Kaplin, 3 OCB2d 28 (BCB 2010)

(IP) (Docket No. BCB-2777-09)

Summary of Decision: Petitioner, a probationary Staff Nurse, claimed that the Union breached its duty of fair representation toward her in the handling of a disciplinary matter arising from an error in the administration of medication. Petitioner also claimed that HHC violated NYCCBL §12-306(a)(1) and (3) by denying her request for union representation when she was questioned by supervisors about the error, and retaliating against her for asserting that right by terminating her employment and reporting the medication error. Respondents argued that the instant petition is untimely and that, even if it were not, Petitioner's probationary status precluded any grievance rights and that the Union thus did not breach the duty of fair representation. HHC asserted as well that Petitioner had no *Weingarten* rights, that the meeting at issue was not disciplinary in nature, and that it did not retaliate against Petitioner. The Board found the claims against the Union and HHC pertaining to the supervisory conference are untimely. The Board found that the petition fails to make out facts sufficient to establish a breach of the duty of fair representation against the Union or to state a *prima facie* case of retaliation or interference on the part of HHC. The petition is denied. **(Official decision follows.)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding
-between-

MICHELLE D. KAPLIN, *Pro Se*,

Petitioner,

-and-

THE NEW YORK STATE NURSES ASSOCIATION
-and-
THE HEALTH AND HOSPITALS CORPORATION and SEAVIEW HOSPITAL AND REHABILITATION CENTER,
Respondents.

DECISION AND ORDER

On June 24, 2009, Michelle D. Kaplin filed a *pro se* verified improper practice petition

alleging that the New York State Nurses Association ("NYSNA" or "Union") breached its duty of fair representation in violation of §§ 12-306(b)(1) and (3), and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Petitioner asserts that this breach arose from the Union's representation of her in a disciplinary matter, which led to her termination as a Staff Nurse at Seaview Hospital and Rehabilitation Center ("Seaview"). The petition also alleges that the Health and Hospitals Corporation ("HHC") retaliated against her and interfered with her right to Union representation at a meeting which she reasonably believed could result in disciplinary action against her. On July 20, 2009, Petitioner filed an amended petition, claiming that HHC's more lenient treatment of another employee cited by HHC in the same incident establishes that her protected conduct motivated the adverse employment action taken against her. Petitioner claims that HHC has violated §§ 12-306(a)(1), (3), and (4) of the NYCCBL.

The Union asserts that the instant petition is untimely and in any event the Union did not breach its duty of fair representation because no grievance remedy was available due to Petitioner's probationary status. HHC asserts that the instant petition is untimely, that Petitioner had no *Weingarten* rights, and that in any event the supervisory conference was not disciplinary in nature. HHC contends the petition does allege sufficient facts to support her claim of anti-union animus or discrimination on the part of HHC against her.

The Board finds that the claims against the Union and HHC pertaining to the supervisory conference are untimely. The Board further finds that no breach of the duty of fair representation can be found based on the timely factual allegations. Finally, the Board finds that the petition fails to state a *prima facie* case of retaliation or interference on the part of HHC. Accordingly, the petition

is denied.

BACKGROUND

HHC hired Petitioner as a Licensed Practical Nurse on December 11, 2007.[1] She became a Registered Nurse ("RN") and was appointed on November 8, 2008, to the position of Staff Nurse, represented by the Union. She served as a probationer on a *per diem* basis in the Staff Nurse title from November 2008 until February 24, 2009, when her employment was terminated. Petitioner alleges that, throughout her employment at Seaview, she was discriminated against by supervisors on medical and religious grounds. (Pet. App. A, at 1.)[2]

In February 2009, Petitioner was assigned to work a 7:00 am to 3:30 pm shift as medication nurse in the Dementia Unit. Her primary task was to dispense and administer medications following physician's orders. According to Petitioner, while on duty on or about February 2, 2009, she observed a patient who appeared to her to be in significant pain. At 3:00 pm, she administered a dose of medication to the patient who was scheduled to receive it, not at that time, but rather three hours later, at 6:00 pm. Petitioner asserts that, as she was noting the records for this change, she got a call about a family emergency. She left the facility to tend to the emergency without notifying the Head Nurse on duty, Elizabeth Cassano, a permanent employee, that she had administered the 6:00 pm dose of medication at 3pm. Petitioner admits that at 3:30pm, she phoned the medication nurse who came on duty after her to report the unscheduled medication. She also admitted, in a written

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[1] The title of Licensed Practical Nurse is covered by a collective bargaining agreement with its own grievance procedures other than that under which Petitioner seeks to grieve in the underlying matter.

[2] On March 11, 2009, Petitioner herein filed claims with the U.S. Equal Employment Opportunity Commission based on religion and disability and on retaliation for having complained of employment discrimination.

report to supervisors after the incident, that her actions diverged from the medication protocol. (Pet. Appendix D.)

On February 5, 2009, Petitioner's direct supervisor questioned her about the matter. The following day, Carole Morgan, Director of Nursing, learned of the incident and determined that Petitioner had acted beyond her authority. Morgan immediately took Petitioner off the work schedule and told her she was being removed from the schedule. Morgan also told Jeanne Policastro, Seaview's Director of Risk Management, about the incident at that time.

On February 9, 2009, Policastro and Morgan called Petitioner to a meeting about the medication error, along with her husband whom Policastro and Morgan allowed to be present.[3] Petitioner asserts that the purpose of the meeting was disciplinary in nature. At the outset of the meeting, Petitioner asked Policastro and Morgan to allow a representative of the Union to be present. They denied the request on confidentiality grounds citing Public Health Law ("PHL").[4] Petitioner asserts that she was asked to provide a urine sample for drug testing purposes on the suspicion that she had taken the medication in question. (Pet. ¶ 6.)

Petitioner alleges that, from the date of the incident, on or about February 2 to February 9,

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[3] It is undisputed that petitioner's husband was permitted to attend on the condition that he not speak during the meeting.

[4] PHL § 2805-m provides, in pertinent part:

> 1. The information required to be collected and maintained pursuant to [§§ 2805-j and 2805-k] of this article . . .and any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be kept confidential and shall not be released except to the department or pursuant to [§ 2805-k(4)] of this article.

she called Union Representative Sonia Echevarria several times and that Echevarria failed to return her calls. (Pet. ¶ 5.) The Union alleges that, on February 10, the bargaining unit chairperson at Seaview reached Echevarria by phone with a report that two unspecified Staff Nurses had been suspended for a narcotics incident. The Union also asserts that Echevarria told the bargaining unit chairperson that no action was in order until HHC contacted the Union or until charges were filed against the employees. The Union alleges that Echevarria was not contacted about the incident again until February 12, 2009, when Cassano left Echevarria a voicemail.

It is undisputed that, on February 13, 2009, Echevarria spoke at length with Cassano, and that Cassano identified Petitioner as the other employee involved in the matter and, further, that Cassano provided Echevarria with Petitioner's phone number. It is also undisputed that Echevarria called Petitioner that same day, and they spoke at length. The Union claims that, during this phone call, Echevarria explained to Petitioner that the collective bargaining agreement ("Agreement") applicable to the Staff Nurse unit does not afford probationary employees grievance rights for allegedly wrongful discipline. Petitioner admits that Echevarria had told her that the Union could not help her.

By letter dated February 24, 2009, HHC formally terminated Petitioner's employment effective that same date. On March 13, 2009, Echevarria filed a grievance on behalf of Cassano alleging wrongful discipline ("Cassano grievance").[5] On March 16, 2009, Petitioner sent Echevarria

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[5] The Agreement between NYSNA and HHC provides, at Article VI, §1 (D), that a grievable claim shall include wrongful disciplinary action against an employee. Section 8 of the agreement provides that wrongful discipline grievance claims may not be filed on behalf of the following categories of employees:

> a. Effective July 1, 2006, full-time employees with less than twelve (12) months of service unless a longer period is agreed by the Association.
> b. Employees covered by Section 75(1) of the Civil Service Law or Section 7:5:1

an e-mail admitting that she had made the medication error. The Union asserts that the next day, Echevarria amended the Cassano grievance by adding "*et al.*" to the caption to include other unnamed members of the bargaining unit as grievants. The Union asserts that this was intended to include Petitioner.[6] Petitioner further asserts, and HHC does not deny, that on March 17, 2009, HHC reported the medication incident and Petitioner's subsequent termination to the New York State Office of Professional Discipline ("OPD"), pursuant to PHL § 2805-e.

Two weeks later, specifically, on April 20, 2009, Cassano's own disciplinary charges were settled by stipulation. Petitioner asserts that the terms of the settlement included a letter to OPD absolving Cassano of disciplinary consequences.[7] The Union asserts that Cassano was represented by her own counsel in the matter and that the Union played no role in the negotiations.

> of the Rules and Regulations of the Health and Hospitals Corporation.
> c. Employees paid on a per visit basis.

Of specific relevance in this case is the following provision of the Agreement:

> Effective July 1, 2006, any *per diem* employee who works at least half-time per week and has performed such *per diem* work at least twelve (12) months shall be entitled to utilize the contractual grievance procedure (including disciplinary matters) up to and including Step III.

[6] Petitioner asserts that she has not seen any documentation of any such grievance assertedly filed on her and others' behalf. In any event, the Union asserts that the grievance was denied at Step II of the contractual procedure, and that it appealed the matter to Step II on August 3, 2009. As of the date the pleadings were complete, the matter was still pending.

[7] The content of the settlement and the letter are not in the pleadings nor is the means by which Petitioner allegedly came to know the details of the Cassano settlement. However, these facts do not have an impact on the resolution of this matter.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that her claims against both the Union and HHC arose from the events that began on or about February 2, 2009. It was then that she admittedly committed a medication error. Specifically, Petitioner contends that HHC violated her *Weingarten* rights on or about February 9 when supervisors denied her request for union representation and questioned her about the medication error.[8] Contrary to Respondents' contention that her employment status did not entitle her to disciplinary grievance rights, Petitioner contends that she was entitled to grieve because the time that she served as a Licensed Practical Nurse, beginning in December 2007, should be credited towards her service in the Staff Nurse title.[9]

Moreover, Petitioner asserts disparate treatment by HHC's refusal to settle her case with a penalty less severe than that afforded Cassano. Petitioner further contends that other, unnamed nurses on whose behalf the Union filed the Cassano grievance alleging wrongful discipline had made medication errors in the past and were not disciplined or reported to the OPD.[10] Petitioner contends

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[8] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975) (granting private sector employees the right to request union representation, and to refuse to submit to an employer's investigatory interview absent union representation, where the employee reasonably believes that the interview could lead to disciplinary action); *Asst. Dep. Wardens' Assn.*, 71 OCB 9, at 13 (BCB 2003)(adopting *Weingarten*).

[9] Petitioner does not offer authority for this assertion. We take administrative notice of the HHC Personnel Rules and Regulations and find no authority therein for such accrual of time served in the LPN title towards time served in the Staff Nurse title.

[10] Petitioner does not dispute that HHC reported Cassano to the OPD as well.

these actions violated NYCCBL §§ 12-306(a)(1) and (3).[11]

Petitioner contends that the Union breached the duty of fair representation in violation of NYCCBL §§ 12-306(b)(1) and (3), in the handling of her wrongful discipline claim by not responding to her attempts to contact Echevarria between February 2, 2009, when the medication incident occurred and February 9, 2009, when she was questioned her about the incident without union representation present. Petitioner alleges that Ecchevaria's failure to represent her in the supervisory meeting actually resulted in the termination of Petitioner's employment because she believed that the first week after the medication error was a crucial time during which she needed but failed to obtain guidance from the Union. Moreover, Petitioner complains that Echevarria failed to include her in the wrongful discipline grievance until after Petitioner's employment was actually terminated on February 24, 2009. Petitioner contends that, if the Union had taken action on her behalf earlier in the investigatory process, termination might not have resulted.

As relief, Petitioner seeks back wages, damages for health insurance costs, infliction of emotional distress and lost income, and a letter to OPD clearing her name of the disciplinary consequences of the medication error.

Union's Position

The Union raises a timeliness defense against Petitioner's claim arising out of the supervisory conference and other alleged acts and omissions by the Union prior to Petitioner's February 24, 2009, as the instant petition was not filed until June 24, 2009. Thus, the earliest timely act or omission which is susceptible to the Board's review is the termination itself, which took place

[11] Petitioner also cites § 12-306(a)(4) as having been violated; however, the cited section is inapplicable to Petitioner *pro se*.

exactly four months prior to the filing of the improper practice petition.[12]

The Union also contends that Petitioner has failed to allege facts amounting to arbitrary or discriminatory treatment of her or that it acted in bad faith toward her or treated her differently from similarly situated fellow employees. Even if Echevarria did not return Petitioner's phone calls during the seven-day period Petitioner claims, the Union argues that this delay does not amount to a breach of the duty of fair representation. Similarly, the Union asserts that Petitioner's dissatisfaction with the outcome of her disciplinary matter is insufficient, standing alone, to establish a *prima facie* violation of the duty of fair representation.

The Union also argues that Petitioner belonged to a class of employees whose disciplinary grievance rights are limited. As a *per diem* employee and a probationer, Petitioner is excluded from the reach of the contractual grievance procedure, as she served less than the requisite 12 months in the relevant title. To the extent that Petitioner complains that NYSNA failed to pursue a disciplinary grievance on her behalf, Petitioner did not possess such rights and any such failure on the part of the Union cannot be found to be arbitrary or exercised in bad faith. Thus, no violation of the NYCCBL can be found against the Union.

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[12] NYCCBL § 12-306(e) provides, in pertinent 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.

See also § 1-107(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, ch. 1)("OCB Rules").

HHC's Position

HHC also argues that the instant petition is untimely as to the allegations that she was wrongfully denied union representation on February 9, 2009, when she was questioned concerning the medication error. The Board must find allegations concerning events prior to February 24, 2009, barred as outside of the applicable, four-month limitations period as measured from the June 24, 2009, filing date of the instant petition.

Even if that specific claim were timely, HHC's refusal of Petitioner's request for union representation did not violate § 12-306(a) of the NYCCBL because Petitioner had no right to union representation at the meeting. First, HHC contends that the meeting was for quality assurance purposes pursuant to PHL § 2805-j, specifically to gather information so that supervisors could take preventive measures in the future. Thus, HHC contends that Petitioner had no reasonable expectation that the meeting could result in disciplinary action. Additionally, Petitioner was not entitled to union representation because, as a *per diem* Staff Nurse with less than 12 months of service in the title, she remained a probationary employee; thus, she had no legal or contractual right to access the disciplinary process.

In addition, Petitioner's allegations are purely conclusory and speculative in asserting that her employment was terminated and her administration of medication to the patient reported to OPD in retaliation for requesting union representation at the February 9, 2009, meeting. Petitioner's admission on February 2, 2009, that she committed the medication error and engaged in an unlicensed medical practice predated her request for union representation. No facts have been alleged tending to establish that the latter, and not the former, was the impetus for HHC's decision to terminate her.

Finally, even if HHC could be found to have exhibited anti-union animus towards Petitioner based on any request for union assistance, the Board must find that HHC possessed a legitimate business reason for terminating Petitioner's employment given her admission of the medication error which jeopardized the delivery of patient care, HHC's primary mission. Not only was HHC's decision a proper exercise of its managerial duties but the report to the OPD about the professional misconduct on Petitioner's part was statutorily required, under the PHL, and thus would have been made without regard to union activity on her part.

As Petitioner has failed to substantiate her claims as to a breach of the duty of fair representation by NYSNA, any derivative claims against HHC arising under NYCCBL § 12-306(d), also must fail.

DISCUSSION

As a threshold matter, it is well established, pursuant to NYCCBL § 12-306(e) and OCB Rule § 1-07d,[13] that an improper practice charge "must be filed no later than four months from the time the disputed action occurred or from the time the petition 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. N.Y.Co. Oct. 8, 2003); *see also Banerjee*, 3 OCB2d 15, at 17 (BCB 2010); *Mahinda*, 2 OCCB2d 38, at 9 (BCB 2009). Therefore, "claims antedating the four-month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Nardiello*, 2

[13] 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. . . ."

OCB2d 5, at 27 (BCB 2009); *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (*citing Castro*, 63 OCB 44, at 6 (BCB 1999)).

Thus, to be timely, the acts or omissions about which Petitioner complains here must have occurred no earlier than February 24, 2009, that is, four months prior to the filing of the instant petition on June 24, 2009. Petitioner contends that the Union breached the duty of fair representation by failing to respond to her requests for assistance from February 2, 2009, when she admits having administered the incorrectly timed dose and informing her supervisor of the error and through February 9, 2009, when the supervisory conference took place. The claims arising from the Union's alleged non-responsiveness during that seven-day period are clearly outside of the statute of limitations. Similarly, we are constrained to find Petitioner's claim that HHC's refusal to afford Petitioner union representation at the February 9, 2009, meeting is likewise time-barred. *Banerjee*, 3 OCB2d 15, at 17; *Nardiello*, 2 OCB2d 5, at 27.[14]

The remaining claims against HHC retaliated against Petitioner for requesting Union

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[14] As the *Weingarten* claim is untimely asserted here, it will not be considered by this Board. However, for future cases, we note that the argument that probationary employees lack *Weingarten* rights is without legal support. The argument equates entitlement to a right to grieve disciplinary matters with an entitlement to representation at meetings which the employee reasonably believes could lead to discipline. We have held that the right to representation is independent from the existence of a statutory or contractual right to grieve disciplinary matters. *Burton*, 77 OCB 15, at 23 (BCB 2006). Moreover, after a careful analysis of legislative history, and public and private sector caselaw, just such an argument has been rejected by a PERB ALJ. *State of New York [Dept. Of Corr. Svcs.]*, 42 PERB ¶ 4552, 4708-4710 (2009)(ALJ). In reviewing the predicates for asserting *Weingarten* rights, the PERB ALJ determined that "[t]here is no evidence that they are tied to the existence of contractual or statutory disciplinary procedures." *Id*. at 4709 (citing, inter alia, *New York City Transit Authority*, 35 PERB ¶ 3029 (2002). Public and private sector decisions have likewise found that the right ro representation inures to the benefit not just of the individual employee, but to the entire bargaining unit as well. *See Burton*,77 OCB 15, at 23; *see also Ass't Dep. Wardens' Assn.*, 71 OCB 9 (BCB 2003); *State of New York [Dept. Of Corr. Svcs.]*, 42 PERB ¶ 4552 at 4710.

assistance in violation of NYCCBL §§ 12-306(a)(1) and (3) by reporting her employment termination to the OPD and by not offering to resolve her termination in the same way that HHC settled Cassano's case in April 2009.[15]

In resolving retaliation claims under the NYCCBL, this Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, which states that a petitioner must demonstrate that

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

Bowman, 39 OCB 51, at 18-19; *see also Edwards*, 1 OCB2d 22, at 16 (BCB 2008). If a petitioner alleges sufficient facts concerning these two elements to state a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *Morris*, 3 OCB2d 19 (BCB 2010), at 14; *DC 37*, 1 OCB2d 5, at 64

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[15] NYCCBL § 12-306(a)(1) provides, in pertinent part:

It shall be an improper practice for a public employer or its agents:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> * * *
>
> (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.

(BCB 2008).

There is no dispute that HHC knew of Petitioner's desire to secure Union assistance. Petitioner has satisfied the first element of the *Bowman-Salamanca* test. The instant petition fails on the second element of the test. Conclusory statements do not state a violation of the NYCCBL. *DEA*, 79 OCB 40 (BCB 2007); *see also Civ. Serv. Bar Assn.*, 71 OCB 5, at 8 (BCB 2003); *COBA*, 65 OCB 19, at 8 (BCB 2000). Assertions of improper motive must be based on specific, probative facts, not conclusions based upon surmise, conjecture, or suspicion. *Feder*, 1 OCB2d 27, at 16 (BCB 2008); *SSEU, L. 371*, 71 OCB 26, at 6 (BCB 2003); *LBA*, 61 OCB 49, at 6 (BCB 1998).

In claiming that HHC retaliated by reporting the medication error and her employment termination to the OPD, Petitioner has not pleaded facts tending to support her contention that HHC was motivated by anti-union animus. Even were she able to establish such a *prima facie* case of anti-union animus, HHC's compliance with the statutory mandate of the PHL which clearly applies to the context at issue is, of course, a legitimate business reason. Petitioner's claim that HHC retaliated against Petitioner by not offering her a similar settlement of the disciplinary matter to that offered Cassano likewise fails plead motive "based on statements of probative facts." *Edwards*, 1 OCB2d 22, at 17; *see also SSEU, Local 371*, 77 OCB 35, at 15 (BCB 2006). Petitioner asks this Board to find disparate treatment between Petitioner and Cassano while ignoring the fact that Petitioner was a probationary employee, and Cassano was permanent. Their respective rights under the Civil Service Law vary widely. As a probationary employee, Petitioner was not entitled to the same due process rights as a permanent employee. Petitioner has presented no grounds under which, in view of her probationary status, she could expect similar treatment to Cassano. Moreover, Petitioner's own admitted actions in directly administering the premature dosage differ from

Cassano's more tangential role, and thus further undermine her claim of entitlement to similar treatment to Cassano. We are constrained to deny the petition as failing to establish a causal connection between her protected activity and the adverse actions complained of. *Andreani*, 2 OCB2d 40 (BCB 2009) (citing *DEA*, 70 OCB 40, at 22-23 (BCB 2007)).

Petitioner's allegations of religious and disability discrimination do not lie within the ambit of this Board to remedy. *See Babayeva*, 1 OCB2d 15, at 7-8 (BCB 2008); *Dimps,* 63 OCB 39, at 4 (BCB 1999). Accordingly, we dismiss any claims arising therefrom without prejudice.

In sum, we find the NYCCBL claims arising from alleged acts or omissions prior to February 24, 2009, to be time-barred, and are therefore dismissed. Those claims which are timely are insufficient. Accordingly, the instant petition is denied in its entirety.

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ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, the improper practice petition filed by Michelle D. Kaplin, docketed as BCB No. 2777-09, is hereby denied without prejudice to the pursuit of a remedy for any claims arising under statutory schemes other than the NYCCBL.

Dated: June 29, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA A. SILVERBLATT
MEMBER

PETER PEPPER
MEMBER