Nardiello, 2 OCB2d 5 (BCB 2009)

(IP) (Docket No. BCB-2719-08).

Summary of Decision*:** Petitioner alleged that HHC retaliated against her through negative evaluations and other actions, cumulating in suspensions and disciplinary charges that could lead to termination in violation of NYCCBL § 12-306(a)(1) and (3). Further, that HHC attempted to coerce her into attending a meeting without her Union representative and interfered with the exercise of her rights by not aiding her in pursuing grievances in violation of NYCCBL § 12-306(a)(1). Petitioner alleged that the Union breached its duty of fair representation by not filing grievances on her behalf and by failing to properly represent her in the disciplinary matters in violation of NYCCBL § 12-306(b)(3). The Board found that Petitioner failed to establish that either HHC or the Union violated the NYCCBL, 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 Proceeding

-between-

SUZANNE NARDIELLO,

Petitioner,

-and-

1199 SEIU UNITED HEALTH WORKERS EAST and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On September 8, 2008, Suzanne Nardiello filed a *pro se* verified improper practice petition against 1199 SEIU United Health Workers East ("Union") and the New York City Health and Hospitals Corporation ("HHC") (collectively, the "Respondents").[1] Petitioner raises claims under

[1] Prior to filing the verified petition form itself, Petitioner, on September 4, filed a 53 page single spaced document ("September 4 Filing") and 65 exhibits ("Pet., Ex."), which have been

the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3), and § 12-306(b)(3). Petitioner alleges that HHC retaliated against her for engaging in protected Union activity through, among other acts, negative performance evaluations and two suspensions which could lead to termination. Petitioner also alleges that HHC attempted to coerce her into attending a meeting without her Union representative and interfered with the exercise of her statutory rights. Petitioner alleges that the Union breached its duty of fair representation by not filing grievances and by failing to properly represent her in disciplinary matters. Respondents allege that Petitioner has failed to state a claim upon which relief may be granted and that many of Petitioner's claims are time barred. Further, HHC argues that it had legitimate business reasons for every action complained of by Petitioner. Finally, HHC argues that any surviving claims should be deferred to the grievance process in the parties collective bargaining agreement ("Agreement"). This Board finds that Petitioner failed to establish that either HHC or the Union violated the NYCCBL. Accordingly, we dismiss the petition in its entirety.

BACKGROUND

Overview

Petitioner is a Dietitian Level II, a title represented by the Union, and has worked in the Food and Nutrition Services Department ("FNS Department") of Bellevue Hospital Center ("Bellevue") since February 17, 2004. The FNS Department currently has 12 dieticians, including Petitioner. Since April 2005, food services at HHC facilities, including the FNS Department, have been

---

deemed to constitute part of the petition. Two substantively identical supplemental petitions were filed, the second on November 5 correcting the lack of numbered paragraphs in the first. References to "Sup. Pet." herein are to the November 5 submission.

managed by a private company, Sodexo. While Petitioner and the other dieticians are HHC employees, the managers of the FNS Department are Sodexo employees.

In June 2006, Sodexo management announced that it would focus on dieticians' productivity, measured by how many patients they see per day. In August 2006, Sodexo management announced that it would start enforcing HHC's time and leave regulations, something that previous management had not done.

In December 2006, Petitioner made a note in a FNS Department log book, known as the communications log, criticizing errors that nurses had made in the computer entries and suggesting an alternative approach; three co-workers signed their agreement to Petitioner's suggestion. In February 2007, management conducted at least one Departmental meeting attended by all dieticians regarding the time and leave regulations and productivity. Petitioner alleges that the log book entry and her attendance at the February meetings constitutes protected Union activity.

Petitioner's claims of retaliation fall into four areas. First was a threat to her employment. Immediately after a February 2007 meeting, Petitioner approached management to discuss the time and leave policy. At management's insistence, Petitioner's Union delegate also attended.[2] Petitioner describes the meeting as contentious with management acting unprofessionally and inappropriately. According to Petitioner, she ended the conversation by walking out when management wanted to continue, initially refused management's requests to return, and only returned at the request of her Union delegate. Upon Petitioner's return, a manager stated that he "did not like [Petitioner's] behavior and that he wants to make clear in front of [her] [U]nion representative that [Petitioner was]

[2] The term "Union delegate" where appearing herein refers to a co-worker of Petitioner representing the Union on site, as distinguished from the "Union organizer," a Union official who does not work at Bellevue.

out of line and that 'I can make her life miserable here at Bellevue if she continues.' [']I can get her fired.'" (Pet., Ex. 14).

Second, Petitioner received negative performance evaluations. The overall rating of Petitioner in her first four evaluations, covering up to February 16, 2007, was Satisfactory. Petitioner's overall rating was downgraded to Needs Improvement on her fifth evaluation, received on March 12, 2008, covering February 16, 2007– February 16, 2008, based upon below standard productivity and violations of the time and leave regulations. The Needs Improvement rating triggered a three month follow-up evaluation, given to Petitioner in July 2008, and, based upon further below standard productivity and violations of the time and leave regulations, further downgraded Petitioner's overall rating to Unsatisfactory, which can lead to termination.

Third, Petitioner was suspended twice and now is facing disciplinary charges that could lead to termination stemming from two altercations with a co-worker. In May 2008, Petitioner allegedly scratched a co-worker; in July 2008, Petitioner allegedly pushed the same employee. Petitioner argues that the first incident should have been handled informally. Instead, Petitioner was placed on pre-hearing suspension without pay. A Step I hearing was held but before a determination was issued the second incident occurred. Petitioner was again placed on pre-hearing suspension without pay. HHC has consolidated the maters. As Petitioner has been out on medical leave since August 2008, the Step I hearing has not been held and no determination has been issued.

Fourth, Petitioner's shift was changed in May 2007 from 6 a.m.– 2 p.m. to 7:30 a.m.– 3:30 p.m. Additionally, in July and August 2008 she was inappropriately counseled over fixing a lamp during work hours and an office move.

Petitioner's claims of coercion and interference fall into two areas. First, that management

interfered with Petitioner's exercise of her rights by not aiding her in pursuing grievances and by threatening her job in a February 2007 meeting, and by refusing her request for a signed copy of HHC's evaluation policy in July 2008. Second, in July 2008 management attempted to coerce her into attending a meeting regarding the follow-up evaluation without Union representation.

Petitioner claims that the Union breached its duty of fair representation by not filing grievances despite at least 11 written requests to do so, but admits that the Union filed two grievances on Petitioner's behalf and that Union officials attended at least 24 meetings that Petitioner had with management on the issues she sought to grieve. Petitioner also alleges that the Union failed to properly represent her in the 2008 disciplinary matters, which have not yet been resolved.

Protected Activity

Petitioner alleges that she "felt that because I expressed my concerns in the 'communications log,' Ann Kehoe was retaliating against me." (Sup. Pet. at p. 2). Kehoe supervises Petitioner. The entry referred to by Petitioner was made on December 7, 2006, and reads, in full:

> We all know that nursing can not–as history shows–complete the nursing screen correctly. I don't understand why we give them an opportunity to continue to do so! Worse off on a L[evel]1 option where by the burden & onus is on nutrition to waste time run around & correct their errors so that we are in compliance. A more effective & efficient standard would be to have the 'other' option in an area on the nutrition screen that enables nutrition to utilize our skills/expertise to code the [patient] correctly in an efficient/effective manner all the time keeping us in compliance & the room for error diminished for both nursing and nutrition. Today from psych we got 4 screens that were done in error–see attached–I hardly think talking to nursing will correct this ongoing problem.

(Pet., Ex. 8). Three co-workers signed the log entry indicating their agreement with Petitioner's notation. Petitioner alleges Kehoe removed the entry and questioned her about it.

In early February 2007, one or more Departmental meetings were held addressing

productivity and the time and leave regulations.[3] Petitioner's submissions do not indicated the extent of her participation but she did memorialize the meetings in memoranda to the Union. After the meeting, Petitioner approached Director of Labor Relations Brian Ellis because she was concerned about possible disciplinary action due her below standard productivity, unjust counseling regarding her sick time, and retaliation from Kehoe because of her entry in the communication log.[4]

Petitioner met with Ellis on February 10, 2007. Also attending were Arthur Simmons, a Bellevue Labor Relations Officer, Kehoe, and, at management's insistence, Petitioner's Union delegate. Petitioner describes Ellis' manner as "an antagonistic, intimidating dialog[ue]–to the point of suggesting that [Petitioner] get another job." (Sup. Pet., p. 2). Petitioner avers that Simmons "blatantly threatened [Petitioner's] job." (*Id.*).

Petitioner, allegedly on the advice of a Union official, memorialized this meeting in a February 12, 2007 memorandum to the Senior Associate Director of Human Resources in which she describes management as acting "antagonistic" and "intentionally taunting." (Pet., Ex. 14). The memorandum states that Petitioner asked Ellis "how he would feel about going behind closed doors to talk with a manager when that manager is acting in an unprofessional manner–clearly out of line and threatening," to which Ellis responded "maybe you should get another job." (*Id.*). Petitioner's description continues:

> [Ellis] stated that he felt [my tone and manner] was unprofessional and inappropriate. . . . I ended the conversation. They wanted to continue. . . . I turned to walk away. . . . At this point, [Kehoe] ran after me and requested I come back. . . . I came back

---

[3] The parties disagree as to the number of meetings but agree that at least one such meeting occurred on or before February 10, 2007.

[4] Although Respondents deny Petitioner's statement as to why she wanted the meeting, it is undisputed that Petitioner had met with Kehoe regarding her productivity and absenteeism.

> at the request of my union representative. At this time, [Simmons] stated in a raised voice, that he did not like my behavior and that he wants to make clear in front of my union representative that I am out of line and that *"I can make her life miserable here at Bellevue if she continues. I can get her fired."* He insisted *"I want the union person to hear this."*

(*Id.*) (emphasis added).

Petitioner asserts that in this meeting she was seeking guidance as to how to grieve the productivity standards and the time and leave regulations, and that Ellis' and Simmons' refusal to help left her "unable to proceed with my grievance pertaining to productivity/performance and time and leave." (Sup. Pet. ¶ 1). However, Petitioner does not allege management refused to answer any questions and admits management answered several of her questions before she walked out.[5]

HHC Time and Leave Regulations

Petitioner claims that her "evaluations were downgraded [due to] anti-union animus–retaliation." (Sup. Pet. ¶ 1). HHC claims that Petitioner's negative evaluations were based in part on her failure to abide by time and leave regulations, and Petitioner admits that "[i]n order to receive a 'satisfactory' or an 'above satisfactory' [rating] . . ., an employee need[s] to . . . follow the time and leave regulations." (Sup. Pet. ¶ 2).

HHC time and leave regulations are found in HHC Operating Procedures ("OP") 20-2 and 20-10. OP 20-10 states that an employee may be counseled if, during a six month period, the

---

[5] Among the questions asked and answered were if management: "can have a formal meeting with an employee without notifying us of the topic" (Ellis replied yes); "had a right to put notes in our file" (Ellis replied no, but stated that a manager can put notes regarding a meeting in the manager's own file); "has the right to threaten or act in an unprofessional manner such as raise her voice to an employee in an informal meeting" (Ellis replied a manager cannot threaten an employee and what is raising one's voice is open to interpretation); and "[can] threaten to take disciplinary action against an employee. For an example 'if you don't improve I will take this to the next steps–Labor Relations and Human Resources.'" (Ellis replied yes). (Pet., Ex. 14).

employee "has had three (3) unscheduled absences, or two (2) unscheduled absences immediately before or after a holiday or pass day." (HHC Ans., Ex. C). A pass day is a regularly scheduled day off. OP 20-10 also provides for counseling if an employee is excessively tardy, defined in OP 20-2 as "three (3) or more occasions in one month or in excess of thirty (30) minutes in one month." (*Id.*, Ex. B).[6] OP 20-2 also sets forth that an employee may be disciplined or terminated for "excessive lateness." (*Id.*). OP 20-10 provides for a warning notice for further unscheduled absences or excessive tardiness and that "disciplinary action shall be taken" for further unscheduled absences or excessive tardiness. (*Id.*, Ex. C). While these regulations pre-date Sodexo's management, they were not enforced by the FNS Department's previous management.

Petitioner denies that there was an explicit announcement that the FNS Department would begin enforcing the time and leave regulations, but admits that on August 9, 2006, Kehoe notified the dieticians that "all sick time will be reviewed." (September 4 Filing ¶ 15). Further, Petitioner complains that after the decision to enforce the time and leave regulations, "Kehoe never afforded the six months needed to improve." (Rep. ¶ 19). HHC avers that between August 4, 2006, and May 23, 2008, seven of the 12 dieticians, including Petitioner, were counseled for either absenteeism or tardiness and that two, including Petitioner, received warning notices, although Petitioner's warning notice was subsequently retracted. Petitioner admits that one other dietician, in addition to herself,

---

[6] Tardiness is defined as "arrival at the . . . work location after the beginning of the scheduled tour." (*Id.*). Excessive Lateness is also addressed in the Bellevue Human Resources Policies and Procedures Manual ("Manual"); copies of the relevant sections of which were distributed to staff at the February 2007 meetings. Manual Code L1 defines lateness as "any unauthorized absence which results in an employee's arrival at his/her work location after the beginning of the hour his/her tour is scheduled to start" and excessive lateness is defined as "un-excused lateness which results in an employee's late arrival at his/her desk or work location on three (3) or more occasions, or for thirty (30) minutes or more in one month." (Pet., Ex. 12).

received a rating of "Needs Improvement" due to time and leave violations and that, after the Union delegate "insisted that fairness be instituted in implementing policy," two other dieticians who had violated the time and leave regulations were re-evaluated. (Sup. Pet. ¶ 7). Petitioner alleges that Kehoe engaged in favoritism, that "only certain dieticians were verbally warned by Ann Kehoe–her 'favorites' were not" and that "it is apparent that this Ann Kehoe 'picks' and 'chooses' those individuals that she wants to enforce policy on." (September 4 Filing ¶¶ 15;106).

Petitioner was counseled three times and received one warning notice due to violations of the time and leave regulations. The warning notice was retracted when it was determined that the absences were covered by the Family Medical Leave Act (28 U.S.C. § 2601, *et seq.*) ("FMLA").[7]

Performance Evaluations

Petitioner has received six performance evaluations since her appointment on February 17, 2004. The first four evaluations rated Petitioner "Satisfactory" overall. The third evaluation, covering February 17, 2005–February 17, 2006, was signed on July 14, 2006, and noted as a "goal" that Petitioner "work on time management skills to achieve the [] standard of 12 to 15 patients per day." (Pet., Ex. 6). Only a month before this evaluation was given, the FNS Department adopted the standard of seeing 12 to 15 patients per day but, as the dieticians as a group failed to meet this goal, the standard was reduced to ten patients per day in February 2007. Petitioner's fourth

[7] On November 17, 2006, Petitioner was counseled after nine unscheduled absences, for a total of 11 days, with five immediately before or after a holiday or pass day, between February 6 and October 19, 2006. The second counseling occurred on December 18, 2007, after 14 unscheduled absences, for a total of 29 days, with ten immediately before or after a holiday or pass day, between May 16 and December 3, 2007. Kehoe issued Petitioner a warning notice on February 13, 2008, after Petitioner had six unscheduled absences, for a total of nine days, between December 3, 2007, and February 8, 2008, but this warning notice was retracted. Petitioner was counseled for a third time on March 24, 2008, for being tardy on four occasions, for a total of eight hours, between February 19 and March 12, 2008.

evaluation, covering February 17, 2006–February 17, 2007, noted that Petitioner still needed to improve her time management skills in order to meet the new lower standard.

Petitioner's fifth evaluation, covering February 17, 2007–February 18, 2008, was signed on March 12, 2008, rated Petitioner as "Needs Improvement" overall due to Petitioner being downgraded on two responsibilities from Satisfactory to Needs Improvement.[8] Petitioner claims that Kehoe informed her that she was downgraded on the "ensuring each patient receives optimal nutritional care" responsibility because it was "only now" that the productivity standard was reflected in the rating, with the fifth evaluation noting that Petitioner averaged seeing only 5.2 patients a day. (Pet., Ex. 38). The second responsibility downgraded was "conforms to established time and leave policies," and the February 2008 evaluation lists six unscheduled absences, for a total of nine days, with four before or after a pass day, between December 3, 2007, and February 8, 2008.

Petitioner filed a rebuttal to the fifth evaluation in which she questioned the productivity standards and complained that she was offered no assistance to reach them. Petitioner did not dispute that she was in violation of the time and leave regulations but argued that she "had requested as a reasonable accommodation" under the Americans with Disabilities Act (42 U.S.C. § 1201, *et seq.*)("ADA") "that adjustment be made regarding time and leave policy . . . I feel this is a violation of my rights under the ADA." (Pet., Ex. 38).[9]

HHC policy calls for any employee who received an overall evaluation of less than

---

[8] Petitioner was also rated Needs Improvement on a third responsibility (the initial charting in the medical record and screening patients for possible nutritional problems and accuracy of the diet order) but she had been similarly rated on her fourth evaluation.

[9] Respondents do not dispute that Petitioner has a disability, the details of which are not pertinent to a legal questions resolved in the instant matter and therefore are not described herein.

Satisfactory to receive a three month follow-up evaluation, and the Union avers that both the Union delegate and the Union organizer so informed Petitioner, but Petitioner complains she was not aware of the follow-up evaluation until significantly after the evaluation period began.[10]

Petitioner's follow-up evaluation, her sixth evaluation, covered March 12–July 8, 2008, and was signed on July 8. Petitioner's rating was downgraded to Unsatisfactory overall due to her continued decline in the two responsibilities downgraded in the fifth evaluation, now further downgraded from Needs Improvement to Unsatisfactory.[11] The follow-up evaluation noted that Petitioner averaged seeing only five patients a day and lists five instances of unscheduled absences for a total of 17 and a half days between March 7 and June 17, 2008. HHC's OP 20-40, §3E, states that "[i]f the overall rating in the follow-up evaluation is less than Satisfactory, disciplinary action should be considered with a view towards either demoting or terminating the employee." (HHC Ans., Ex. F).

Petitioner, through her Union delegate, filed a grievance on July 7, 2008, stating that management "attempted to hold a reevaluation which could possibly lead to disciplinary action without respecting my right to [U]nion representation." (Pet., Ex. 51). The evaluation meeting was initially scheduled for July 1, 2008, a day Petitioner's Union delegate was absent, although another

---

[10] Bellevue's Administrative Policy and Procedure reads, in pertinent part, that "[a] follow-up evaluation must be prepared after three (3) months for any employee who has received a below satisfactory rating." (Pet., Ex. 53). Similarly, HHC's OP 20-40, §3E, states: "A follow-up evaluation is required if an employee has received an overall evaluation which is less than Satisfactory," and that "the employee must be notified as soon as possible of the requirement for the follow-up evaluation and the dates of the evaluation period." (HHC Ans., Ex. F). HHC avers that Petitioner was so informed on March 12, 2008, and that the other dietician who received an overall Needs Improvement rating in 2008 also had a follow-up evaluation.

[11] Petitioner's rating on the initial charting in the medical records responsibility remained Needs Improvement and she was rated Satisfactory on all other responsibilities.

Union representative was available. When Petitioner requested a postponement, management inquired as to "how come [she] couldn't get a union present [*sic*] when she had one yesterday." (Pet., Ex. 5). However, management acceded to Petitioner's demand and postponed the meeting until July 8, when Petitioner's choice of Union representative was available. On July 9, Kehoe denied this grievance, stating: "Union representation in not necessary to review evaluations. Rebuttal is your recourse." (Pet., Ex. 51). Despite the denial of the grievance, it is undisputed that Petitioner was allowed her choice of Union representative in all evaluation meetings.[12]

Petitioner, with her Union delegate, met with Kehoe on July 8, 2008, to review the follow-up evaluation, during which Petitioner requested, and Kehoe provided, a copy of the follow-up evaluation policy. Petitioner subsequently requested a signed copy of the same policy from Ellis. Ellis refused on the grounds that Petitioner already possessed a copy of the policy, stating in a July 10 e-mail, on which Petitioner's Union delegate was copied, that Petitioner "will not get the policy from me. The bottomline [*sic*] is your evaluation is unsatisfactory and your department will begin progressive discipline. If your work performance impacts on patient care[,] disciplinary action will be requested." (Pet., Ex. 53).[13] Petitioner alleges that Ellis' refusal is a "form of interference, intimidation and retaliation." (Sup. Pet. ¶ 4). On July 18, and again on July 21, 2008, Petitioner sent

---

[12] Petitioner initially claimed that she "was literally coerced and intimidated by Ann Kehoe, . . ., into attending my last evaluation meeting without my right to have Union representation." (Sup. Pet. ¶ 4). However, in her Reply, Petitioner clarified that the "Employer allowed Union Delegate [] to be present after [I] insisted and only after [I] was subject to repeated attempts of intimidation, and harassment all occurring when [my] Union delegate [] was unavailable." (Rep. ¶ 4).

[13] Ellis also stated that "[i]n the future be advised your [U]nion representative will not be permitted to participate in the evaluation process as the evaluation process is not a discipline process." (Pet., Ex. 53). Despite Ellis' comments, Petitioner was allowed to have her Union delegate attend subsequent meetings with management regarding her evaluations.

her Union delegate a rebuttal of the follow-up evaluation, but the record is not clear whether the Union ever received it or whether it was also sent to HHC.

On August 15, 2008, another counseling session was held regarding the follow-up evaluation, at which Petitioner was presented with a three month Action Plan that called for Petitioner to increase her productivity to eight patients per day and for her to be in compliance with the time and leave regulations. Petitioner submitted a written response to management in which she claimed that Kehoe's superior had observed her performance on December 6, 2007, and "assured me that my work was excellent." (Pet., Ex. 65). Petitioner also claimed that none of her supervisors saw eight patients a day. Regarding the time and leave regulations, Petitioner responded: "I requested an adjustment to the time and leave policy by my rights under the [ADA]. plan [*sic*] to recognize my medical condition and abide by laws governing it." (*Id.*).

Disciplinary Charges

During the period of Petitioner's follow-up evaluation (March 12–July 8, 2008), Petitioner was involved in two altercations with a co-worker. The first, according to the charges filed against Petitioner, occurred on May 8, 2008, when Petitioner "proceeded to harass" a co-worker by stating "[y]ou have been giving me dirty looks for several years" and then accused the co-worker "of making telephone calls that [Petitioner] had received from numbers listed under her name." (Pet., Ex. 50). Petitioner then allegedly handed the co-worker a paper listing the numbers which she subsequently "snatched . . . away, superficially scratching the [co-worker's] right wrist." (*Id.*). When the co-worker indicated that she would report the incident, Petitioner allegedly stated: "No you won't, I will get you." (*Id.*). Pursuant to § 7.5.2 of HHC's Personnel Rules and Regulations, Petitioner was placed on pre-hearing suspension without pay from May 9 to June 9, 2008. (Conference Ex. C.).

On June 13, 2008, Petitioner was charged with three counts of gross misconduct: harassing, scratching, and threatening the co-worker.

Petitioner denies the charges and argues that her actions "do not represent 'gross misconduct.'" (Sup. Pet. ¶ 10). Petitioner has not provided any details regarding this incident, except for the following brief characterization in her September 4 Filing:

> 5/8/08 I had been receiving phone calls on my home number–as hang ups for some time. When I looked up some of these numbers, they had the same last name as one of the RN's on a unit that I cover (20E). . . . I would like to confront the RN but do not want to violate her in any way. . . . I follow [a friend's] instructions and speak with the RN. She is extremely belligerent and I am taken off guard by her stance.

(September 4 Filing ¶ 118). Petitioner claims that management "took a situation that should have been addressed between two individuals through discussion and instead orchestrated bogus charges in an attempt to intimidate and coerce me into a 'settlement' thereby establishing a record of 'misconduct.'" (Sup. Pet. ¶ 10). A Step I(A) conference was held by Simmons on June 20, 2008. The Union negotiated a settlement offer with HHC that Petitioner declined.[14]

On June 23, 2008, Petitioner filed a grievance claiming the denial of pay for a half hour of lunch due to her attendance at the June 20 conference. Petitioner filed the grievance directly after the Union informed her that it "would not process her grievance . . . because it lacked merit in light of her flexible lunch schedule." (Union Ans. at ¶ B(4)). HHC also asserts Petitioner did not suffer any loss of pay on June 20 and denied the grievance.

A second altercation occurred on June 26, 2008, between Petitioner and the same co-worker. Petitioner filed a Hospital Police Report alleging that the co-worker, when exiting an elevator, had

---

[14] The details of the offer are not clear, as HHC only describes its initial offer, while the Union avers that it had convinced HHC to reduce Petitioner's total penalty to a 15 day suspension.

pushed her. Hospital Police referred the matter to Bellevue's Office of Labor Relations ("Bellevue OLR"), which initiated an investigation with which Petitioner allegedly refused to cooperate, and which concluded that Petitioner had filed a false police report, in that Bellevue OLR concluded that Petitioner had pushed the co-worker and not the reverse. Petitioner claims that the officer who took her police report informed her that Bellevue OLR did not believe her because "they have cameras in the elevators." (September 4 Filing ¶ 153). On July 10, 2008, Petitioner was once again placed on pre-hearing suspension without pay. On August 22, 2008, disciplinary charges were preferred against Petitioner for two counts of gross misconduct, alleging that Petitioner "provided Hospital police false information" and that she "failed to cooperate in an official agency investigation." (HHC Ans., Ex. L). The two disciplinary matters have been consolidated. A Step I(A) conference was scheduled for August 25, 2008, but canceled when Petitioner went out on medical leave, and the consolidated disciplinary matter has been held in abeyance since.

Lamp

Petitioner describes as an act of retaliation unwarranted counseling regarding a lamp. In February 2008, HHC provided a 10,000 lux lamp to Petitioner as an accommodation for her disability. On April 29, 2008, Petitioner e-mailed Director of the FNS Department Donald Sheen, informing him that "due to lack of accommodations which go hand and hand with my therapy, I will be unable to use the lamp for therapy at this point in time." (HHC Ans., Ex. M). That same day, Bellevue's EEO Officer e-mailed Petitioner that "[s]ince the lamp is Bellevue's property, I recommend that it be kept in either [Kehoe's] or [Sheen's] possession until you notify them that you wish to start using it." (*Id.*). The next day, Sheen instructed Petitioner in an e-mail to return the lamp to Kehoe or himself. It is undisputed that Petitioner did not return the lamp. In June 2008,

Petitioner informed Sheen that the lamp was broken. Petitioner states that Sheen gave her permission to keep the lamp and provided her with a screwdriver to fix it. HHC avers that Sheen told Petitioner not to try to fix the lamp but to return it, as previously instructed. It is undisputed that Petitioner fixed the lamp during work hours. At the July 8, 2008, review of the follow-up evaluation, Kehoe discussed with Petitioner her failure to return the lamp as instructed, that it was inappropriate for her to fix the lamp at all, and that it was inappropriate for her to fix the lamp during work hours.

Office Move

Petitioner describes as an act of retaliation unwarranted counseling regarding an office move. It is undisputed that in May 2008, Petitioner moved into a recently vacated office without permission from management. Kehoe became aware of the move on July 14 after she had authorized another employee to move into the office. Petitioner avers that prior to her moving, the other employee had agreed that Petitioner would move into the recently vacated office, while the co-worker would move into Petitioner's old office. Petitioner claimed she was unable to notify management of the office switch due to her suspension, and complains that the other employee was not counseled. Nothing in the record indicates that the other employee actually moved. Petitioner was counseled for moving offices without permission during her August 15 evaluation meeting.

