Andreani, 2 OCB2d 15 (BCB 2009)

(IP) (Docket No. BCB-2725-08).

Summary of Decision: Petitioner claimed that the New York City Department of Environmental Protection violated NYCCBL § 12-306(a)(1), (2), and (3) by removing a communication from Petitioner's collective bargaining representative that was posted on a designated bulletin board. Petitioner further alleged that DEP dominated the administration of the collective bargaining representative, and retaliated against Petitioner due to his protected actions. The City claimed that the posting on the bulletin board was removed because it contained inflammatory language, that DEP never dominated the administration of any collective bargaining representative, and that any adverse employment actions taken against Petitioner were not motivated by anti-union animus, but was, instead, impelled by legitimate business reasons. Upon reviewing the pleadings, the Board severed a number of Petitioner's claims and disposed of the severed claims, holding that these particular claims were untimely. The remaining claims were held in abeyance until a hearing concerning disputes of material factual contentions could be conducted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

JOSEPH ANDREANI,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

INTERIM DECISION AND ORDER

On October 6, 2008, Sergeant Joseph Andreani ("Petitioner"), who is a member of and delegate for the Law Enforcement Employees Benevolent Association ("LEEBA" or "Union"), filed

a verified improper practice petition, *pro se*, against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP") alleging that DEP violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (2), and (3). Petitioner asserts that DEP's removal of communications from LEEBA to its constituents that were posted on a bulletin board used by the Union interfered with and restrained the exercise of statutory rights of employees in the title Environmental Police Officer ("EPO"), and further constituted an act of domination over LEEBA by DEP. Petitioner also alleges that DEP retaliated against him because of his numerous protected acts in which he engaged for the betterment of the EPO's in his precinct. The City argues that most of Petitioner's claims should be disregarded by the Board because they were raised in Petitioner's reply, not the original petition. The City further argues that if these claims are considered by the Board, they should be dismissed because they are untimely. Substantively, the City further argues that Petitioner's claim regarding interference lacks merit because the removed posting contained inflammatory language and was not on LEEBA letterhead. The City further argues that Petitioner failed to enunciate a *prima facie* case making out a claim of domination. Here, we find that a portion of Petitioner's claims are not within the four month statute of limitations, and hereby dismissed. We further hold that the remaining timely alleged claims require an evidentiary hearing, and therefore we order a hearing be conducted to resolve issues of disputed material facts.

BACKGROUND

DEP, *inter alia*, is responsible for delivering drinking water to the residents of New York City from sources within the New York City Water Supply System, which consists of 19 reservoirs

and three controlled lakes in the 1,969 square mile watershed spreading across nine counties within the State of New York. In furtherance of this duty, it maintains and operates 13,000 miles of water mains and sewers, 14 waste-water treatment plants, and enforces noise, air and hazardous material codes to ensure the safety of the drinking water. DEP employs EPOs to carry out a part of this mission and they are charged with protecting the New York City Water Supply System and its related infrastructure, such as the treatment plants and water mains, including those that are located outside of New York City.

DEP divides its jurisdiction into geographic regions, and allocates its staff by precinct. The 7th Precinct station is located at 100 Central Park Avenue North, Yonkers, New York, and is also referred to as the Hillview Precinct ("7th Precinct" or "Hillview Precinct"). According to Petitioner, he has been stationed at the 7th Precinct since May 2002, and has been a Union representative at that location since that same year.[1] According to Petitioner, as a Union representative, he represented EPOs assigned within the Hillview Precinct concerning issues related to, *inter alia*, work place safety and privacy; wage, hour, overtime and benefit disputes; and maintained the "union bulletin board." (Rep. ¶ 3).

---

[1] Service Employees International Union, Local 300 ("SEIU, Local 300") was the bargaining representative for employees in the job title of EPO until March 2005. Prior to that date, LEEBA filed a representation petition requesting the Board of Certification to fragment the EPO title from the remaining titles represented by SEIU, Local 300 because EPOs, a title that engaged in law enforcement duties, no longer shared a community of interest with the other remaining SEIU, Local 300 titles, which were primarily civilian titles, and therefore were no longer the most appropriate unit for the EPO title. In *LEEBA*, 76 OCB 5 (BOC 2005), the Board of Certification held that, generally, in cases where employees performing law enforcement duties are grouped with civilian titles, fragmentation is appropriate. *Id.*, 76 OCB 5, at 15-20 (following precedent of the New York State Public Employees Relation Board). This decision further held that self-determination was the appropriate means for EPOs to designate the most appropriate bargaining unit. Accordingly, an election was held and LEEBA was elected the collective bargaining representative for employees in the job title EPO.

Factual Allegations Pre-Dating June 6, 2008

Petitioner alleged that in November 2006 his pay was improperly reduced by DEP. Based upon the documents in the record in the instant matter, DEP stated that it mistakenly paid Petitioner overtime pay and failed to charge Petitioner annual leave on two separate occasions, in November 2005 and July 2006. Specifically, Petitioner was overpaid approximately $1,700 in overtime pay and his annual leave bank was not charged for 84 hours. As a result of DEP's oversight, DEP devised several different means by which to recover this overpaid sum of wages and to adjust Petitioner's annual leave bank to accurately reflect the amount of time Petitioner had accrued. Ultimately, DEP "hope[d] . . . the overpayment and the lack of leave charges could be recouped over several pay periods." (Rep., Ex. B).

In December 2006, Petitioner requested and received "paid leave" to attend a "Delegate Training Meeting" for LEEBA. (Rep. ¶ 17). Shortly thereafter, Petitioner learned that his request for "paid leave" was rescinded and, instead, DEP deducted time from Petitioner's "comp time" bank. (*Id*.). Petitioner contended that when SEIU, Local 300 represented EPOs, these requests for leave to conduct such business were approved without complications. However, since LEEBA became the certified bargaining representative for EPOs, DEP decided to engage in such "Union Bashing" acts. (Rep., Ex. C). Petitioner further alleges that DEP had not informed him of the change in the characterization of his leave request prior to his attendance at the training session. In response, the City contends that DEP has never granted "paid leave [to employees] for the type of activity Petitioner described as [a] Delegate Training Meeting." (Sur-Rep. ¶ 17).

According to Petitioner, on January 31, 2007, he testified in a federal lawsuit filed by another

EPO against DEP and SEIU, Local 300.[2] During his testimony on behalf of the plaintiff in this lawsuit, Petitioner contends that he implicated DEP EPO Chief Edward Welch, DEP EPO Assistant Chief Mark Benedetto, then-Captain Frank Milazzo, and Captain Thomas Arnold as those who carried out the actions complained of in that matter. Petitioner further alleges that, in his testimony, he witnessed these discriminatory and retaliatory acts by DEP and SEIU, Local 300 and Petitioner, himself, was targeted also for acting to remove SEIU, Local 300.

According to Petitioner, these superior officers learned that Petitioner levied said accusations against them in his testimony. According to Petitioner, as a result of this knowledge, on February 16, 2007, Chief Welch approached Petitioner and, in a "confrontational" conversation, told Petitioner "that he had knowledge and details of [Petitioner's] testimony and that he would not tolerate anything being said about his commanders." (Rep., Ex. A). According to the City, shortly after this conversation, Petitioner's claims of retaliation that stemmed from his testimony in the federal lawsuit were forwarded to DEP Assistant Legal Counsel, Henry Baranczak, so that he could conduct an investigation into Petitioner's claims. During this investigation, DEP Assistant Legal Counsel Baranczak found that Chief Welch "had engaged in a conversation with [Petitioner] about his testimony in the [federal] lawsuit . . . [but] Petitioner stated that he was not threatened by Chief Welch in the course of his conversation." (Sur-Rep. ¶ 15).

Also in February 2007, DEP performed an audit on Petitioner's time and leave for the

---

[2] In this lawsuit, the plaintiff alleged that DEP and SEIU, Local 300 violated § 301 of the Labor Management Relations Act of 1947, (29 U.S.C. § 185), the Civil Rights Act of 1871, (42 U.S.C. § 1983), and the First and Fourteenth Amendments of the United States Constitution. According to this plaintiff, SEIU, Local 300 breached its duty of fair representation, violated the parties' collective bargaining agreement, and conspired with DEP to have him terminated because of his efforts to decertify SEIU, Local 300 as collective bargaining representatives for EPOs.

previous five years. During this audit, DEP discovered several discrepancies, which, based upon the record before us, are in no way attributable to Petitioner. Based upon DEP's audit findings, DEP verified that Petitioner received approximately $1,700 in overpaid overtime and 84 hours of uncharged annual leave.[3] On March 8, 2007, the findings of this audit were implemented; Petitioner's annual leave bank was docked; and DEP began deducting "$100 from each [pay] check until the overpayment [of overtime was] recovered." (Rep., Ex. B).

On March 19, 2008, Petitioner sent a memorandum to DEP's Director of the Equal Employment Opportunity Office indicating that Inspector Milazzo and at least seven other, male members within DEP's police force went on "a personal vacation" with their respective families. (Rep., Ex. D). Petitioner contended that this type of activity "contributes to a lack of transparency in the DEP Police civil service promotion process [and] creates an environment where discrimination can exist." (*Id*.). Petitioner further stated that "employees should be confident that no-one will receive less favorable treatment than someone else because of their gender, marital or family status, sexual orientation, religious belief, age, disability, race or membership to any association." (*Id*.). As such, Petitioner contended that this preferential treatment indicated that DEP failed to uphold "equality for the purpose of eliminating discrimination."[4] (*Id*.).

According to the City, in response to this allegation, representatives from DEP's Equal Employment Opportunity office met with "LEEBA representatives on a number of occasions . . .

---

[3] Based upon the record in the instant matter, it is unclear whether and, if so, how DEP's audit findings were communicated to Petitioner.

[4] In the Reply, Petitioner further alleges that he has "been a target of retaliatory actions from individuals involved with that [vacation]" but does not elaborate as to what retaliatory acts were committed against him and, specifically, who engaged in such acts. (Rep. ¶ 19).

[and] informed LEEBA that [DEP] would investigate those matters which were within the jurisdiction of [that] office and provided guidance documents delineating the type of subject matter they could consider." (Sur-Rep. ¶ 18). Furthermore, the City contends that DEP, the New York City Conflicts of Interest Board and the New York City Department of Investigation, each independently conducted investigations of this matter. "Each of these investigations determined that Inspector Milazzo's attendance on the [vacation] was not inappropriate [because] each participant paid their own way and no financial obligations were created between or among any . . . DEP employees." (Sur-Rep. ¶ 19).

According to Petitioner, in May 2008, Inspector Milazzo conducted a "secret" inspection of the 7th Precinct, of which Petitioner, who was on duty, was not informed. During this inspection, Inspector Milazzo, by himself and without being accompanied by a female officer, entered the female locker room. According to Petitioner, Inspector Milazzo "found and confiscated 43 envelopes from [a female EPO's] closed Patrol Bag," where she had "private items," but did not inspect any other female EPO's personal effects. (Rep., Ex. E). According to Petitioner, this incident was reported to him by this particular female EPO. Petitioner, shortly thereafter, reported this incident to his superior officers in order to complain about Inspector Milazzo's actions.

According to the City, during a "routine walk-through" by Inspector Milazzo, he "observed that the female locker room was open and verified that the room was empty before entering." (Sur-Rep. ¶ 20). Upon entering, Inspector Milazzo noticed "a stack of 40 or more envelopes bearing the DEP logo in plain view atop an officer's duty bag," and then, after consulting with DEP legal counsel, confiscated the envelopes. (*Id.*). Even though DEP later determined that the envelopes were misappropriated by a female EPO, DEP's Equal Employment Opportunity office "issued a

recommendation that such inspections include an escort whenever feasible." (*Id.*).

Factual Allegations Post-Dating June 6, 2008

On July 23, 2008, Petitioner sent a memorandum to two EPO Sergeants and one EPO Lieutenant within the Hillview Precinct, concerning inquiries he received from three subordinate EPOs in the 7th Precinct regarding the amount of compensation he received from LEEBA due to his service as an Union representative. In this memorandum, Petitioner stated that these three subordinate EPOs accused Petitioner of "collecting a $40,000 [a] year salary" from LEEBA because of his status as a Union representative. (Rep., Ex. F). Petitioner further wrote that, due to these accusations, he has "been asked by various members in your team in the past about this issue" and that he "[took] these defamatory statements as a personal attack, attempting to discredit [his] name and reputation." (*Id.*). Petitioner concluded this memorandum requesting that two EPO Sergeants and one EPO Lieutenant "address and correct the situation." (*Id.*).

In September 2008, Petitioner contacted Captain Arnold regarding the docking of his pay and the reduction of his annual leave bank, which resulted from the February 2007 audit. According to Petitioner, "Captain Arnold . . . was contacted regarding [Petitioner's] payroll discrepancy, promised to get back to [him] with answers, and failed to ever notify [Petitioner]" about the reduced pay and annual leave balance. (Rep. ¶ 22). The City asserts that it stands by the results of its previous investigation and audit, and further denies the allegations concerning Petitioner's claims that his pay and annual leave were docked in retaliation for his protected union activity.

In that same month, Petitioner contacted DEP's Health Benefits Unit to change his insurance coverage due to a "financial hardship." (Rep. ¶ 23). Petitioner asserts that he was advised by an administrator within this unit to file a "financial hardship letter" requesting a change of coverage.

On September 19, 2008, Petitioner submitted this letter requesting change in medical plans in order to alleviate a "financial burden." (Rep., Ex. H). On September 24, 2008, an administrator in DEP's Health Benefits Units informed Petitioner that his request was "denied because there [was] no qualifying event at this time to change [Petitioner's] insurance coverage," but suggested that Petitioner could change medical plans "during the transfer period which [would] probably be in November [2008]." (*Id*.).

Petitioner further alleged that, in September 2008, Captain Arnold reduced Petitioner's "supervisory job functions" and overtime assignments, opting rather to use Sergeants from another precinct to perform such functions and assignments. (Rep. ¶ 24). One of Petitioner's supervisory duties which was reduced was the scheduling of overtime assignments within the Hillview Precinct, which was reassigned to Sergeants from DEP's 6th Precinct. Petitioner further contended that he was subjected to overly burdensome "scrutiny and denials of the most common requests." (Rep. ¶ 26). According to the City, Petitioner "became resentful of Captain Arnold's oversight in the area of overtime scheduling," and Petitioner became uncooperative and combative. (Sur-Rep. ¶ 24). However, the City also contends that, eventually, Petitioner resumed the responsibility of assigning overtime assignments four weeks later, which he currently continues to do. (*Id*.).

In the afternoon of September 18, 2008, Inspector Milazzo was present at the Hillview Precinct conducting an inspection of the facility, and saw a posting on a bulletin board in the kitchen area of this precinct.[5] The posting consisted of "copies of several letters which had been mailed to

[5] Regarding the bulletin board at issue in the instant matter, the City asserts that "the bulletin board [was] customarily used by [DEP] for notices to employees [and was] also made available to all employees within the 7th Precinct, as well as [u]nions representing employees of [DEP]." (Ans. ¶ 13). In response, Petitioner claims that the vast majority of postings on that bulletin board were (continued...)

the Union Attorney, DEP, and the [New York City] Law Dep[artment]." (Ans., Ex. C). A review of this posting indicates that it was an unsigned, open letter addressed to all union members on letterhead from the Watershed Police Benevolent Association, Inc., located at 880 South Lake Boulevard in Mahopac, New York. The body of the posting, in pertinent part, reads:

> [S]ome of our fellow union members have attempted to sabotage our Federal lawsuit. Several attempts to be diplomatic with these members have resulted in them stabbing the rest of us . . . in the back. The days of being polite and respectful with these members are now over. Here is a list of the members that have requested their names be taken off the suit. In addition to the names, the letters they sent to the union and the NYC Law Department are attached.
> The word sabotage is being used to describe the few members that sent their letters to the NYC Law Department. If they only wanted off of the suit, then they would've only needed to contact the union. Instead, they sent their letters to the NYC Law Department in an attempt (intentionally or not) to give NYC a defensive strategy to have the case dismissed. Their actions could possibly destroy the lawsuit for the rest of the membership.

(*Id*.). This letter then listed the names of the five EPOs who allegedly sent these letters to the New York City Law Department, and suggested that "every member of the PBA . . . will now have the ability to personally thank those members [for sending these letters]." (*Id*.).

According to the City, Inspector Milazzo "deemed this posting to be an inappropriate use of . . . [DEP's] bulletin board based upon his assessment that the posting contained language that was threatening." (Ans. ¶ 14). Specifically, the City asserts that the statement "the days of being polite and respectful to these members is now over" was deemed to be threatening. (Sur-Rep. ¶ 11). Inspector Milazzo alleges that he then consulted with DEP's Director of Labor Relations, Denise

---

[5](...continued)
Union related and consisted of "e-mail communications, newspaper articles, letters and memos which were not on [Union] stationary." (Rep. ¶ 4). Furthermore, DEP's Acting Chief of Operations, Inspector Frank Milazzo, admitted, in an affidavit attached to the City's answer, that "this bulletin board is customarily used by the union representing [EPOs]." (Ans., Ex. B).

Dyce, and DEP's Equal Employment Opportunity Officer, both of whom "confirmed that the posting was inappropriate by the threatening nature of the message. (Ans., Ex. B ¶ 6). According to Inspector Milazzo, this posting also was inappropriate because it appeared on "the letterhead of [the] Watershed PBA," which is not the certified bargaining representative for EPOs. (*Id*.). According to the City, based upon these consultations, DEP determined that this posting violated DEP's Code of Discipline §§ E(20) and (21)[6] and the parties' collective bargaining agreement ("Agreement") Article VII.[7] Shortly thereafter, this posting was removed from the bulletin board.

On September 24, 2008, Inspector Milazzo informed Captain Arnold to "conduct an inquiry into who was responsible for the posting." (Ans., Ex. B ¶ 8). On September 25, 2008, Captain questioned supervisory staff at the 7th Precinct, including Petitioner, but no one "identified the source of the posting." (Ans., Ex. ¶ 10). According to Inspector Milazzo, on October 1, 2008, the same posting appeared on the bulletin board at the Hillview Precinct, and, again, Captain Arnold removed it.

---

[6] DEP's Code of Discipline § E(20) states:
Employees shall not engage in any conduct that interferes with any activities of the Agency/ or improperly influences any decision of the agency or that of its officers or employees.

DEP's Code of Discipline § E(21) states:
Employees shall not distribute or post or attempt to distribute or post in or about any agency premises . . . any unauthorized notices, bulletins or announcements, except announcement or notices from certified labor unions may be distributed before or after scheduled tours of duty, to employees during scheduled lunch period. Certified labor union representative may post notices, bulletins, or announcement on bulletin boards reserved for such items pursuant to collective bargaining agreements.

[7] Agreement, Article VII, in pertinent part, states:
The Union may post notices on bulletin boards in places and locations where notices usually are posted by the Employer for the employees to read. All notices shall be on Union stationary, and shall be used only to notify employees of matters pertaining to Union affairs.

On October 8, 2008, Petitioner filed the instant improper practice petition alleging that DEP violated the NYCCBL by engaging in a pattern of discriminatory behavior that targeted Petitioner, and, by removing a posting from the Union bulletin board, interfered with EPOs' exercise of their statutory rights. As a remedy, Petitioner requested an order that DEP "cease and desist from removing printed communication protected by the [NYCCBL] from designated Union Bulletin Board and threatening employees with discipline if the printed communications are re-posted." (Pet., p. 2). Further, Petitioner requests an order that DEP cease and desist from interfering with, restraining, retaliating against or coercing employees in the exercise of their rights.

On October 17, 2008, Petitioner, "in order to furnish [two EPOs] with fair Union representation during a disciplinary action," attended a Step I conference and then a disciplinary hearing located at the Office of Administrative Trials and Hearings ("OATH"). (Rep., Ex. J).[8] According to an email sent by Lieutenant Michael Reda, he authorized Petitioner to participate in these disciplinary hearings. However, Inspector Milazzo, who also was at these hearings, then called Lieutenant Reda and informed him that Petitioner "was to return to the precinct or use his own leave time being that [Petitioner] did not receive prior authorization from Director Dyce. Confused by "this new procedure [concerning] requests for union representation," Lieutenant Reda wrote an email to both Inspector Milazzo and Director Dyce inquiring about the methods by which Union representatives need to undergo to get valid, authorized leave to attend Union related business. (*Id.*).

The next day, Director Dyce responded stating that DEP is not utilizing new procedures. She further wrote that:

---

[8] This exhibit is a chain of emails between Petitioner, Lieutenant Michael Reda, and Director Dyce.

> Some releases are excused which means the employee is paid as if s/he were at work. Those situations usually involve [labor-management] meetings. . . . Other releases are not paid, and the employee has to submit a leave slip and use his own time. All release [requests] should be made in writing by the union, on union letterhead, [and] submitted to my office. My office will then contact the division regarding the release, and where feasible, the release will be granted.

(*Id*.). Lieutenant Reda's response, on October 21, 2008, stated that these release procedures were "new" because such procedures did not exist when SEIU, Local 300 represented EPOs. (*Id*.).

That same day, Petitioner wrote an email to Director Dyce regarding this event and stated that he "had been only several feet away from Inspector Milazzo throughout the afternoon, and at no time did he relay to [Petitioner] that there was a problem concerning [Petitioner's] representing two [EPOs] in their disciplinary hearings." (*Id*.). He further stated that Inspector Milazzo "continue[d] to retaliate against [Petitioner], members of [the] Union, and LEEBA in its entirety," and that, since 2002 when he became a delegate, he has "never seen these so called established procedures." (*Id*.).

On October 22, 2008, Director Dyce responded to Petitioner's email and stated that, since he was only authorized to attend the Step I conference and not the disciplinary hearing at OATH, Petitioner was on "excused" leave for only part of the day. As such, DEP's timekeeper within the 7th Precinct used Petitioner's compensatory time in order to make-up for the hours that Petitioner was not at his assigned post. (*Id*.). Director Dyce concluded by stating that, "to avoid conflicts of this nature, [Petitioner should] have the union submit on letterhead (or via email) to [Director Dyce's] office, in advance, a request to have [Petitioner] released to attend these sorts of activities." (*Id*.). In Petitioner's responses to this email, he highlighted the fact that he was in a DEP-marked vehicle with one of the EPOs facing disciplinary charges. Thus, returning to the Hillview Precinct immediately after the Step I conference would have been imprudent because he either would have

left an EPO stranded at OATH, or Petitioner would have left the DEP-marked vehicle with that EPO and been required to take public transportation back to the Hillview Precinct.

Director Dyce responded to this email by stating: "after reviewing your email, I have further reviewed the situation and find that there is merit to your argument about your inability to return." (*Id*.). According to Director Dyce, after speaking with Inspector Milazzo, the compensatory time usage was restored to Petitioner's balance, and his pay for that day would be as if he worked a normal shift.

Petitioner, on February 2, 2009, submitted a Reply that contained a number of new allegations to include the events that occurred after Petitioner initiated the instant matter. On February 3, 2009, Counsel for the city wrote to the Board requesting that these newly alleged contentions contained in Petitioner's reply be ignored. The City, in the alternative, requested that the Board allow the City to submit a sur-reply to address these newly alleged facts and arguments. By letter dated February 9, 2009, the Board granted the City's request that to file a sur-reply. The City's Sur-Reply was received on March 12, 2009.

POSITIONS OF THE PARTIES

Petitioner's Position

First, Petitioner argues that DEP violated NYCCBL § 12-306(a)(1) by interfering with the statutory rights of LEEBA members when Captain Arnold, upon direction from Inspector Milazzo, removed the posting that appeared on the Union bulletin board at the 7th Precinct.[9] DEP's action

[9] NYCCBL § 12-306(a)(1) provides, in pertinent part:
It shall be an improper practice for a public employer or its agents:

(continued...)

prevented the Union from keeping its constituents informed about an ongoing federal lawsuit which effected all LEEBA members, both individually and as a whole. Interruption of the distribution of Union materials constitutes a violation of the NYCCBL; and Inspector Milazzo, by his own admission, stated that this bulletin board was customarily used to post Union communications.

Second, Petitioner contends that DEP violated NYCCBL § 12-306(a)(2) by dominating and interfering with the Union's ability to represent its members. In essence, DEP demonstrated favoritism toward SEIU, Local 300 because, prior to LEEBA's certification as the collective bargaining representative for EPOs, DEP did not demonstrate any hostility toward the delegates of that union. However, subsequent to the certification of LEEBA, DEP, specifically, Inspector Milazzo and Captain Arnold, acted in a hostile and retaliatory manner toward the delegates of the Union. Petitioner, who was a representative for both SEIU, Local 300 and LEEBA, asserts that DEP's new attitude toward protected union activity establishes DEP's attempts to dominate and interfere with the administration the Union.

Finally, with regard to Petitioner's retaliation claim against DEP, Petitioner asserts that Inspector Milazzo and Captain Arnold retaliated against Petitioner because of his active participation

---

[9](...continued)
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(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 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.

in such protected union activity, including but not limited to, communicating concerns of EPOs to DEP regarding work place safety and privacy; wage, hour, overtime and benefit disputes with DEP, and representing other EPOs in grievance and disciplinary hearings. As a result of Petitioner's protected union activity, he was docked pay and leave time, had his overtime assignments reduced, and had certain supervisory duties taken away. Based upon the temporal proximity between Petitioner's protected union activity and the adverse employment actions, the motivation for such discriminatory treatment can be reasonably inferred to be based upon anti-union animus. Accordingly, DEP violated the NYCCBL and appropriate remedies should be awarded to Petitioner.

City's Position

First, the City contends that a large portion of Petitioner's allegations contained in the Reply should be dismissed because they were not responsive to the City's answer and were outside the scope of the facts contained in the original petition. Specifically, the petition dealt exclusively with an incident in which DEP allegedly removed a communication from a bulletin board located at the Hillview Precinct, while the Reply contains allegations ranging from improper reduction of pay to retaliatory reduction of job assignments. Accordingly, Petitioner's claims that are unrelated to those set forth in the petition should be excluded from consideration by the Board, pursuant to Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") § 1-07(c)(4).[10]

Alternatively, the City argues that a majority of the allegations contained in Petitioner's

---

[10] OCB Rules § 1-07(c)(4), in pertinent part, states:
[P]etitioner may serve and file a verified reply which shall contain admissions and denials of any facts alleged in the answer. . . . The reply should be limited to a response to specific facts or arguments alleged in the answer, and the Board may disregard new facts or new arguments raised therein.

Reply are untimely. Pursuant to NYCCBL § 12-306(e) and OCB Rules §§ 1-07(b)(4) and 1-12(f), Petitioner was required to file any and all claims within four months of the occurrence of these events in order for these claims to be timely.[11] However, most of Petitioner's claims contained in the reply were filed well after the four months statute of limitations. Since Petitioner filed the petition on October 6, 2008, claims relating to events that occurred on or after June 6, 2008 are timely, but most of Petitioner's claims contained in his reply occurred prior to this date. Therefore, Petitioner's claims that pre-date the June 6, 2008 should be dismissed.

The City also contends that Petitioner failed to establish a *prima facie* case with regard to his claim that DEP violated NYCCBL § 12-306(a)(1) and (3). Petitioner was not involved in protected union activity because the posting dealt with a federal lawsuit not a Union matter, did not appear on

---

[11] NYCCBL § 12-306(e), in pertinent part, states:
A petition alleging that a public employer . . . 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.

OCB Rule § 1-12(f) provides, in relevant part:
In computing any period of time prescribed or allowed by these rules, or by order or direction, the day of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday or legal holiday, in which event the period shall run to the next business day.

LEEBA letterhead, and Petitioner never claimed responsibility for placing the posting on the bulletin board in the Hillview Precinct. Petitioner also cannot demonstrate that any adverse employment actions taken against him, including the removal of the posting, was motivated by anti-union animus. Petitioner's allegations that DEP retaliated against Petitioner due to his protected union activity are conclusory and speculative.

The City further argues that the removal of the posting was motivated by legitimate business reasons, since the posting contained inflammatory, inappropriate and threatening language, which violated DEP's Code of Discipline §§ E(20) and (21) and Article VII of the Agreement. Also, the posting appeared on the letterhead of an organization that was not the certified labor union for EPOs, and Petitioner, if he was responsible for the posting, distributed an unauthorized announcement of an organization not recognized by DEP because LEEBA is the certified collective bargaining representative for EPOs. Moreover, the posting was not on LEEBA stationary, which contradicts Article VII of the Agreement requiring all Union notices be posted on Union stationary.

The City further argues that DEP's removal of the posting was in accordance with NYCCBL § 12-307(b).[12] Since the posting contained inflammatory, inappropriate and threatening language, the removal of the posting was based upon the legitimate business reason of maintaining the order and effectiveness of EPOs within DEP. Accordingly, even if Petitioner could demonstrate a *prima facie* case of interference and/or retaliation, DEP's removal of the posting was ultimately motivated

---

[12] NYCCBL § 12-307(b) states, in pertinent part:
It is the right of the City, or any other public employer, acting through its agencies to determine the standards of service to be offered by its agencies; . . . direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization . . . .

by legitimate business reasons, therefore Petitioner's claims should be dismissed.

With regard to Petitioner's claim that DEP dominated the administration of the Union in violation of NYCCBL § 12-306(a)(2), the City argues that Petitioner has not demonstrated a *prima facie* case of this type of violation. There is no basis that DEP dominated with the formation and/or administration of LEEBA, acted in a manner that demonstrated that DEP ran LEEBA, or that DEP supported the actions of the SEIU, Local 300 over LEEBA. Furthermore, Petitioner has not alleged any evidence that DEP acted in a manner "which would rise to the level of domination or interference in the activities or operation of [the Union]." (Ans. ¶ 35).

Finally, the City contends that a number of Petitioner's claims are beyond the scope of this Board. Any claims that allege discrimination or retaliation based upon, including but limited to, an employee's race, gender and/or national origin, are outside the scope of this jurisdiction. As such, any claim raised by Petitioner that involve an adverse employment action that was allegedly undertaken due to a matter that involves the Equal Employment Opportunity office should be dismissed.

DISCUSSION

At the outset, we must address the City's argument that, pursuant to OCB Rules § 1-07(c)(4), many of the factual allegations made by Petitioner in his reply must be ignored by the Board, as a large portion of these allegations were not responsive to the City's answer and were outside the scope of the facts contained in the original petition. We do not require a petitioner, particularly one appearing *pro se*, to submit technically perfect pleadings, only that "a petitioner provide information sufficient to place the respondent on notice of the nature of the claim and to enable [respondent] to

formulate a response thereto." *UPOA*, 37 OCB 44, at 9 (BCB 1986); *see also* 29 OCB 23, at 8 (BCB 1982). "We have held that persons filing *pro se* should be treated less stringently," and do not "require a *pro se* petitioner to execute technically perfect or detailed pleadings." *Abdal-Rahim*, 59 OCB 19, at 3 (BCB 1997).

With regard to the substantive allegations in a reply, the very language of OCB Rules § 1-07(c)(4) states that "the Board may disregard new facts or new arguments raised therein," providing an inherent amount of discretion by the Board to contemplate and analyze the newly alleged facts and/or arguments contained in the reply. OCB Rules § 1-07(c)(4) (emphasis supplied). In addition, when new information is presented by a *pro se* petitioner in a responsive pleading to the respondent's answer, we have provided respondent with an opportunity to address the newly alleged facts and arguments. *See Cunningham*, 51 OCB 15, at 21 (allowing respondent to submit an additional submission since a *pro se* petitioner submitted a responsive pleading containing "more specific allegations of the bases for [his] claims").

In the instant matter, we find that the new factual and legal contentions contained in Petitioner's reply will be considered by the Board. Petitioner initiated this action *pro se* and alleged that DEP violated NYCCBL § 12-306(a)(1), (2), and (3) by removing a posting from a bulletin board used by the Union, and engaged in "a pattern of retaliation against [Petitioner]," thereby placing DEP on notice that his claims involved alleged interference with statutory rights, alleged domination of the administration of LEEBA, and alleged discriminatory acts against Petitioner. (Pet. ¶ 3). Though not artfully or technically detailed, DEP had sufficient notice concerning the claims raised in the petition. In addition, Petitioner, in his reply, sets forth in great detail the acts of interference, domination and discrimination allegedly perpetrated by DEP, and the City, via its sur-reply, had an

opportunity to respond to these bolstered allegations. Since the City received an ample period of time to respond to these clarifying allegations and, in fact, submitted a response, we cannot find that the City was prejudiced in any manner. Therefore, based upon our statutory and case law, we reject the City's argument that we should ignore Petitioner's contention in his reply.

In an additional preliminary matter, the Board has determined, in the interests of administrative efficiency, that this case presents two separate sets of claims. Consideration of these sets of claims together is not warranted, as one set is susceptible to resolution on the pleadings and the other is not. This Board has the authority to consolidate or sever two or more scope of bargaining, arbitrability, mediation, impasse, and/or improper practice proceedings. *See* OCB Rules § 1-12(m). In the past, we have severed claims that arise from the same petition and proceeding. *See DC 37, Local 1407*, 47 OCB 1, at 8-10 (BCB 1991) (severing the claims of two employees because the union failed to recite enough facts to allege a *prima facie* retaliation claim for one of the employees; but, satisfied its initial burden for the other employee); *see generally DC 37, Local 1757*, 53 OCB 4, at 41 (BCB 1994).

Consistent with our case law, we sever the following claims from the petition in the instant matter: Petitioner's claims concerning DEP's alleged improper reduction of pay and annual leave balance in November 2006; DEP's alleged improper rescission of Petitioner's paid leave to attend a LEEBA meeting in December 2006; DEP's alleged improper reduction of pay and annual leave balance, as a result of a DEP audit in February 2007; Petitioner's claims of alleged discriminatory treatment arising out of the "personal vacation" in March 2008; and Petitioner's claim arising out of the alleged improper inspection in May 2008. All of these claims contain a fatal flaw of timeliness, which does not exist with the other claims contained in the petition, and we sever them

accordingly.

With regard to the previously stated severed claims, we dismiss these claims in their entirety because they are untimely. The NYCCBL requires that an improper practice charge must be filed no later than four months from the date the disputed action occurred. *See* NYCCBL § 12-306(e); OCB Rules §§ 1-07(b)(4) and 1-12(f). Therefore, the statute of limitations precludes this Board from ruling on the substantive merits of the incidents that occurred prior to the applicable four month period. Since Petitioner filed the petition on October 6, 2008, claims relating to events that occurred on or after June 6, 2008 are timely, while any of DEP's actions that occurred prior to October 6, 2008 are untimely.

Nevertheless, "factual allegations of events that occur outside of the four month limitations period . . . cannot be themselves treated as remediable violations of the NYCCBL," but can be "considered only as background information that may illuminate the context and motivations underlying actions that form the basis of timely claims under the NYCCBL." *Colella*, 79 OCB 27, at 49-50 (BCB 2007); *see DC* 37, 77 OCB 33, at 24 (BCB 2006). Earlier events, including but not limited to Petitioner's claims concerning DEP's alleged improper reduction of pay and annual leave balance in November 2006; DEP's alleged improper rescission of Petitioner's paid leave to attend a LEEBA meeting in December 2006; and Petitioner's claims of alleged discriminatory treatment arising out of the "personal vacation" in March 2008 are not remediable. Yet, these incidents provide background and may illuminate the motivations for actions that are the basis of timely claims.

With regard to the claims that survive the initial level of scrutiny of timeliness, we find that an evidentiary hearing is necessary to resolve the relevant material questions of fact that have been

raised by the submissions of Petitioner and the City. Specifically, we find that Petitioner has alleged timely violations of the NYCCBL arising out of the following events: i) the statements concerning the amount of compensation Petitioner receives from the Union due to his status as LEEBA representative; ii) DEP's denial of Petitioner's financial hardship application related to his medical insurance coverage; iii) Captain Arnold's reduction of Petitioner's supervisory duties and overtime assignments; iv) the removal of the Union posting on the bulletin board in the 7th Precinct; and v) the time and leave dispute between DEP and Petitioner which occurred on October 17, 2008. Accordingly, we order a hearing concerning these limited, timely issues raised by Petitioner.

.

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 claimed violations of NYCCBL § 12-306(a)(1), (2), and (3) that pre-date June 6, 2008 in the improper practice petition filed by Joseph Andreani, docketed as BCB-2725-08, and the same hereby are, dismissed; and it is further

ORDERED, that an evidentiary hearing be conducted regarding the claimed violations of NYCCBL § 12-306(a)(1), (2), and (3) that occurred after June 6, 2008, as set forth in the improper practice petition filed by Joseph Andreani, docketed as BCB-2725-08.

Dated: New York, New York
April 22, 2009

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PETER PEPPER
MEMBER