

Local 2627, DC 37, 3 OCB2d 37 (BCB 2009)
(IP) (Docket No. BCB-2741-09).

Summary of Decision: The Union primarily alleged that the City retaliated against a Union member for filing an out-of-title grievance by subjecting her to a higher level of scrutiny regarding her use of sick leave. The City contended that a majority of the allegations were untimely filed, that the member was properly placed “on documentation,” and that anti-union animus did not motivate DSNY to place her in that category. The Board found that many of the Union’s claims were untimely, except for the allegation that the member was subjected to a higher level of scrutiny. Furthermore, in examining the totality of the circumstantial evidence regarding the motivation behind DSNY’s employment action, the Board found that the Union did not show that DSNY retaliated against Malatzky for purposes of anti-Union animus. *(Official decision follows.)*

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 2627, DISTRICT COUNCIL 37, AFSCME, AFL-CIO

Petitioner,

- and -

**THE CITY OF NEW YORK and THE NEW YORK CITY
DEPARTMENT OF SANITATION,**

Respondent.

DECISION AND ORDER

On January 27, 2009, Local 2627, District Council 37 (“Union”) filed a verified improper practice petition against the City of New York (“City”) and the New York City Department of Sanitation (“DSNY”) claiming primarily that DSNY violated § 12-306 (a)(1) and (3) of the New

York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by subjecting one of its members to a higher level of scrutiny regarding her use of sick leave, in retaliation for filing a grievance, among other things. The City contends that a majority of the allegations were untimely filed, that the member was properly placed “on documentation” and that anti-union animus did not motivate DSNY to place her in that category. The Board finds that the Union’s claims are untimely, except for the allegation that the member was subjected to a higher level of scrutiny. Furthermore, in examining the totality of the circumstantial evidence regarding the motivation behind DSNY’s employment action, the Board finds that the Union did not show that DSNY retaliated against Malatzky based upon anti-Union animus.

BACKGROUND

After two days of hearing in this matter, the Trial Examiner found the facts to be as follows.

Arlene Malatzky is employed by DSNY in the Bureau of Information and Technology (“BIT”). BIT’s primary function is to ensure that DSNY’s computer hardware and software are functioning properly. Malatzky has been employed by BIT for over 20 years and, at the time of the hearing, held the Civil Service Title of Computer Specialist Software Level I.

In August 2005, Malatzky’s then-supervisor, Steven Stam, Chief Information Officer of BIT, asked her to handle administrative duties such as personnel matters and purchasing in return for a merit increase. Malatzky’s title and work hours would not change, and Stam would continue to assign her computer software tasks. She agreed in November 2005. The City agrees that Stam asked Malatzky to perform additional duties but denies that he offered her a merit increase.

Malatzky’s new administrative duties involved procurement and purchasing for BIT and

handling personnel matters including hiring, firing, sick leave, and wage increases. Malatzky also supervised Serena Lau-Hernandez, whose in-house title was Administrative Manager. Lau-Hernandez was responsible for monitoring employees' time and leave, among other things.

In March 2007, Malatzky filed an out-of-title grievance because Stam did not give her the alleged promised merit increase for her increased duties. Malatzky testified that Stam told her that she would no longer receive the merit increase because she filed the grievance. (Tr. 27-28). In July 2007, Stam officially retired from his position as CIO, and Joel Binn replaced him.¹

After the Step III grievance hearing on August 21, 2007, BIT acknowledged that Malatzky performed out-of-title duties. Because the majority of Malatzky's tasks from November 2005 through August 2007 had been administrative in nature, and therefore inconsistent with her civil service title, BIT found it necessary to locate a new position for her. The new position, with the Telephone Coordinator's Office ("TCO"), was located a few blocks away from her old location. Malatzky testified that as a result, she no longer held the in-house computer title of Program Manager, which she had held for ten years, that she would be working with less independence, and that she could have performed her in-title tasks from the old location. (Tr. 32). The TCO project to which Malatzky was assigned was scheduled to last between three to six months.

In March 2008, BIT asked Malatzky to work in a computer-related capacity at Floyd Bennett Field ("FBF") in Brooklyn, three days a week. At this time, one of Malatzky's supervisors was Maida Jasper, Deputy Chief Information Officer at BIT, and a BIT employee for 23 years.² Jasper

¹ Stam did not testify at the hearing.

² Jasper and Malatzky have known each other for the 23 years that Jasper has been at DSNY, and Jasper credibly testified that she considers Malatzky to be a friend. Jasper was also involved in the determination that Malatzky should be transferred out of her administrative

testified that they asked Malatzky to work there because one of the employees who was in her title at FBF was out sick frequently. (Tr. 161-162). FBF also needed someone who was skilled in a certain computer program in which few at BIT had expertise but for Malatzky. (*Id.*). Malatzky testified that she could have completed most of the work via a remote connection at her Manhattan office, and that the long commute aggravated an existing medical condition. (Tr. 37-38, 132-133).

Since Malatzky lives in Rockland County, DSNY provided her with a City vehicle to make her commute to eastern Brooklyn more reasonable. Soon after DSNY gave her the vehicle, Petitioner had two accidents in a short period of time. DSNY decided that it would no longer provide her with a car, despite Jasper's attempts to let her keep a City vehicle. (Tr. 99-100, 163, 163).

Malatzky's Placement "On Documentation"

Jasper testified that in August 2008, Malatzky was absent for four days, and since Binn made a comment to Jasper about Malatzky's frequent absences, Jasper asked Lau-Hernandez to present her with Malatzky's time and leave records. (Tr. 296). In 2007, Malatzky took 21 total days of sick leave, 9 days of which were undocumented. Between January 1 and August 9, 2008, Malatzky took 13 days of sick leave, two of which were undocumented. Jasper testified that after reviewing Malatzky's time and leave records, she noticed that from January to August 2008, Malatzky had been absent six or more times. (*Id.*). Jasper testified that, at that time, she and John Pawelcyk, Director of Application Development at BIT, orally informed Malatzky that they were placing her "on documentation." "On documentation" is a term that refers to a period of time where an employee's

duties, and to where she would be assigned to work, including her transfer to TCO and subsequently FBF.

sick leave use is subjected to a higher level of scrutiny. An employee may have to provide doctor's notes that meet a certain specific criteria if the employee uses sick leave days. At the hearing, Jasper admitted that she made a mistake by failing to initially inform Malatzky in writing that she had been placed on documentation. (Tr. 194). Malatzky denies that, at that point, either Jasper or Pawelcyk told her that she was being placed on documentation.

On September 29, 2008, Malatzky submitted medical notes for sick leave that she had taken from September 23 to 26, 2008. On September 30, Pawelcyk sent an e-mail to Malatzky, in which he wrote that he reviewed her doctor's notes and found them insufficient. In the email, he wrote that the notes were insufficient because none of them instructed her to be out of work for those days. He wrote further that she must provide a note from her doctor stating that she could not go to work for that period of time. (Pet., Ex. D). The e-mail was copied to Jasper, among others. Malatzky responded on October 2, 2008 by writing an email to Pawelcyk, copied to Jasper: "Notes stating that I was under a doctor's care are sufficient under the contract for absences. If you have questions about this please contact either the Union, FIAT, or HR." (*Id.*).

Jasper wrote in reply that none of the doctor's notes state that she was required to be out of work, and since she had been absent a substantial number of times over the past year, she is required to document her need to use sick leave. Jasper's email further stated that Malatzky was required to provide a note indicating the specific dates the doctor required her to stay out of work. Jasper closed by writing that the policy "has always been the practice at BIT for staff members that are required to provide 'documentation' because they have been off for more than six occurrences in a six month period of time." (*Id.*).

On November 5, 2008, Malatzky and Jasper emailed each other several times, with Malatzky

claiming that she was unaware that she had been placed on documentation, and Jasper claiming “numerous” discussions about Malatzky’s “excessive absences and [her] need for documentation.” (*Id.*). Throughout the correspondence, the tone of Malatzky’s correspondence was argumentative, and she demanded proof from her supervisor of the discussions regarding documentation. She also demanded “concrete evidence” of her documented and undocumented leave before Jasper could ask for her to be placed on documentation. (*Id.*). She insisted that the doctor’s notes that she had already provided were sufficient.

Malatzky provided her own accounting of the amount of sick leave that she had taken in the year 2008. According to a chart contained in one of her emails to Jasper, Malatzky used 16 days total sick leave during eight incidents. Malatzky claimed that she had provided documentation for five of the incidents, and four were undocumented. Malatzky further claimed that the number of her undocumented incidents did not exceed the limit for the time period.

Varying Interpretations of BIT’s Sick Leave Policy

When Stam functioned as CIO, he determined the standard as to when employees at BIT would be placed on documented sick leave, using criteria and procedures that he personally developed. He memorialized this policy in an undated memorandum to “BIT Staff” that has a word processing imprint noting that the document was last edited on December 11, 2006.³ (City Ex. 1).

The relevant portion of the memorandum, regarding sick leave, is as follows:

In case of one and two day illness, you must call your work location on each day of absence.
Within five work days of returning, you may be required to

³ The 2006 memorandum may accurately represent what the sick leave policy was at BIT prior to 2006, however, the 2006 Stam policy memorandum is the only written document introduced into evidence that outlines the policy to which BIT may have adhered.

provide medical documentation satisfactory to the Director of BIT for sick leave of more than two days duration, or if you have taken more than three days of sick leave in the previous six months.

Upon the third day of medical absence, you may be required to provide a valid note from your medical provider, clearly identifying the caring physician, indicating the medical reason for your treatment, and indicating the expected length of absence due to this condition.

Medical documentation may not be approved unless it includes information that clearly identifies the caring physician . . . date and time of visit, and the provider's statement satisfactorily describing the medical reason and time period for the absence.

Unapproved Medical Leave may be considered Absence Without Leave (AWOL) and may result in loss of pay, termination or other disciplinary actions.

Jasper testified that Stam's policy memorandum outlined her understanding of what the sick leave policy was at BIT. She testified that when Stam was CIO, she witnessed numerous different ways in which he would apply his sick leave policy and place employees on documentation. (Tr. 146-151). The City supported Jasper's testimony by submitting three memoranda written by Stam on October 5, 2000, placing three employees, including Malatzky, on documentation. (City Ex. 2, 2A). The memoranda began, "Please be advised that in the past six months you have been using an excessive number of Sick Leave Days and now have fewer than five days of Sick Leave time available. For future reference, only documented and approved Sick Leave requests will be charged against your accrued time." (*Id.*). Stam did not specify the number of sick leave days that the employees had taken to that point, and he did not mention whether those absences were documented or undocumented. Jasper testified that Stam was not very specific in his reasoning about when an employee should be placed on documentation, so she was unclear as to the criteria Stam used when he decided to place Malatzky on documentation in October 2000.

Jasper testified that for as long as she could recall, BIT never used the sick leave policy

outlined in “Leave Regulations for Employees Who are Under the Career and Salary Plan” in the Citywide Agreement (“Leave Regulations”), nor did BIT follow DSNY’s Operations Order 88-16 (“Operations Order”) on the same subject. The Leave Regulations provide that an employee must provide “proof of disability” if: an employee requests sick leave for more than three consecutive work days; an employee uses undocumented sick leave more than five times in a six month sick leave period; or if an employee uses undocumented sick leave more than four times in a sick leave period on a day immediately preceding or following a holiday or scheduled day off. The Operations Order sets forth DSNY’s Absence Control policies for Career and Salary employees and outlines the various courses of action management is expected to take before placing an employee on documentation. Jasper testified that she did not recognize the Operations Order, and she was not familiar with the “Step” procedure enunciated in the Operations Order.

As the Administrative Manager at BIT, Lau-Hernandez testified that she also believed the operative sick leave policy at BIT was outlined in the Stam policy memorandum. (Tr. 225). Lau-Hernandez stated that, pursuant to the memorandum, she did not believe that BIT considered whether an employee’s absences were documented or undocumented. She also testified that she did not believe that the policy had been changed or altered during the course of her 11-year tenure at BIT. (Tr. 226). Lau-Hernandez stated that when Stam was CIO, he would place employees on documentation when he noted excessive sick leave usage. She also believed that Stam counseled employees prior to placing them on documentation, but that he did not document those sessions. (Tr. 227).

In her affidavit attached to the Petition and in her testimony, Malatzky gave differing accounts of what she believed the BIT sick leave policy was. In her affidavit, Malatzky averred that

as an employee at BIT, management was required to provide written proof that she had met the requirements for being placed on documentation, as provided for in the Leave Regulations. (Union Ex. 1, ¶ 16). Also in her affidavit, Malatzky stated that only one employee had been placed on documentation prior to 2008, and that employee had been counseled before being placed on documentation. She averred that the employee was placed on documentation because the employee had a combination of excessive absences, lateness, and a repeated failure to call when he or she was going to be late. (*Id.*). Malatzky also stated in the affidavit that she had never been placed on documentation before 2008. On cross-examination, Malatzky testified that at the time she submitted the affidavit, she had forgotten that Stam placed her on documentation in 2000. (Tr.298). Malatzky acknowledged that when she was placed on documentation in 2000, she got into an argument with Stam because she believed that he did not follow the policy as outlined in the Leave Regulations. (Tr. 296).

At the hearing, however, Malatzky testified that BIT's sick leave policy was that if an employee had six undocumented absences in a six month time period, they could be required to provide documentation. (Tr. 46-47). She testified that she believed that the Operations Order, and its outlined Step procedure, is what governed BIT employees. In contrast, Jasper and Lau-Hernandez both testified that they were not aware of the Operations Order until after the Union filed the instant petition. (Tr. 188, 233-234).

On cross-examination, Malatzky acknowledged that she "might have" come across Stam's memorandum at some point in her employment. (Tr. 285). She also acknowledged that Stam was "a little looser" in his interpretation of the Leave Regulations and that an employee had to be "extremely abusive" in order to be placed on documentation. (Tr. 104). She further testified that

Stam had poorly followed the Leave Regulations. (Tr. 296).

POSITIONS OF THE PARTIES

Union's Position

The Union argues that it has shown that the Respondent violated NYCCBL § 12-306(a)(1) and (3) by retaliating against Malatzky. The Union encouraged the Board to view any events that it may consider to be untimely filed as background to its claims.

It is clear that when Malatzky filed her grievance, she engaged in protected activity, and that DSNY was aware of that grievance, because DSNY participated in the grievance process. Stam, Binn, Jasper, and Pawelcyk all had direct knowledge of her grievance. Stam was the supervisor who told Malatzky that she would not receive her merit increase because she filed the grievance. Further, Jasper and Pawelcyk informed Malatzky that she was being transferred in order to cease her assignment to her out-of-title duties. Binn and Jasper also informed Malatzky of her transfer to FBF three days a week.

DSNY's retaliatory acts are certainly linked to the grievance filing. First, three days after Malatzky filed her grievance, Stam threatened her with the denial of the merit increase he had promised. Second, the day after DSNY held the Step III hearing in August 2007, Jasper and Pawelcyk transferred her to a different location, had her in-house title of ten years removed, and had the amount of independence with which she performed her duties reduced. Further, in May 2008, she was reassigned to FBF three days a week despite the fact that training is only offered intermittently and despite the fact that she could have performed a portion of her duties from virtually any DSNY computer. The long commute exacerbated the particular medical condition that

Malatzky has, and creates additional expenses for gas and tolls. DSNY has ignored her numerous requests to remain at her Manhattan location.

The most recent retaliatory act, placing Malatzky on documentation, was an adverse employment action because she was then required to submit additional documentation for any day of sick leave, for an unspecified period of time. Malatzky was treated differently than other BIT employees who had been placed on documentation in the way that the DSNY policy was applied and in the way she was notified and counseled regarding being placed on documentation.

In its post-hearing brief, the Union argued that the City, in its Answer, contended that BIT does not utilize the Leave Regulations regarding sick leave. It argued that BIT utilized a different, internal policy that was not attached to the Answer, and it did not provide evidence that the alleged policy had been applied to other bargaining unit members. Further, Jasper and Lau-Hernandez testified inconsistently regarding how an employee was placed on documentation.

The Union argues that the evidence shows that Malatzky did not have an excessive amount of sick leave, and that only two of the sick leave days in 2008 were undocumented. Malatzky's sick leave use did not even meet the requirements for sanction status under the Leave Regulations or DSNY's Operations Order, which require at least five undocumented sick days. The distinction between documented and undocumented sick leave is relevant to the determination to place an employee on documentation. The summary of Malatzky's 2007 and 2008 sick leave time, prepared at Jasper's request, was divided into the columns of "documented" and "undocumented." Unlike Malatzky, another BIT employee took 15 sick leave days in April 2009 alone and was not placed on sick leave documentation. In addition, yet another employee was placed on documentation in 2006, but her excessive use of sick leave was set forth in summaries provided to her in a counseling

session.

Jasper evinced familiarity with the step procedure in the Operations Order when she wrote to Malatzky in the October 5, 2008 email exchange that, “six or more occurrences in a six month period of time” warrants BIT placing an employee on documentation. (Pet., Ex. D). The Operations Order also informs management to look at an employee’s sick leave time in “occurrences,” therefore, Jasper must have known about the Operations Order.

Malatzky was also notified differently from other employees that she had been placed on documentation. Malatzky, unlike the other employees who had been placed on documentation—including Malatzky herself in 2000—did not receive written notification that she had been placed on documentation. Each of the other employees received a memorandum from Stam that informed them of the excessive use of sick leave and informing them that only documented and approved sick leave requests would be charged to their accrued time. The Stam policy memorandum has language very similar to the Operations Order, of which the City’s witnesses denied knowledge. Since superiors at BIT did not inform Malatzky of her status until Jasper wrote to her and told her that she had violated the policy, Malatzky was placed at risk for not being paid for her sick leave days or for being deemed AWOL.

The course of conduct, therefore, shows that DSNY have been violating the NYCCBL by repeatedly retaliating against Malatzky for her protected Union activity, including the act of placing her on documentation.

City’s Position

The City argues that a majority of the Union’s claims should be dismissed as untimely, since it did not file the petition until January 23, 2009. As such, any improper practices alleged to have

occurred four months prior to January 23, 2009 must be dismissed. The City argues that the following claims are untimely: 1) that Malatzky, in March 2007, was told that she would not receive a merit increase due to her filing a grievance, 2) that Malatzky's work duties and location were changed in August 2007 because of the grievance, and 3) that the decision to have Malatzky work at FBF three days a week in May 2008 was retaliatory.

Further, the instant petition must be dismissed because the Union had failed to demonstrate that DSNY retaliated against the Petitioner for filing a grievance. The City concedes that Jasper, when she placed Malatzky on documentation, was aware of Malatzky's grievance; however, the Union has failed to demonstrate a *prima facie* showing of wrongful intent. Eighteen months passed between the time Malatzky filed the grievances and the time she was placed on documentation. If BIT was going to retaliate against her for filing the grievance, it most likely would have happened at an earlier date when Stam was in charge.

Additionally, the City argues that BIT did not veer from its own internal policy when it placed Malatzky on documentation. While the Union and Malatzky accurately recited the rules set forth in the Leave Regulations and Operations Order, they were unable to demonstrate that BIT deviated from its own internal practice of placing employees on documentation without following the regulations set forth under the Leave Regulations or the step procedure in the Operations Order. The only way that BIT arguably departed from its past practice was that Jasper informed Malatzky orally, as opposed to in writing, that she was placed on documentation. The memo from Stam to BIT staff clearly deviated from the aforementioned written policies, and Jasper and Lau-Hernandez credibly testified that BIT did not follow the Leave Regulations or Operations Order. In addition, none of the employees placed on documented sick leave met the requirements set forth under the

Leave Regulations or Operations Order. Even Malatzky admitted that Stam did not follow the Leave Regulations strictly, was looser in his interpretation, and that he failed to follow the provisions set forth in the Leave Regulations. Since BIT did not deviate from its own internal practice, the Union cannot legitimately argue that Malatzky was treated unfairly.

The City contends that Malatzky's testimony was full of contradictions, so her testimony cannot be credited. Most notable was her assertion that she may not have been aware of the Stam memorandum outlining BIT's sick leave policy. The memorandum was directed to all BIT staff and both Jasper and Lau-Hernandez testified to being aware of it. Also, the memorandum was provided to BIT staff when Malatzky was performing administrative duties while working with Stam and Lau-Hernandez.

The City argues that DSNY had legitimate business reasons for placing Malatzky on documentation. After Jasper reviewed Malatzky's sick leave records, she and Pawelcyk had numerous conversations with Malatzky pertaining to the fact that she was using excessive sick leave and that she was going to be placed on documentation. Then, Jasper placed Malatzky on documentation because she had six absences in a six month period. The decision to place her on documentation would have been made regardless of whether Malatzky filed a grievance 18 months earlier, since BIT obviously has an interest in ensuring that its employees follow internal policies and do not abuse sick leave.

Further, the City asks that the Board not draw an adverse inference from Stam's failure to testify. Stam, who retired in 2007, is no longer under the City's control. When the City did request that Stam testify, he declined. Since Stam is no longer under the "control" of DSNY, an adverse inference should not be taken because he did not testify.

DISCUSSION

The Union claims that DSNY retaliated against Malatzky for filing a grievance regarding her out-of-title duties, in violation of NYCCBL § 12-306(a)(1) and (3).⁴ NYCCBL § 12-306(e), provides that an improper practice petition must be filed within four months of the accrual of the claim.⁵ Failure to file a petition within this period renders the claims untimely, and this Board will not consider the substantive merits of those claims. *Morris*, 3 OCB2d 19, at 13 (BCB 2010); *Howe*, 77 OCB 32, at 16 (BCB 2006); *Castro*, 63 OCB 44, at 6 (BCB 1999). Since the instant petition was filed on January 27, 2009, we can only consider those incidents that occurred in the four months prior to the petition's filing. Therefore, the only allegations that we will consider as timely filed are the actions DSNY took after September 27, 2008 up to the filing of the petition. Reviewing the

⁴ 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;

* * *

(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.

⁵ 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. . . .

events in the instant matter, the only timely claim is the allegation that DSNY placed Malatzky on documentation in retaliation for filing a grievance. We will consider the other allegations only as background to this claim. *Morris*, 3 OCB2d 19, at 13; *see PBA*, 77 OCB 10, at 13 (BCB 2006).

In resolving discrimination and 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, and requires that a petitioner 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 make out a *prima facie* showing, "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." *DC 37*, 1 OCB2d 5, at 64 (BCB 2008); *see also CEU, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

Here, we find that Petitioner has satisfied the first element of the *Bowman-Salamanca* test, since the City admits that Jasper, the supervisor who was in large part responsible for placing Malatzky on documentation, was aware of Malatzky's grievance. Regarding the second prong of the *Bowman-Salamanca* test, which addresses the motivation behind the employment action in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26 (BCB 2006); *see also CEU, Local 237*, 67 OCB 13, at 9 (BCB 2001); *CWA, Local 1180*, 43 OCB 17, at 13 (BCB 1989). In prior decisions, the Board

has examined the “proximity in time” between the protected activity and the alleged retaliatory act, among other things, to determine if an employer’s action was improperly motivated. *Local 1087, DC 37*, 1 OCB2d 44, at 22 (BCB 2008); *Feder*, 1 OCB2d 27, at 17 (BCB 2008) (A petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence.); *Local 1180, CWA*, 45 OCB 24, at 17 (BCB 1990).

After reviewing all of the allegations, including the background to those allegations, we find that the Union has not shown that Malatzky was placed on documentation because of anti-Union animus. Malatzky filed her grievance in March 2007, and she was not placed on documentation until late 2008, nearly a year and a half later. Furthermore, Stam—the BIT CIO who threatened to not grant her the promised merit increase because she filed a grievance—left DSNY’s employment in July 2007. The alleged primary “bad actor” in this matter no longer worked at BIT, and had not for a significant period of time—over a year—before she was placed on documentation.

Furthermore, no evidence shows that any other BIT supervisor who remained throughout the relevant time period directly or indirectly demonstrated or adopted any anti-union animus. Jasper, who was the supervisor primarily responsible for placing Malatzky on documentation, showed no indicia of anti-union animus towards Malatzky during the relevant time period or in her testimony at the hearing. On the contrary, Jasper also testified that she and Malatzky became friends in the 23 years that they knew each other from their employment at BIT, and Jasper often advocated on Malatzky’s behalf. Though the emails they traded in October 2008 were contentious, the acrimony expressed by Malatzky and Jasper during that exchange may best be characterized as two long-time friends who are comfortable with speaking freely to each other, and does not suffice to

show anti-union animus. *Edwards*, 1 OCB2d 22, at 18 (BCB 2008) (citing *Warlick*, 29 OCB 1, at 3 and 7 (BCB 1982) (personality conflicts with superiors do not fall within the prohibited conduct contemplated by the NYCCBL and thus, this Board cannot remedy such a complaint).

We also find that the existing policy followed at BIT was the one that Stam outlined in his memorandum to staff, even though BIT's utilization of that particular policy may not have been consistent with the policy applied elsewhere in DSNY.⁶ Regardless of Jasper's and Lau-Hernandez' testimony, we do not find any support for Malatzky's assertion that BIT adhered to either the Leave Regulations or the Operations Order as the operative policy. Malatzky was in an administrative position at BIT with Stam as her supervisor, and during cross-examination, she acknowledged that she "might have" seen a copy of Stam's policy memorandum. Further, Malatzky testified that when Stam placed her on documentation in 2000, they got into an argument regarding the fact that he did not follow the Leave Regulations. Though the Union argues that Malatzky's time records were divided into documented and undocumented leave, thus establishing that the distinction was important and that another policy was in effect, the operative Stam policy memorandum and the counseling memoranda do not make such a distinction.

The record does not contain sufficient evidence that Malatzky was treated any differently than other employees. In her November 5, 2008 email to Jasper, Malatzky admitted to 16 days of sick leave, year-to-date, in a total of eight incidents. On the chart Malatzky included in her email to Jasper, she shows six of those days as documented and four undocumented. Sixteen days of sick leave is not an insignificant amount of leave, and the record contains no evidence that BIT treated

⁶ As the issue is not before us, we will make no holding as to whether the sick leave policy at BIT was consistent with that found in the applicable collective bargaining agreement.

other employees with similar sick leave totals in the relevant time period any differently than Malatzky. Though the Stam policy memorandum leaves discretion to a BIT supervisor, the Union has failed to show that the discretion was abused for purposes of retaliation for Union activity. Further, the fact that Malatzky was not notified in writing that she had been placed on documentation is not sufficient under these circumstances to find that she was treated differently. The evidence adduced did not compare employees similarly situated to Malatzky and, therefore, did not show that written notification was mandated.

In examining the totality of the circumstantial evidence regarding the motivation behind DSNY's employment action, we find that the Union has not shown that DSNY retaliated against Malatzky for purposes of anti-Union animus. *COBA*, 2 OCB2d 7, at 41-42 (BCB 2009). Accordingly, we dismiss the petition in its entirety.

ORDER

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

ORDERED, that the improper practice petition docketed as BCB-2741-09 be and the same hereby is, dismissed as to any claims arising under NYCCBL § 12-306(a)(1) and (3).

Dated: New York, New York
August 9, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

I dissent.