Shift Change

Petitioner describes as an act of retaliation the changing of her shift hours in May 2007. According to Petitioner, upon her return from a FMLA leave on April 16, 2007, she was given the choice of two units. Petitioner chose a unit that included "rehab patients," who are at rehabilitation from 9:30 a.m. to 12:30 p.m., and, therefore, inaccessible to the dieticians during those hours. Rehab patients are considered low priority. Petitioner quickly realized that, since she had to see the high

priority patients in the morning, she would not have enough time in the afternoon to see all of the rehab patients, take her lunch hour at 1 p.m., when she was used to taking it, and then leave at 2 p.m., when her shift ended. On April 17, 2007, Petitioner informed Kehoe of this and requested the other unit initially offered to her on April 16. Kehoe denied Petitioner's request and instead changed her shift from 6 a.m.–2 p.m. to 7:30 a.m.–3:30 p.m., effective May 6, 2007.

On April 18, 2007, Kehoe announced to all dieticians that, effective May 6, 2007, except for dieticians assigned to accompany physicians on surgical rounds, the early shift would change from 6 a.m.–2 p.m. to 7:30 a.m.–3:30 p.m. This shift change affected only two of the 12 dieticians, including Petitioner. The other dietician, however, was assigned to the General Surgery Unit and would still work the 6 a.m.–2 p.m. shift some days. The shift changes were reiterated in an April 19 memorandum to Petitioner and at an April 25 staff meeting. In an April 26 meeting between Kehoe, Petitioner, and her Union delegate, Petitioner requested that Kehoe not implement her shift change, a request Petitioner repeated in writing that day and again on April 29. The request was denied by Kehoe in a May 4 meeting with Petitioner and her Union delegate. Petitioner, however, continued to work her old shift (6 a.m.–2 p.m.) until May 16 when the Union organizer informed her that the shift change was within Bellevue's authority and was not grievable.[15] Thereafter, Petitioner worked the new shift. Kehoe notified Petitioner by e-mail, with a copy to Sheen, that Petitioner had been insubordinate by working her old shift on six occasions between May 6 and May 16, 2007.

---

[15] The Union avers that nothing in the Agreement would permit them to grieve the shift change and that it lacked any medical evidence of a health impact due to the shift change upon Petitioner. Petitioner, however, avers that the shift change was grievable, that the Union delegate had attended all meetings regarding accommodations, received copies of the documents Petitioner provided management, and that the Union never asked for additional documentation.

Alleged Union Inaction

Petitioner states "that all of my many requests to file a grievance went neglected, with absolutely no form of acknowledgment, recognition or response. The representation that I did receive was intentionally misguided and contained elements of 'misrepresentation.'" (September 4 Filing ¶ 172). Between May 4, 2007, and July 17, 2008, Petitioner made at least 11 written requests that the Union file grievances on her behalf, and Petitioner claims that she verbally followed up on these requests on numerous occasions.[16] Petitioner sought to grieve the following: the denials of her requests for accommodation; the threat of termination on February 10, 2007; the productivity standards, HHC's time and leave regulations, and the warnings she has received regarding them; her February 2007 evaluation; the shift change, including the notice of insubordination for not abiding by it; her February 2008 evaluation; her loss of half hour of her lunch due to the disciplinary meeting of June 20, 2008; her July 2008 follow-up evaluation; and her suspensions.

On July 14, 2008, Petitioner wrote to the Union President complaining that "[n]one of [her] repeated requests to file a grievance were ever implemented" and requesting "an attorney from your organization to represent me." (Pet., Ex. 56). On July 17, 2008, Petitioner requested that the Union grieve her suspension and also to file an improper practice petition with the Office of Collective Bargaining.

Two grievances were filed by the Union delegate on Petitioner's behalf on July 7, 2008. The first, dated June 18, 2008, disputed the Needs Improvement rating of the fifth evaluation and was denied. The Union avers that both the Union delegate and the Union organizer "informed [Petitioner] that it could not further process her grievance concerning her evaluation based upon the

---

[16] *See, e.g.,* Pet., Ex. 19, 20, 32, 42, & 45; Rep., Ex. 1.

existing facts as there was no evidence that the [HHC] had violated the [Agreement]." (Union Ans. at ¶ B(3)). Specifically, article V, § 1(a) of the Agreement allows HHC to establish and revise performance standards, while article V, § 1(b) indicates that the evaluations themselves do not constitute discipline.[17] While poor evaluations may lead to discipline, Petitioner has not, in fact, been issued a formal warning based upon any evaluation.

The second grievance, dated July 7, 2008, alleged that management had violated Petitioner's right to Union representation by attempting to hold a meeting to review her follow-up evaluation without Petitioner's Union delegate. This grievance was also denied and HHC avers that neither Petitioner nor the Union pursued this grievance to any other step.

As for Petitioner's other grievance requests, the Union avers that it informed Petitioner "that under the circumstances, and given the facts at its disposal, it either cannot grieve or sees no merit in grieving the vast majority of [Petitioner's] issues with and accusations against [HHC]. However, the Union has attempted to address [Petitioner's] concerns through informal meetings when possible." (Union Ans. at ¶ C). Petitioner's submissions describe 20 meetings with her management attended by her Union delegate and five attended by other Union officials between November 17, 2006, and August 15, 2008, regarding the issues Petitioner sought to grieve.

The Union states that it attempted to schedule a informal conference to discuss the February 10, 2007, termination threat "but was unsuccessful in its efforts to do so due to the lack of

---

[17] Article V, § 1(a) of the Agreement, reads, in pertinent part, that HHC may "establish and/or review performance standards or norms notwithstanding the existence of prior performance levels, norms or standards" and that "[s]uch standards . . . may be used to determine acceptable performance levels, prepare work schedules and to measure the performance of each employee or group of employees." (Union Ans. ¶ A(11)(B)(I)). Article V, § 1(b) of the Agreement, reads, in pertinent part, that "[e]mployees who work at less than acceptable levels of performance *may be subject* to disciplinary measures." (Union Ans. ¶ A(11)(B)(ii)) (emphasis added by Union).

availability by [Petitioner] and management." (Union Ans. ¶ 1). Although the Union believed that the May 2007 shift change was not grievable, and so informed Petitioner, it nevertheless "attempted to schedule a voluntary informal conference meeting with management to discuss [Petitioner's] compliance with the shift change, but management refused to schedule a meeting because of [Petitioner's] frequent absences." (Union Ans. at ¶ 11(a)). The Union similarly believes that the productivity standards are not grievable. As for the evaluations, the Union "has made a reasonable determination" not to grieve them as they are not considered to be discipline. (Union Ans. at ¶ 11(b)(ii)). Nevertheless, the Union did file a grievance on Petitioner's behalf regarding the fifth evaluation, discussed earlier.

As for the first suspension, the Union avers that its ability to aid Petitioner was limited by Petitioner's failure to provide the Union organizer a detailed description of her version of the events. Petitioner claims to have provided the details to the Union Vice President with whom she spoke "at length" on May 15, 2008, and who told her "he [was] 'taking notes,'" but admits that she never provided details to any other Union official. (September 4 Filing ¶ 125).[18]

As for the second suspension, no Step I hearing has been held. The Union Vice President and the Union organizer met with Petitioner in late July 2008 to discuss the second suspension, a meeting both parties describe as heated. The Union claims that Petitioner "became extremely agitated, refusing to listen, and stormed out of the meeting." (Union Ans. at ¶11(c)(ii)). Petitioner describes the meeting as the Union organizer's attempt "to cover herself and make justification for her lack of, misguided and no representation." (September 4 Filing ¶ 165). In an August 17, 2008,

[18] Petitioner admits that in a June 11, 2008, conversation, the Union organizer "ask[ed] me what happened," to which Petitioner responded that the organizer should "speak with her superior." (September 4 Filing ¶ 141).

letter to the Union organizer, Petitioner complained that the Union organizer "attempted to intimidate [Petitioner] into a 'settlement' indicating a number of times that no one will hire someone that is terminated by HHC." (Pet., Ex. 64).

The Union defends it decision not to contest the consolidation of the disciplinary proceedings based on the "reasonable determination that consolidation will: (1) facilitate settlement negotiations with the Employer, and (2) reduce the maximum allowable suspension so that [Petitioner] will receive a greater amount of back pay when the issue is resolved." (Union Ans. at p. 11).

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner believes that her participation in the February 2007 meetings constitutes protected union activity as she "has a right to attempt to enforce the provisions of the [] Agreement and attempt to exercise [her] rights under the [] Agreement without fear of retaliation, intimidation, discrimination or interference." (Sup. Pet., at p. 2). The meetings addressed "departmental concerns among all dieticians . . . union activity (to clarify policy/procedures regarding time and leave and performance/ productivity)." (*Id.*). Further, Petitioner argues that "because I expressed my concerns in the 'communication log[,'] Ann Kehoe was retaliating against me." (*Id.*, at p. 1).

Petitioner argues that her "evaluations were downgraded in . . . retaliation. . . . in an attempt to . . . 'make her (my) life miserable here at Bellevue' and to get me fired." (*Id.* ¶ 1) (quoting Simmons' alleged February 10, 2007, threat). Petitioner was denied accommodations "to help aid in [her] termination–noting adversely my failure to abide by time and leave on my evaluation." (*Id.* ¶ 2). Petitioner argues disparate treatment, in that she "was the only dietician held responsible for

time and leave and productivity on [their] evaluation." (*Id.* ¶ 7).

Petitioner argues that her two suspensions are "clear evidence of anti-union animus in the form of discrimination, intimidation and retaliation" as management "took a situation that should have been addressed between two individuals through discussion and instead orchestrated bogus charges in an attempt to intimidate and coerce me into a 'settlement' thereby establishing a record of 'misconduct.'" (*Id.* ¶ 10).

Petitioner argues that HHC "coerced and intimidated" her by attempting to meet with her without her Union delegate. (*Id.* ¶ 4). Petitioner argues that management interfered with the exercise of her rights by not aiding her in pursuing grievances, in that she sought help in the February 10, 2007, meeting to grieve the time and leave regulations, but received hostility instead of help, and was therefore unable to grieve the policies. Ellis' "hostile and intimidating" e-mail in response to Petitioner's request for a signed copy of HHC's policy is evidence of "interference, intimidation and retaliation." (*Id.* ¶ 5). Those policies resulted in her receiving a Unsatisfactory evaluation which can lead to disciplinary action. Further, Petitioner argues retaliation in that she was hassled over "issues [that] are insignificant"–her office move and fixing a lamp during work hours. (*Id.* ¶ 3). Also, the "refus[ual] to maintain [her] shift. . . . was discrimination and retaliation related back to protected union activity on [February 10, 2007]." (*Id.* ¶ 11).

Regarding the Union, Petitioner argues that "[a]ll [her] requests to file grievances to . . . went without recognition." (*Id.* ¶ 11). Except for the shift change, which the Union organizer informed Petitioner was not grievable, the Union failed its "affirmative duty to inform a member [whether] or not it will pursue a grievance on [her] behalf." (*Id.*). Regarding the shift change, Petitioner argues that the "contract provides for the option to grieve based upon past precedent." (*Id.*). When

Petitioner "did receive 'representation' . . . the Union organizer . . . failed to act in good faith. She coerced me into a hearing . . . she never returned my repeated phone calls." (*Id.*).

In response to Respondents' statute of limitations arguments, Petitioner argues that "[u]ntimely claims may be admissible as [b]ackground [i]nformation when offered to establish a continued course of violative conduct. . . . Background information [is] provided to support *prima facie* evidence of continued anti-union animus." (Rep., p. 18).

HHC's Position

First, HHC argues that many of Petitioner's allegations are untimely as they occurred more than four months prior to Petitioner's September 4 Filing–that is, any claim stemming from an alleged act prior to May 4, 2008, is time barred, including any claim based upon: the alleged threat of termination in the February 2007 meeting; the denial of Petitioner's request in May 2007 that her shift not be changed; the fourth evaluation, signed on March 12, 2008, which rated Petitioner as Needs Improvement; counseling for violation of HHC's time and leave regulations that pre-date May 4, 2008; and any claims regarding deficiencies by the Union that pre-date May 4, 2008.

Second, HHC argues that any claims regarding the establishment of performance and productivity standards, legitimacy of disciplinary charges, and the denial of grievances all should be deferred to the grievance procedure set forth in article VI, § 2 of the Agreement.

Third, Petitioner fails to establish any independent violations of NYCCBL § 12-306(a)(1) as there are no allegation of inherently destructive behavior in the Petition. HHC views the petition as including only two possible alleged acts of interference, restraint, or coercion–the alleged refusal to have a Union representative present at the meeting regarding the follow-up evaluation and Ellis' refusal to provide a copy of HHC policy to Petitioner. As to the first, even though an employee does

not have a right to have a Union representative present during an evaluation meeting, Petitioner's Union delegate attended the meeting. As to the second, Ellis' refusal cannot be viewed as interference as Petitioner already had a copy of the policy she demanded of Ellis.

Petitioner also fails to state a *prima facie* case of NYCCBL § 12-306(a)(1) and (3) violations, as she has not established that she was engaged in any union activity. Petitioner acted on her own behalf, not for the collective welfare of her fellow employees. Presuming Petitioner's conduct constituted union activity, no causal connection exist between the alleged protected activity and the allegedly discriminatory acts–specifically, the downgrading of her evaluations, counseling for the unauthorized office move and retention of the lamp, denial of grievances, and suspensions.

Petitioner has put forth nothing to demonstrate that the downgrading of her evaluation stemmed from anything other than her failure to meet productivity standards and abide by the time and leave regulations. Nor can Petitioner show disparate treatment, as other dieticians were counseled and subject to follow-up evaluations. As for the office move and the lamp, Petitioner violated HHC policy and was justifiably counseled, and there is no evidence of any anti-union animus. Petitioner accuses Kehoe of denying her request to file grievances, when, in fact, Petitioner was able to file grievances, which Kehoe properly denied and which Petitioner then chose not to pursue further. Lastly, Petitioner's suspensions followed established HHC policy and Petitioner cannot establish temporal proximity between her alleged union activity (all completed by March 2007) and the alleged discrimination (only considering claims occurring after May 4, 2008).

Fourth, presuming Petitioner was able to establish a *prima facie* case o NYCCBL § 12-306(a)(1) and (3) violations, HHC's actions are supported by legitimate business reasons. NYCCBL § 12-307(b) provides HHC the right to discipline employees for violations of its rules and

regulations. Petitioner's excessive absenteeism is undisputed. HHC also has a legitimate business reason to suspend an employee, and subsequently issue charges, for threatening a co-worker and for refusing to participate in an investigation. NYCCBL § 12-307(b) also reserves for the employer the right to supervise and direct employees, including evaluating their performance.

Finally, Petitioner has failed to demonstrate a breach by the Union of its duty of fair representation, and, therefore, any derivative claim against HHC under NYCCBL § 12-306(d) must be dismissed.[19]

Union's Position

The Union argues, as does HHC, that "all of the allegations in the Complaint which occurred prior to May 4, 2008[,] should be dismissed as time barred." (Union Ans., p. 12).

The Union then argues that to prevail on a claim of breach of its duty of fair representation, Petitioner must present evidence of an improper motivation. No such evidence is presented by Petitioner. Petitioner disagrees with the Union's tactics, and the quality and extent of representation. Such disagreements do not support finding a breach of the duty of fair representation.

As for Petitioner's specific allegations against HHC, the "Union is unaware of any evidence to support a claim of anti-union animus on [HHC's] behalf with respect to these allegations." (*Id.* ¶¶ 1-8, 11(D)). The Union argues that, for the instances it choose not to file grievances, it was "unaware of any evidence that [HHC] violated the contract." (*Id.* ¶¶ 3, 4, 11(A), 11(B), & B(3)). The Union filed grievances where appropriate, and where grievances were not appropriate, sought,

---

[19] HHC also argues Petitioner does not have standing to file claims under NYCCBL § 12-306(a)(4), (a)(5), (b)(2), and © and that Petitioner has failed to allege any facts supporting a violation of NYCCBL § 12-306(a)(2) as nothing in the Petitioner's filings indicates any domination or interference with a union.

whenever possible, to resolve Petitioner's concerns through meetings with her employer.

Regarding the disciplinary charges, the Union argues that Petitioner refused to provide any details regarding the May 8, 2008, incident to the Union organizer, only a blanket denial. Therefore, the Union was unable to effectively refute the charges. As a Step I(A) determination has not yet issued, the Union cannot proceed to Step II. Nevertheless, the Union negotiated in good faith on Petitioner's behalf and convinced HHC to reduce the suspension to 15 days–a settlement offer Petitioner refused. As for the June 13, 2008, incident, the Union scheduled a Step I(A) hearing, but Petitioner's indefinite disability leave has made it impossible to proceed.

The Union argues that there is nothing in the Agreement that would support a grievance over the shift change; nor is there anything in the Agreement or the Citywide Agreement that would allow the Union to grieve based upon a past practice theory. As for Petitioner's claims that the Union should have grieved the shift change based upon it adversely affecting Petitioner's health, the Union claims Petitioner has not presented it, or her employer, with any medical evidence establishing the alleged health impact or any evidence that Petitioner's desired shift (6 a.m.– 2 p.m.) qualified as an accommodation under the ADA. Nor can any such evidence be found in the Petition.

Regarding the evaluations, the Union filed a grievance on Petitioner's behalf, which was denied, and the Union "could not further process [Petitioner's] grievance concerning her evaluations based upon the existing facts as there was no evidence that [HHC] had violated the [Agreement]." (*Id.* ¶ B(3)). The Union argues that management has the right to establish and revise performance standards and, while a poor evaluation may lead to discipline, the evaluations themselves are not considered to be discipline. The remedy is to file a rebuttal, not a grievance.

DISCUSSION

Prior to proceeding to the merits, we note that Petitioner has raised claims of alleged violations of NYCCBL § 12-306(a)(1), (a)(3), and (b)(3). In analyzing Petitioner's allegations, we are cognizant that "because Petitioner is *pro se* in this proceeding, . . . 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." *Feder*, 1 OCB2d 23, at 13 (BCB 2008); *see also Castro v. City of New York,* 2007 U.S. Dist. LEXIS 77878, at * 32 (S.D.N.Y. October 10, 2007) ("the court's obligation to parse the complaint for any arguably available legal theory is particularly acute when the pleading has been drafted by a *pro se* plaintiff.").[20] Such a liberal reading of Petitioner's submissions reveals that she has raised claims under NYCCBL § 12-306 (a)(1), (a)(3), and (b)(3).

Although Petitioner's account is in many ways disputed by the Respondents, we need not resolve these disputes to decide the instant case. Rather, we are able to decide upon the record before us as the factual disputes which exists are not material to the legal claims raised. *See DC 37*, 79 OCB 37, at 8-9 (BCB 2007). We find that, upon all the pleadings and exhibits submitted, Petitioner has failed to plead factual allegations which would, if proven, establish that either HHC or the Union violated the NYCCBL.

Timeliness

As a threshold matter we address Respondents' argument that any allegation related to acts

[20] Petitioner cited to NYCCBL §§ 12-305, 12-306, and 12-307, inclusive of all sub-sections therein. While such over-citation by a *pro se* petitioner is not uncommon, narrowing our review to the applicable theories under which Petitioner could proceed both streamlines and clarifies analysis.

prior to May 4, 2008, are time-barred.[21] *See OSA*, 1 OCB2d 45, at 13 (BCB 2008) (timeliness is a threshold question). It is well established that an improper practice charge "must be filed no later then four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *aff'd*, *Raby v. Office of Coll. Barg.*, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)); *see also DC 37, Local 1457*, 1 OCB2d 32, at 21 (BCB 2008); *Tucker*, 51 OCB 24, at 5 (BCB 1993).[22]

Therefore, "claims antedating the four month period preceding the filing of the Petition are not properly before the Board and will not be considered." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (citing *Castro*, 63 OCB 44, at 6 (BCB 1999)). As Petitioner's first filing was September 4, 2008, claims arising after May 4, 2008, are timely. However, "factual statements comprising untimely claims may be admissible as background information, and are so taken here." *Id.* (citations

---

[21] In their answers, both Respondents correctly calculated the statute of limitations period from Petitioner's initial filing on September 4, 2008, although the actual verified petition form was not filed until September 8, as the petition is deemed filed from the date of the original filing. *See* § 1-07(c)(2)(iii) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") (Petitioner can cure defective petition within ten days of Executive Secretary serving deficiency letter and the "amended petition shall be deemed filed from the date of the original petition.").

[22] NYCCBL § 12-306(e) provides, in relevant part:

> 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 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(d) provides, in relevant part: "A petition alleging that a public employer or . . . a public employee organization . . . has engaged in or is engaging in an improper practice in violation of [§] 12-306 of the statute may be filed with the Board within four (4) months thereof . . ."

omitted). Such allegations "are considered by this Board solely as background material, but not as remediable allegations of violations of the NYCCBL, as these factual allegations occurred outside the four month statute of limitations." *Id.* Such material, while "not actionable, [] may have bearing upon the [employer's] motivation for subsequent acts occurring within the statute of limitations and included within the scope of the petition." *PBA*, 77 OCB 10, at 10 (BCB 2006); *see also Rosioreanu*, 1 OCB2d 39, at 14 (BCB 2008) ("information regarding untimely allegations may be admissible as factual background, or to illuminate the intent of the employer.").

NYCCBL § 12-306(a)(1)

NYCCBL § 12-306(a)(1) makes it an improper practice "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305."[23] We have found violations of NYCCBL § 12-306(a)(1) where an employer's actions "either created visible and continuing obstacles to the exercise of future employee rights or directly and unambiguously penalized protected activity." *CEU, Local 237*, 77 OCB 24, at 22 (BCB 2006). We have repeatedly held that an employer may violate NYCCBL § 12-306(a)(1) when it attempts to control an employee's choice of union representatives. *See Local 376, DC 37*, 73 OCB 6, at 10 (BCB 2004); *Lehman*, 29 OCB 23, at 11 (BCB 1982); *see also Monticello Cent. Sch. Dist.*, 22 PERB ¶ 3002, at 3006 (1989). We have also found employers to have violated of NYCCBL § 12-306(a)(1) through

[23] Such claims are most commonly presented in the form of derivative violations arising from acts of discrimination in violation of NYCCBL § 12-306(a)(3), and which require proof of anti-union animus. However, in affording meaning to every provision of the statute, we note that some acts independently may constitute an interference proscribed by NYCCBL § 12-306(a)(1) without falling afoul of NYCCBL § 12-306(a)(3). *See, e.g., Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"); *City of New York v. Dezer Props.*, 95 N.Y.2d 771 (2000).

their handling of grievances. *See Comm. of Interns and Residents*, 51 OCB 26, at 45 (BCB 1993), *enforced sub nom. Comm. of Interns and Residents v. Dinkins*, No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993) (NYCCBL § 12-306(a)(1) violated when an employer copied "the Union's grievance, distributed it to bargaining unit employees . . ., and commented to the employees that deficient [employees] were attempting to use the Union to cover up their deficiencies.").

Petitioner arguably raises two claims of independent NYCCBL § 12-306(a)(1) violations. First, that management attempted to coerce her into attending a meeting without her Union representative in July 2008. Second, that management interfered in her ability to file a grievance regarding HHC policy by not providing guidance in the February 2007 meeting and by refusing to provide a signed copy of HHC policy in July 2008.[24]

As for the first, Petitioner's own contemporaneous notes describe a scheduling conflict–albeit a contentious one–and not an attempt to deny Petitioner the Union representative of her choice. Management had scheduled a meeting for July 1, 2008, a day Petitioner's Union delegate was absent. Petitioner requested a postponement, which management initially denied. However, management than acceded to Petitioner's demand and postponed the meeting until her choice of Union representative was available. Nothing submitted by Petitioner indicates that management acted to prevent Petitioner's choice of Union representative from attending, or scheduled the meeting in a manner designed to prevent the attendance of any Union representative, let alone the representative of Petitioner's choice. Under these undisputed facts, there is no evidence that HHC violated by

[24] Petitioner also alleges that HHC "orchestrated bogus charges in an attempt to intimidate and coerce me into a 'settlement' thereby establishing a record of 'misconduct.'" (Sup. Pet. ¶ 10). This claim, however, is properly analyzed as a derivative (as opposed to independent) claim under NYCCBL § 12-306(a)(1) and analyzed accordingly in the following section.

NYCCBL § 12-306(a)(1) by attempting to force Petitioner into attending a meeting without her chosen Union representative and we do not find management's denial of Petitioner's grievance regarding such to be "anti union animus in the form of interference." (Sup. Pet. ¶ 9).[25]

The second claim–that management interfered with Petitioner's ability to file a grievance by not providing guidance and by failing to provide a signed copy of HHC policy–is also unsupported by undisputed facts. Petitioner concedes that in the February 2007 meeting, management answered numerous questions before she walked out of the meeting when management wanted to continue. Petitioner does not identify what questions, if any, went unanswered or what information necessary to file a grievance was withheld. Nor does Petitioner explain why the lack of a signed copy of HHC policy interfered with or prevented her from filing a grievance, especially when it is undisputed that Petitioner was given an unsigned copy by management.[26] There is no allegation that management in anyway or at any time prevented Petitioner from dealing with her Union to file grievances.

NYCCBL § 12-306(a)(3)

NYCCBL § 12-306(a)(3) makes it an improper practice "to discriminate against any

---

[25] Petitioner's grievance presumes a right to have union representation in an evaluation meeting. We note, however, that a right to Union representation attaches when the employee has a reasonable expectation of discipline and evaluations and reviews thereof are not considered to be disciplinary. *See DC 37*, 79 OCB 24, at 7 (BCB 2007); *Doctor's Council*, 53 OCB 18, at 13-14 (BCB 1994) ("in the absence of any other evidence of disciplinary action, [the Board] will not accept a grievant's contention that an unsatisfactory rating on an annual performance evaluation is the equivalent of the service of written charges of incompetency.") (emphasis in original). Therefore, HHC's denial was in accordance with our prior decisions. *Id.* In light of Ellis' statement that Petitioner's "evaluation is unsatisfactory and your department will begin progressive discipline" (Pet., Ex. 53), Petitioner's concerns regarding discipline may have been reasonable, but we need not reach that issue because HHC ultimately allowed Petitioner the Union representative of her choice.

[26] Petitioner's request was based on her belief "that a policy needs to be signed to become activated." (September 4 Filing ¶ 157). If correct, the lack of signed policy may form the basis of a grievance, but the failure to provide such does not evidence interference with the ability to so file.

employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization." To establish a violation of NYCCBL § 12-306(a)(3) and a derivative violation of NYCCBL § 12-306(a)(1), Petitioner must establish that:

1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19 (BCB 1987) (applying *City of Salamanca*, 18 PERB ¶ 3012 (1985)); *DC 37*, 1 OCB2d 6, at 27 (BCB 2008).

It is undisputed that HHC had knowledge of Petitioner's actions but the parties disagree as to whether her actions qualify as protected union activity, a question we need not resolve because we find that "[e]ven assuming that [Petitioner] was engaged in protected activity and that the employer knew of that activity, [Petitioner has] failed to show that the activity was the motivating factor behind [HHC's] actions." *SSEU, Local 371*, 77 OCB 28, at 14 (BCB 2006). Petitioner alleges four areas of retaliation: the threat of termination on February 10, 2007; the downgrading of her evaluations; the disciplinary actions; and the harassment in the form of the shift change and unwarranted counseling regarding her office move and retention/fixing of a lamp.

As outright admissions are rare, anti-union animus is typically proven by circumstantial evidence. *Id.* (citing *Burton*, 77 OCB 15 (BCB 2006)). Here, however, Petitioner alleges such a 'smoking gun'–claiming that immediately after engaging in protected activity (the February Departmental meetings), a manager (Simmons) threatened, "I can make her life miserable . . . I can

get her fired." (Sup. Pet. ¶ 1).[27] Assuming that the threat was made, Petitioner's description of the events leading up to the threat clearly establish that the alleged threat was not made in response to Petitioner engaging in protected activity; rather, it was made in response to the manager's belief that Petitioner was insubordinate.

On February 12, 2007, just two days after the alleged threat, Petitioner memorialized her version of the confrontation. While Petitioner describes Simmons as being antagonistic, she admits that Simmons informed her that he found her "tone and manner" in the meeting "unprofessional and inappropriate," after which Petitioner "ended the conversation [when management] wanted to continue" and then "proceeded to walk out." (Pet., Ex 14). Petitioner explains that her decision to walk out was based on her belief that management's behavior was inappropriate; nonetheless, she admits that she walked out on a meeting with her superiors. Petitioner also admits that when a manager requested she return she refused, only returning after the intervention of the Union delegate. It was only then that management made the alleged threat of termination, which, according to Petitioner, Simmons stated he wanted the Union delegate to hear and which was based upon his opinion that Petitioner was "out of line." (*Id.*). The threat itself, as described by Petitioner, clearly refers to the behavior described above and not to any Union activity. It was also conditional–that is, Simmons would fire Petitioner if her behavior continued. Although Petitioner left the meeting "concerned about [her] job," she was not disciplined for her actions in the meeting. (*Id.*).

Second, Petitioner alleges that "her evaluations were downgraded in the form of anti-union animus–retaliation." (Sup. Pet. ¶ 1). Petitioner's first four evaluations rated her Satisfactory overall,

---

[27] Although February 2007 is well outside of the statute of limitation, we consider this meeting in determining the existence of anti-union animus.

her fifth rated her as Needs Improvement, and her sixth (the follow-up evaluation) rated her as Unsatisfactory. A review of the evaluations clearly establishes that the downgrading was due to Petitioner's failure to improve her productivity and violations of the time and leave regulations. Petitioner was advised in both the third and the fourth evaluations to improve her productivity, but it was not until Petitioner's fifth evaluation that her productivity was reflected in the ratings. Similarly, the time and leave regulations were not enforced until the middle of 2006, and, therefore, did not influence the first four evaluations.[28] A comparison of the of the fourth and fifth evaluations reveals that the Petitioner's individual ratings on the two responsibilities reflective of productivity and compliance with time and leave regulations were downgraded from Satisfactory to Needs Improvement, resulting in the downgrading of the overall evaluation to Needs Improvement.[29] When Petitioner failed to improve in these two responsibilities, they were further downgraded on the follow-up evaluation, from Needs Improvement Unsatisfactory, resulting in the downgrading of the

---

[28] We note that, while not reflected on the evaluations until 2007, Petitioner was first counseled regarding these violations of the time and leave regulations on November 17, 2006–three weeks prior to her first alleged protected activity, the log entry, on December 7, 2006. Therefore, the decision to hold Petitioner accountable for these violations of the time and leave regulations cannot be shown to be retaliatory. *See DEA*, 79 OCB 40 at 22 (BCB 2007) (actions that antedated protected activity "cannot be persuasively shown to have been retaliatory in nature.") (citing *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) ("Where the decision to take adverse employment action is reached prior to a plaintiff's protected activity, the causal connection necessary to link the adverse action to that protected activity is lacking")).

[29] In her rebuttal to the fifth evaluation, Petitioner admitted that her productivity had not increased from her last evaluation–that she "had the same quantity last year." (Pet., Ex. 38). Similarly, Petitioner did dispute her violations of the time and leave regulations but argued that the failure to adjust those policies was "a violation of [her] rights under the ADA." (Pet., Ex. 38). We do not have jurisdiction nor do we make any conclusions as to Petitioner's rights and claims arising under statutes other than 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).

overall evaluation to Unsatisfactory.[30] Petitioner has provided nothing from which we can infer a causal relationship between the downgradings and protected activity. *See Collella*, 77 OCB 27, at 54.

Petitioner does not dispute that it is HHC's policy is to require a follow-up evaluation whenever an employee is rated Needs Improvement but argues that HHC failed to inform her that she would receive one and, thus, she claims her follow-up evaluation, her sixth evaluation, was retaliatory. However, assuming Petitioner is correct and that she was not informed in a timely manner, we cannot conclude that the failure by HHC to do so was motivated by Petitioner's protected activity.

In addition, Petitioner alleges disparate treatment–that other dieticians who should have received counseling due to excessive absenteeism were not counseled and that the other dietician who received a Needs Improvement rating "was never re-evaluated in three months." (Sup. Pet. ¶ 6).[31] Assuming Petitioner's facts are correct, we do not find any violation on the evidence herein because, according to Petitioner, the alleged disparate treatment stemmed not from any protected activity but from favoritism by Kehoe, and claims of disparate treatment based on a personal relationship are not related to rights protected under the NYCCBL and, therefore, may not be addressed by this Board. *Williams*, 59 OCB 48, at 9 (BCB 1997); *Siegel*, 47 OCB 23, at 9 (1991). Further, Petitioner admits that four of the 12 dieticians had been counseled and that one other dietician had received a Needs Improvement rating due to violations of the time and leave

[30] The follow-up evaluation noted petitioner's productivity had not improved and that she had five violations of the time and leave regulations, facts Petitioner does not dispute.

[31] HHC avers that the other dietician has received a follow-up evaluation. Petitioner, in her Reply, denied knowledge and information sufficient to form a belief as to the truth of this assertion.

regulations.

Third, Petitioner alleges that her two suspensions are "pure and clear evidence of anti-union animus in the form of discrimination, intimidation and retaliation" and that management "orchestrated bogus charges." (Sup. Pet. ¶ 10). However, Petitioner provides nothing more than "the mere assertion of retaliation" while the undisputed facts in the record defeat any such claims stemming from the disciplinary actions. *SSEU, Local 371*, 77 OCB 28, at 14.

We do not opine as to the underlying charges and make no finding as to whether Petitioner engaged in the alleged conduct. Petitioner admits she confronted a co-worker who filed a police report and that HHC has a practice of pre-hearing suspension but takes issue with how her supervisors handled the complaint, arguing that it should have been dealt with through informal counseling, not formal charges, and that her conduct does not equate to gross misconduct.

We do not find it violative of NYCCBL § 12-306(a)(1) for management to choose formal charges over informal resolution when presented with a police report made by an employee complaining of a co-worker's alleged assault coupled with an alleged threat of "I will get you." (Pet., Ex. 50). We find similarly for the second suspension. Petitioner denies the substance of the charges–she states that her police report was not false and argues that she was unaware of any investigation and, therefore, did not refuse to cooperate with it. Valid defenses and allegations that an employer's charge of misconduct are incorrect do not, of their own weight, convert the filing of charges into an improper practice claim. Once again, we do not opine as to the substance of the underlying charges. Nothing, however, alleged by the Petitioner indicates that HHC followed other than its standard procedure in serving the charges.

Regarding Petitioner's objection to HHC's tactics in trying to secure a settlement, for us to

find such settlement tactics violative, they would need to rise to the level of duress– "that threats of an unlawful act compelled [] her performance of an act which [] she had the legal right to abstain from performing." *Feuer v. Darkanot*, 36 A.D.3d 753, 754 (2d Dept. 2007) (citations and editing marks omitted); *Okorie-Ama*, 79 OCB 5, at 15-16; *see also, Bd of Managers of Atrium Condo. v. W. 79th Street Corp.*, 19 A.D.3d 241 (1st Dept. 2005); *Town of Clarkstown v. M.R.O. Pump & Tank, Inc.*, 287 A..D.2d 498, 499 (2d Dept. 2001). Despite the alleged coercion, we note that no settlement was reached. Petitioner was not forced into a settlement. Further, as Ellis had the option of recommending termination, no unlawful act has been alleged. *Fred Ehrlich, P.C. v. Tullo*, 274 A.D.2d 303 (1st Dept. 2000) ("threatened exercise of a legal right is not duress"); *Osborne v. County of Nassau*, 57 A.D.2d 551 (2d Dept. 1977) (where employer had right to prefer disciplinary charges, threat to do so unless case resolved did not constitute duress).

Fourth, Petitioner claims that her shift change, which occurred less than two months after Petitioner's alleged protected activity, was retaliatory.[32] However, we do not find any retaliatory motive because Petitioner's description of how the shift change occurred indicates that it stemmed from her choice of assignment, not her protected activity. Petitioner states that in April 2007 when she returned from FMLA leave she was given the choice of two assignments and that the one she chose conflicted with her 6 a.m.–2 p.m. shift, prompting management to change her shift to 7:30 a.m.–3:30 p.m. Petitioner than requested as an accommodation under the ADA her old shift, which was denied. Under these facts, it was Petitioner's choices that resulted in the shift change.

---

[32] We note that any alleged violation of the NYCCBL by HHC stemming from the shift change itself is time barred as Petitioner was aware of such in May 2007, more than 15 months prior to her first submission to the Board. We nevertheless analyze it because it is also alleged to be evidence of anti-union animus.

We do not find any indication of retaliation in management's response to Petitioner's office move. Petitioner argues that she was unable to promptly notify management of her office move due to her suspension but does not dispute that she moved without any prior permission of, or even notice to, management, which is what she was counseled for. Petitioner alleges disparate treatment because the co-worker who agreed to let Petitioner move into the vacant office was not counseled. However, although Petitioner claims that the co-worker planned to move into her old office, there is no allegation or anything else in the record indicating that the co-worker actually moved. Petitioner was the only one to actual move without prior notification or permission of management.

Lastly, Petitioner describes management's response to her retention and fixing of the lamp provided her as an accommodation as retaliatory. Petitioner does not deny that she did not return the lamp when instructed to do so and that she fixed the lamp on company time, which is what she was counseled for. Rather, she argues that, after not abiding by the instructions to return the lamp, she later received permission to keep it in her office and that a superior implicitly authorized her to fix it by providing her a screwdriver. Petitioner might have valid explanations for her actions, but that does not make management questioning her failure to follow instructions retaliatory and there is no indication that management was motivated by anti-union animus.

Therefore, we find no violations of NYCCBL § 12-306(a)(3) and, subsequently, no derivative violation of NYCCBL § 12-306(a)(1).

NYCCBL § 12-306(b)(3)

NYCCBL § 12-306(b)(3) makes it an improper practice for a union to "breach its duty of fair representation to public employees under this chapter." Petitioner complains that the Union failed to prosecute her grievances or even recognize her grievance requests, failed to provided

adequate representation, and that the Union organizer did not act in good faith.[33]

We have "long held that the that the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Okorie-Ama*, 79 OCB 5, at 14; *see also Whaley*, 59 OCB 41, at 12 (BCB 1997); *New York City Transit Authority*, 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employment Relations Board); *see generally Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (same standard under federal National Labor Relations Act).

To establish a breach of the duty of fair representation, Petitioner must establish that the Union acted "arbitrary, discriminatory, perfunctory, or in bad faith." *James-Reid*, 77 OCB 29, at 16-17; *see also Hug*, 47 OCB 5, at 14 (BCB 1991); *New York City Transit Authority*, 37 PERB ¶ 3002. The burden of pleading and proving that the Union has breached its duty of fair representation lies with the Petitioner. *See Minervini*, 71 OCB 29, at 15-16 (BCB 2003); *Yovino*, 69 OCB 40, at 9

---

[33] In the Reply, Petitioner has, in conclusory terms, accused the Union organizer of collusion with HHC. At a conference, and re-iterated in letters to the trial examiner, Respondents have argued that the Board should not consider any such allegation as it was raised, for the first time, in the Reply. Petitioner responded that her citation in her petition to *Okorie-Ama*, 79 OCB 5, provided Respondents sufficient notice of the allegation of collusion. While the petition in the instant case lacks any direct reference to collusion, the petitioner in *Okorie-Ama* argued that the net result of the union organizer's behavior in that case was that the organizer had "essentially . . . joined with HHC." *Id.* at 11. As discussed earlier, when reviewing claims made by a *pro se* petitioner, we do not demand exact language or citation but rather our "review [is] exercised with an eye to establishing whether the facts as pleaded support any cognizable claim for relief." *Feder*, 1 OCB2d 23, at 13. However, assuming that the mere citation to *Okorie-Ama* was sufficient to put Respondents on notice of a claim of collusion, we find that Petitioner's allegations of collusion, based solely on the Union organizer's tactical decisions and presentation on her behalf in endeavoring to resolve disciplinary charges against Petitioner in the instant case, are the kind of speculative and conclusory allegations that we have held fail to make out a claim of collusion. *See D'Onofrio*, 79 OCB 26, at 13 (BCB 2007) ("claim of collusion between [employer] and the Union" dismissed where based only upon "speculative and conclusory" allegations); *Gertskis*, 77 OCB 11, at 13 (BCB 2006) ("assertions that the Union attorney was in collusion with the City attorney because of her conduct at the arbitration are speculative and conclusory and, without more, do not state a claim.").

(BCB 2002). Petitioner cannot meet this burden "simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union." *Okorie-Ama*, 79 OCB 5, at 14 (citations omitted). That is, petitioners "must allege more than negligence, mistake or incompetence to meet a *prima facie* showing of a union's breach." *Gertskis*, 77 OCB 11, at 11; *see also Hodge*, 77 OCB 36, at 17-20 (BCB 2006) (applying duty of fair representation standard to settlement by Union of a grievance); *Richardson*, 53 OCB 24 (BCB 1994) (same). The NYCCBL codifies a duty of fair, not competent, representation, as "[e]ven gross negligence does not breach the duty of fair representation" *Okorie-Ama*, 79 OCB 5, at 15 (citing *Gertskis*, 77 OCB 11, at 12-13; *CSEA v. Pub. Employees' Rel. Bd and Diaz*, 132 A.D.2d 430, 432 (3d Dept. 1987), *aff'd on other grounds*, 73 N.Y.2d 796 (1988); *New York City Transit Authority*, 37 PERB ¶ 3002)).

A union is not obligated to advance every grievance. *See Minervini*, 71 OCB 29, at 15 (citing *Keyes*, 37 OCB 32, at 7 (BCB 1986)). It "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *Edwards*, 1 OCB2d 22, at 21 (citations and editing marks omitted). Further, the Board "will not substitute its judgment for that of a union or evaluate its strategic determinations." *Id.* (citations and editing marks omitted). However, the Union has "an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf." *Id.* (citing *Fabbricante*, 69 OCB 39, at 20 (BCB 2002)) (emphasis in original).

Between May 4, 2007, and July 17, 2008, Petitioner made at least 11 written requests of her Union to file grievances on her behalf regarding the denials of her request for accommodation; the threat of termination; the productivity standards; the time and leave regulations; her evaluations; the

shift change; and her suspensions.[34]

The Union made the strategic decision, based upon its reading of the Agreement, that the evaluations, the productivity standards, and the shift change were not grievable. (Union Ans. ¶ A(11), (B)(I) & (ii)).[35] As for the requests for accommodation, it made the strategic decision that it lacked adequate documentation to pursue it. As for the February 10, 2007, meeting, despite the threat of termination, no disciplinary or other actions have been shown to stem from that meeting.

While the Union did not file grievances regarding these matters on Petitioner's behalf, documents created by Petitioner establish that the Union attempted to address her concerns. Petitioner's Union delegate accompanied Petitioner to at least 20 meetings with management between November 17, 2006, and August 15, 2008, including at least three regarding the shift change, three regarding accommodation, three regarding absenteeism, four regarding her evaluations, and two regarding her suspensions. In the same time period, Petitioner met with the Union organizer

---

[34] We do not address the Union's argument that some of Petitioner's claims are time barred. While the statute of limitations (four months) is clear, it is not readily discernible when Petitioner's alleged claims against the Union arose. That is, such claims arise when Petitioner reasonably should have known that the Union would not pursue the grievances on her behalf. *Seale*, 79 OCB 7, at 5-6 (BCB 2007). However, Petitioner repeated her grievance requests in her July 14, 2008, letter to the Union President, an event within four months of the filing of the instant Petition, clearly indicating Petitioner's belief that the Union may still file the requested grievances. *See id.* (claim of breach of duty of fair representation filed in May 2006 found to be timely even though petitioner was aware by September 2005 that her union had not responded to her request to file a grievance because a clear denial of the request was not communicated to petitioner by a union official until February 2006). In the instant case, we need not resolve whether Petitioner's belief was reasonable, as we find on other grounds that the Union has not breached its duty of fair representation.

[35] We note that "[t]his Board does not have the authority to determine the merits of the underlying grievances. To the extent that Petitioner alleges that the City violated the Agreement, those claims are beyond our jurisdiction." *Minervini*, 71 OCB 29, at 15, n. 2 (citing *Krumholz*, 51 OCB 21, at 14-15 (BCB 1993); *Urban*, 59 OCB 20, at 11 (BCB 1997)).

on at least four occasions.[36] Petitioner's submissions also establish frequent contact with various Union representatives. While Petitioner may not have agreed with her Union's handling of her complaints, the material provided by Petitioner established that the Union regularly represented her at meetings with management and kept her informed of its decisions.[37]

On July 14, 2008, Petitioner wrote the Union President complaining of the Union's handling of her suspension and failure to file grievances on her behalf, claiming, incorrectly, that "[n]one of my repeated requests to file a grievance were ever implemented." (Pet., Ex. 56). In fact, the Union had filed two grievances on Petitioner's behalf on July 7, 2008; one challenging her fifth evaluation and another regarding managements' attempts to hold a meeting with Petitioner without her chosen Union representative. Petitioner admits in the letter that she was in frequent contact with her Union delegate during her suspensions and documents created by Petitioner describe over a dozen exchanges between Petitioner and the Union organizer regarding her suspensions. Petitioner is clearly dissatisfied with her Union's handling of her situation, but her submissions do not establish that the Union's behavior was arbitrary, discriminatory, perfunctory, or in bad faith.

We, therefore, find that Petitioner's claim that the Union breached its duty of fair representation must fail, as must any derivative claim against the employer pursuant to NYCCBL § 12-306(d). *See Howe*, 79 OCB 23, at 13-14 (BCB 2007); *Samuels*, 77 OCB 17, at 16 (BCB 2006).

---

[36] The Union also claims to have attempted, unsuccessfully, to schedule an informal conference to discuss the February 10, 2007, meeting.

[37] On May 24, 2007, Petitioner requested that the Union respond in writing to her request to grieve the shift change. Petitioner admits that the Union organizer had verbally informed her that the shift change was not grievable. The duty of fair representation requires the Union notify Petitioner of a decision whether or not to pursue a grievance, it does not mandate that such notification be in writing.

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, Docket No. BCB-2719-08, filed by the Suzanne Nardiello against the SEIU United Health Workers East and the New York City Health and Hospitals Corporation be, and the same hereby is, denied.

Dated: March 9, 2009
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER