of the claim as it fails to describe specific acts or dates, and does not provide a legal argument in support of Petitioner's claim. The City acknowledges receipt of a sufficiency letter from the Executive Secretary of the Board, but argues that such does not preclude the City from arguing the insufficiency of the petition.

The City further argues that the Petition should be dismissed for failure to allege facts sufficient to establish a violation of the NYCCBL. The petition does not allege that Petitioner was engaged in protected union activity, nor does it establish a *prima facia* case of retaliation.

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[9] OCB Rule § 1-07(c)(1) reads, in pertinent part, that a petition shall include:

C. The specific sections of the statute alleged to have been violated;

D. A clear and concise statement, in numbered paragraphs, of the facts constituting the claim under § 1-07(b) of these rules. The statement shall include the nature of the controversy and specify any provisions of the contract, executive order, or collective bargaining agreement involved; a copy of such provisions should be provided. If the controversy involves an alleged improper practice, the statement shall include but not be limited to the names of the individuals involved in the particular act specifically alleged and the date, time, and place of occurrence of each particular act alleged. Such statement may be supported by affidavits, documents, and other evidence that may be relevant and material but may not consist solely of such attachments, and any attachments or exhibits shall be specifically identified and referred to in the petition;

E. An argument with citations to legal authority in support of the claims asserted. The argument may be included either in the petition or in a separate memorandum of law;

DISCUSSION

The standard for addressing a pre-answer motion to dismiss is well established:

> For the purposes of deciding the [] pre-answer motion to dismiss, the facts alleged by the petitioner must be deemed to be true, and the only question presented for adjudication is whether, taking the facts as alleged by petitioner, a cause of action within the meaning of the NYCCBL has been stated. . . . Moreover, in ruling on a motion to dismiss, we will accord the petition every favorable inference and will construe it to allege whatever may be implied from its statements by reasonable and fair intendment.

James-Reid, 77 OCB 6, at 11-12 (citations and editing marks omitted); *see also Melisi*, 57 OCB 52, at 3 (BCB 1996); *DC 37*, 49 OCB 37, at 12-13. (BCB 1992); *Farina*, 31 OCB 20 (BCB 1983); *McAllan*, 27 OCB 25, at 6 (BCB 1981).

The City claims that the petition does not provide adequate notice to appraise Respondents as to the gravamen of the charged improper practice and, thus, is deficient under § 1-07(c)(1) of the OCB Rules. Although no statutes are cited in the petition itself, Petitioner satisfied the requirement set forth in OCB Rule § 1-07(c)(1)(C) that a petition include the "specific sections of the statute alleged to have been violated" by reference to Board decisions which, *inter alia*, reference sections of the NYCCBL, specifically NYCCBL § 12-306(a)(1), (3), and (4). *See Seale*, 79 OCB 30, at 7 (BCB 2007) ("The principle that claims arise out of the facts asserted and not a petitioner's statutory citations is particularly salient with respect to a *pro se* petitioner.") (citing *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) ("[L]iberal pleading principles do not permit dismissal for failure in a complaint to cite a statute, or to cite the correct one . . . Factual allegations alone are what matters."); *Northrop v. Hoffman of Simsbury,* 134 F.3d 41, 46 (2d Cir. 1997) ("[A]ppellant's failure to cite the correct section of the [applicable statute] does not require us to affirm the dismissal of her complaint so long as she has alleged facts sufficient to support a meritorious legal claim."); *Lupski*

v. County of Nassau, 32 A.D.3d 997 (2d Dept. 2006)).

Petitioner also satisfied the requirement of OCB Rule § 1-07(c)(1)(D) that the petition contain a "clear and concise statement, in numbered paragraphs, of the facts constituting the claim." Petitioner states that she developed health problems in 2006, for which she provided her Command with medical documentation, that led to numerous sick days and limited her ability to perform overtime. This resulted in negative performance evaluations, disciplinary charges, and the docking of her pay.

OCB Rule § 1-07(c)(1)(D) also requires that the petition include "the names of the individuals involved in the particular act specifically alleged and the date, time, and place of occurrence of each particular act alleged." The petition identifies Petitioner's Commanding Officer as the individual responsible for the alleged improper practices. The documents provided by Petitioner, including copies of her performance evaluations and letters from her physicians, provide the requisite information. Also, while few dates are specified in the petition itself, the dates the petition is lacking can be found in the City's own records and the petition provides sufficient information for the City to easily locate such.

As for the requirement of OCB Rule § 1-07(c)(1)(E) that the petition includes a legal argument with citation to supporting authority, this Board is mindful that a petitioner appearing *pro se* may, and often does, lack the familiarity with niceties of legal procedure or pleading practices that one would expect from an attorney. The petition, however, cites four decisions of the Board, which, we find, sufficiently puts the City on notice as to Petitioner's legal arguments that the City violated Board orders and retaliated against her. *See Seale*, 79 OCB 30, at 7. In her opposition to the motion to dismiss, Petitioner provided additional specificity, identifying her Commanding Officer as the

individual allegedly responsible for the retaliation and describing her situation as "similar to the 'suspicious evaluations'" in *DEA*, 79 OCB 40, in that "the evaluations are a progressive retaliatory disciplinary tool to justify future termination of Petitioner." (Opposition to Motion to Dismiss, p. 2).

Having found the petition to provide the required notice under OCB Rule § 1-07(c)(1), we next turn to whether the petition has alleged facts, which if true, would be sufficient to establish a violation of the NYCCBL. Petitioner's first argument, which avers that the NYPD violated *DC 37*, 77 OCB 34, *DC 37*, 79 OCB 24, and *DC 37*, 79 OCB 25, misconstrues these decisions. These cases are factually similar to the instant case, in that they involve discipline stemming from failure to document leave. Moreover, the City has failed to articulate a reasoned ground why it deemed the documentation provided by Petitioner insufficient, or why it insisted on additional documentation in light of the documentation submitted, including numerous letters from Petitioner's treating physicians.

However, in the cited cases, the unions challenged changes to both the documentation required and the frequency for certification for leave under FMLA. Here, Petitioner was not subject to the procedures deemed to have been improperly unilaterally changed, as Petitioner never requested leave under FMLA, only sick leave. Petitioner further fails to allege that there was any change, unilateral or otherwise, in the procedures for sick leave. Therefore, Petitioner has failed to allege facts that, even if accorded all favorable inferences, establish that the City violated the prior Board orders cited in the petition.

As for the second argument, Petitioner alleges that the retaliation stemmed from the filing of a federal discrimination lawsuit on August 22, 2007, and that the negative performance evaluations recommending her termination were not presented to Petitioner until after she filed her

lawsuit. Although Petitioner does not explicitly allege that the performance evaluations, or the four Reports of Violations, were drafted until after she filed her lawsuit, that is the fair intendment of her petition. *See James-Reid*, 77 OCB 6. In other words, we accept for purpose of deciding this motion to dismiss that the documentation recommending termination all post date the filing of the lawsuit. Further, reading the petition in the context of the documents provided, we find the fair intendment is that Petitioner alleges the City was aware of her lawsuit. *Id.*

To establish retaliation, the Petitioner must demonstrate that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
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> 2. the employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19 (BCB 1987) (adopting *City of Salamanca*, 18 PERB ¶ 3012 (1985)); s*ee also Howe*, 79 OCB 19, at 11 (BCB 2007); *CEA*, 79 OCB 39, at 15 (BCB 2007).

A condition of the first prong of the test is union activity, and the City argues that Petitioner in the instant case has not alleged any union activity. We have long held that in appropriate circumstances the filing of a lawsuit can be considered union activity. *McNabb*, 41 OCB 48, at 13-22 (BCB 1988) (first Board decision so holding); *see also PBA*, 79 OCB 16, at 13-15 (2007) (in depth discussion as to what constitutes union activity). To be so, the lawsuit "must be related, if only indirectly, to the employment relationship between the City and bargaining unit employees." *UFA*, 1 OCB2d 10, at 21 (BCB 2008) (citing *SSEU*, 79 OCB 34, at 9 (BCB 2007); *Bd. of Educ. of Deer Park Union Free Sch. Dist.*, 10 PERB ¶ 4594, at 4689 (1977), *aff'd*, 11 PERB ¶ 3043 (1978)).

We do not opine as to the merits of Petitioner's lawsuit, as our jurisdiction is limited toclaims arising under the NYCCBL. *See Colella*,79 OCB 27, at 52 (BCB 2007); *James-Reid*, 77 OCB 29,

at 15 (BCB 2006); *Edwards*, 65 OCB 35, at 10-11 (BCB 2000). We need not decide, in ruling upon this motion, whether Petitioner's lawsuit constitutes union activity as protected under the NYCCBL.

The allegations in the petition, however, fail to make out a claim of retaliation as they fail to establish the second prong – that the employee's union activity (the filing of the lawsuit) was a motivating factor in the employer's decision (progressive discipline). Petitioner's retaliation claim is that her negative "evaluations are a progressive retaliatory disciplinary tool to justify future termination of Petitioner." (Opposition to Motion to Dismiss, p. 2). Otherwise stated, the NYPD created numerous documentation (four performance evaluations and four Reports of Violations) between the filing of Petitioners' lawsuit and the issuance of Charges and Specifications against her to support terminating her in retaliation for filing suit against them.

However, documents provided by the Petitioner establish that the disciplinary process that could lead to her termination began prior to the filing of the lawsuit. *See DEA*, 79 OCB 40, at 22 ("Many of the adverse actions cannot be persuasively shown to have been retaliatory in nature simply because they *antedated* the protected activity, let alone any knowledge on the part of management thereof.") (emphasis in original); *see also CEU, Local 237*, 69 OCB 12, at 8 (BCB 2002); *Wilson v. New York City Housing Auth.*, 2007 U.S. Dist. LEXIS 25258 at *30 (S.D.N.Y. April 2, 2007).

Petitioner admits that, prior to filing the lawsuit, she did not provide the documentation requested by her Command and was at Step IV sick status.[10] Petitioner also states that, as a result of being in Step IV sick status, her pay was docked, and she provided pay stubs establishing the pay

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[10] For example, in her opposition to the motion to dismiss, Petitioner states that her Commanding Officer ignored the letters from her doctors – six of which pre-date the filing of the lawsuit – that she not work overtime, or work only limited overtime, and than states: "Petitioner did not do the overtime, and was thus disciplined and put into 'steps,' in which her pay was docketed considerably and her time taken away." (Opposition to Motion to Dismiss, p.1); *see also* Pet. ¶ 3.

period docked was June 24, 2007, to July 7, 2007 – over a month before the filing of her lawsuit.[11] Additionally, Petitioner received two Command Disciplines in June 2006, one for the failure to submit a doctor's note when she was on Step IV sick status, the other for failure to follow a supervisor's instruction. The Command Disciplines are referenced in the October 2006 performance evaluation. While Petitioner challenges the fairness of and motivation underlying the ratings in the performance evaluations, she does not dispute the facts contained therein indicating that she received two Command Disciplines in June 2006. Similarly, Petitioner does not dispute the factual accuracy of the Reports of Violation – that is, she does not dispute the two unauthorized absenteeism in December 2006 and two incidents of failure to submit requested documentation in June 2007.

Petitioner's case is distinguishable from *DEA*, 79 OCB 40, in which the negative evaluations were unsupported. *Id.* at 28 (noting petitioner received low scores in areas unrelated to any documented problem). In the instant case, the only negative remarks and ratings on the performance evaluations concern undisputed facts – Petitioner's absenteeism, tardiness, and failure to submit requested documentation.

The Charges and Specifications Petitioner faces are based primarily on undisputed events that pre-date the filing of Petitioner's lawsuit, specifically Petitioner's attendance and late record.[12] The petition clearly indicates that prior to filing of her lawsuit Petitioner was aware her attendance record

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[11] In ¶ 3 of the petition, Petitioner states: "She is now in Step 4 [sick] status, her 'time' is depleted and her pay was docked considerably ($786.90 was taken out of her pay as punishment leaving her with a paycheck of $67.25)." Petitioner provided her pay stubs, which identify the pay period in which she netted $67.25 as June 24, 2007, to July 7, 2007.

[12] Petitioner does not dispute the accuracy of the sick and late days reported in the performance evaluations, and from them it is clear that all of the instances of tardiness documented in the Charges and Specifications occurred before September 16, 2007, as well as 71 of the 96 days absent.

could lead to discipline as she was aware she was in Step VI sick status. Indeed, Petitioner was disciplined by having her pay docked prior to the filing of the lawsuit. On the undisputed facts, we find that Petitioner has failed to show a causal connection between the filing of her lawsuit and the negative evaluations and discipline that were imposed. Petitioner, therefore, has failed to make out a *prima facia* case of retaliation. Accordingly, the City's motion to dismiss is granted.

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 docketed as BCB-2692-08 be, and the same hereby is, dismissed.

Dated: New York, New York
September 24, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER