Local 1157, 3 OCB2d 40 (BCB 2010)

(IP) (Docket No. BCB-2770-09).

Summary of Decision: Local 1157 alleged that the City retaliated against its members for asserting their right to be paid the prevailing rate of wages and benefits pursuant to Labor Law § 220 in violation of NYCCBL § 12-306(a)(1), (2) and (3) by reducing members' leave accruals and by treating other unions more favorably. In a prior decision, the Board dismissed Local 1157's claims as not yet ripe for adjudication. The City argued that the claims were still not ripe, that the Board lacked jurisdiction, that it did not interfere, discriminate, or retaliate, and that it had legitimate business reasons for its actions. The Board found the claims ripe for review, that it had jurisdiction, and that improper motive had not been established. Accordingly, the improper practice petition was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1157, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On May 26, 2009, Local 1157, District Council 37, AFSCME, AFL-CIO ("Local 1157" or "Union") filed a verified improper practice petition against the City of New York ("City"). Local 1157 represents Supervisor Highway Repairers ("SHR"), who are covered by New York Labor Law § 220 ("§ 220"). The Union alleged that in response to it securing a prevailing wage for SHRs, the City violated the New York City Collective Bargaining Law (New York City Administrative Code,

Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (2), and (3) by reducing SHRs' leave accruals and by treating other unions more favorably. The Board previously found that these claims would not be ripe for adjudication until the Office of the New York City Comptroller ("Comptroller") determined whether the City's actions were in accordance with its Final Order and Determination ("Order"). Local 1157 argues that its claims are now ripe as the Comptroller has clarified that its Order did not require the City to reduce leave accruals. The City argues that the claims are still not ripe as Local 1157 has not exhausted its administrative remedies. Noting that the Board has held it lacks jurisdiction over claims of bad faith bargaining of § 220 employees, the City argues that the Board lacks jurisdiction over NYCCBL § 12-306(a)(1), (2), and (3) claims that arise from the same facts. The City further argues that it did not interfere, discriminate, or retaliate and had legitimate business reasons for its actions. The Board found that the claims are ripe for review, that it has jurisdiction, and that improper motive has not been established. Accordingly, the improper practice petition was denied.

BACKGROUND

The Trial Examiner held five days of hearings and found that the totality of the record established the relevant background facts to be as follows:

District Council 37 ("DC 37") is the certified representative for SHRs but has delegated day-to-day representation to Local 1157. In September 2007, the City unilateral reduced SHRs' leave accruals. This is the fourth decision stemming from that action.[1] The most recent Consent

[1] Familiarity with our prior decisions is presumed. In *Local 1157*, *DC 37*, 1 OCB2d 7 (BCB 2008), we found that Local 1157 lacked standing to bring NYCCBL § 12-306(a)(4) or (5) claims. In *Local 1157*, 2 OCB2d 10 (BCB 2009), we held that we do not have jurisdiction over a claim by

Determination for SHRs covered April 1, 1995, through March 31, 2000.[2] In March 2000, DC 37 requested a preliminary determination from the Comptroller, which was issued on August 19, 2004. The Comptroller found that the prevailing wage rate was 46% higher than SHRs' current wage rate. DC 37 and Local 1157 (together, the "Unions") met with the City's Office of Labor Relations ("OLR") on several occasions between the issuance of the preliminary determination and a hearing at the New York City Office of Administrative Trials and Hearings ("OATH") on October 19, 2005.

2004-2005 Negotiations

The parties agree that the City informed the Unions that it wanted to negotiate based upon the Citywide pattern–the pattern offered other non-uniformed City employees–not the Comptroller's preliminary determination. The parties also agree that the Unions informed the City that they intended to pursue a prevailing rate through the Comptroller. OLR Commissioner James Hanley testified that he informed the Unions that if they would not negotiate based upon the Citywide pattern, the City would fully avail itself of its legal rights. Assistant Commissioner Matthew Campese corroborated that Commissioner Hanley made statements to that effect.

The parties further agree that they discussed the time it would take to secure a prevailing rate under § 220. A Union witness, SHR Louis Vacaro, recalled that at a December 8, 2004 meeting, Commissioner Hanley stated that the SHRs "will never get the prevailing rate, it will be ten to twelve years, some of [you] will be retired before [you] even get it." (Tr. 33). Another Union witness, Area

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§ 220 employees that the City failed to bargain in good faith and, accordingly, dismissed the NYCCBL § 12-306(a)(4) and (5) claims. We dismissed a subsequent petition by DC 37 on the same grounds in *DC 37*, 2 OCB2d 31 (BCB 2009).

[2] The § 220 process has been addressed in detail in our prior decisions. *See Local 1157*, *DC 37*, 1 OCB2d 7, at 3-4; *Local 1157*, 2 OCB2d 10, at 3-4; *DC 37*, 2 OCB2d 31, at 3-4.

Supervisor Marc Reed, corroborated that Commissioner Hanley made a statement to that effect in response to DC 37's Director of Research and Negotiations informing OLR that the SHRs intended to seek a prevailing wage. SHR Vacaro further testified that a City representative–he could not recall who–referenced a § 220 case that took over a decade to resolve, and stated that SHRs would have to wait as long.

The parties also agree that the City told the Unions that it would seek to offset the costs associated with a determination by the Comptroller raising the wage rate of SHRs. Assistant Commissioner Campese testified that before the October 19, 2005 OATH hearing, he informed the OATH ALJ that if the Comptroller's preliminary determination was "imposed on them, . . . the City may have to look at other cost-saving ideas such as seasonalization." (Tr. 224-225).[3] Area Supervisor Reed testified that on October 19, Assistant Commissioner Campese mentioned layoffs and reclassifying SHRs as a non § 220 title as well as seasonalization of the title. Assistant Commissioner Campese acknowledged that layoffs may have also been discussed on October 19.[4] SHR Vacaro testified that Assistant Commissioner Richard Yates similarly stated that the City might seasonalize and/or layoff SHRs to fund a raise, but he could not recall when the statement was made.

Area Supervisor Reed testified that Commissioner Hanley stated that the SHR title was not a § 220 title. SHR DelGeorge testified that Assistant Commissioner Yates also stated that SHRs were not § 220 employees and were never going to get the prevailing rate. At the OATH hearing,

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[3] Assistant Highway Repairers are seasonalized and laid off between December 15 and March 15. Highway Repairers, who are supervised by SHRs, are not seasonalized.

[4] Two Union witnesses, SHRs Vacaro and Carl DelGeorge, corroborated that Assistant Commissioner Campese stated that the City would seek to offset the costs associated with a Comptroller's award, but they could not recall when the statements were made.

the City unsuccessfully challenged SHR's status as a prevailing rate title.[5]

Other § 220 Negotiations

The City witnesses testified that its handling of the SHR negotiations were similar to other § 220 negotiations. Commissioner Hanley testified as to one such negotiation involving Steamfitters. In the early 1980s, the Steamfitters successfully secured from the Comptroller a determination that the prevailing wage rate was higher than the wage rate paid by the City. According to Commissioner Hanley, the Steamfitters expected to receive the higher prevailing wage rate and continue to receive the same supplemental benefits from the City, which were greater than the prevailing supplemental benefit rate. The City raised the wages to the determined prevailing rate. However, it also sought to reduce the Steamfitters' benefits such as sick leave so that the total hourly costs of supplemental benefits matched those found by the Comptroller. The reduced benefits were agreed to by the Steamfitters' union and incorporated into a Consent Determination.

Assistant Commissioner Campese testified as to three other Consent Determinations in which a § 220 title had their leave benefits reduced. In each instance, OLR prepared a costing model that found that the supplemental benefits provided by the City exceeded the prevailing supplemental benefit rate. Leave accruals were ultimately reduced so that the value of the supplemental benefits would be consistent with prevailing supplemental benefit rate.[6]

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[5] *See Comptroller ex rel. Local 1157 v. Office of Labor Relations*, OATH Index No. 1887/05, at 4 (Jan. 23, 2006). We take administrative notice that the City took the same position in court. *See Matter of Hanley v. Thompson*, 41 A.D.3d 207, 208 (1st Dept. 2007).

[6] According to Assistant Commissioner Campese, in its determinations the Comptroller does not calculate the value of supplemental benefits provided by the City. Rather, OLR determines that value. Assistant Commissioner Campese testified that some OATH ALJ's leave the valuation of supplemental benefits to the City while others will hold hearings on the valuation.

The first Consent Determination described by Assistant Commissioner Campese concerned Oilers, Plant Maintainers, and Stationary Engineers. It was entered into in December 2005 by the City and two locals of the International Union of Operating Engineers. In it, leave was drastically reduced in order to match the total compensation from the private sector. Among other leave reductions, sick days were reduced from 12 days per year to one. The second example concerned Construction Laborers. It was entered into in April 2007 by the City and DC 37. In it, Construction Laborers' annual leave accrual was reduced by five days. In a subsequent bargaining round, DC 37 used discretionary money to restore these days. The third example concerned Highway Repairers. It was entered into in April 2007 by the City, DC 37, Local 300 of the Service Employees International Union ("SEIU"), and the District Council of Pavers and Road Builders. In it, Highway Repairers' annual leave accrual was reduced by four days. As with Construction Laborers, the unions used discretionary money from a subsequent bargaining round to restore these days.

The City also introduced a 1982 Decision from the Comptroller concerning Laborers ("1982 Laborers Decision") and its appended Report of the Assistant to Comptroller ("1982 Laborers Report"). The 1982 Laborers Decision determined the prevailing rates of wages and benefits and ordered a hearing to determine whether there were any over or under payments. The1982 Laborers Report found that "to the extent that City provided more than the prevailing benefits, it should recoup the difference." (City, Ex. P, at 9). The 1982 Laborers Report further notes that Laborers:

> cannot maintain that they are entitled to recover any deficiency in the rate of wages paid as determined by the Comptroller and at the same time urge that they are entitled to retain any extra supplemental benefits beyond those established by the Comptroller in the same determination. The determination is one entire and complete document.

(*Id.*). No witnesses testified concerning the1982 Laborers Decision or Report.

Assistant Commissioner Campese acknowledged that SHRs were the first title to have their leave accruals reduced without their union's consent. He also acknowledged that the City had reached Consent Determinations with several titles without an OATH hearing, including Construction Laborers, Oilers, Electricians, Plumbers, Painters, and Glazers.

Local 1157 introduced a Consent Determination concerning High Pressure Plant Tenders that was entered into in August 2008 by the City and DC 37. The City acknowledged that it agreed to pay High Pressure Plant Tenders wages and supplemental benefits that exceeded those found by the Comptroller in its preliminary investigation. Assistant Commissioner Campese explained that DC 37 was willing to negotiate the High Pressure Plant Tenders wages and benefits based upon the Citywide pattern. Therefore, the figures in that Consent Determination reflect the Citywide pattern, and not the prevailing rate.[7]

Commissioner Hanley testified that OLR did not believe it was illegal to pay a § 220 employee more than the prevailing rate but that it would be bad public policy to do so, and that there was caselaw stating that the City did not have to. Assistant Commissioner Campese also acknowledged that it was not illegal to pay a § 220 employee more than the prevailing rate but described doing so "as a gift of public funds."[8] (Tr. 292).

Implementation of the Order

At the October 19, 2005 OATH hearing, the City disputed the appropriateness of the private

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[7] The Union also introduced a 2006 preliminary determination from the Comptroller concerning Highway Repairers that it argues shows that the supplemental benefit rate received by Highway Repairers was greater than the prevailing supplemental benefit rate.

[8] In its Answer to the instant action, the City stated it reduced leave accruals to avoid the criminal penalties set out in § 220.

sector positions the Comptroller used to determine the prevailing rates but did not suggest an alternative. On January 23, 2006, the OATH ALJ issued a Report and Recommendation affirming the preliminary determination in its totality. On March 2, 2006, the Comptroller issued its Order adopting OATH's findings. The City appealed the Order and on June 14, 2007, the Appellate Division unanimously confirmed the Order.

Commissioner Hanley and Assistant Commissioner Campese testified that the City was following the procedures outlined in § 220 and waited for the Appellate Division decision before undertaking any action regarding the Order. Assistant Commissioner Campese testified that in response to the Appellate Division's decision the City prepared a costing model of SHRs' supplemental benefits, which it shared with the Unions. The City concluded that the supplemental benefits SHRs were receiving was $3.22 an hour greater than the prevailing supplemental benefit rate required by the Order. The City proposed, and the Unions rejected, reducing the SHR's supplemental benefits. On September 11, 2007, Local 1157 filed notice with the Comptroller that it would go to court to seek back pay and interest. On September 26, 2007, the City informed DC 37 that the City would pay the prevailing wage rates, retroactive to April 1, 2000, but would also reduce SHRs' supplemental benefits to the prevailing rate found by the Comptroller.[9] SHRs would accrue 4 ½ fewer annual leave days and 5 fewer sick days per annum.[10] In October 2007 and

[9] The City initially took the position that it would seek to recoup overpayments of SHRs benefits. We take administrative notice that on December 16, 2009, the City informed Local 1157 that no recoupment would be sought. *See McFarland v. City of New York*, Index No. 100452/2008 (Sup. Ct. N.Y. Co. Apr. 20, 2010) (Sherwood, J.) (attached Stipulation of Discontinuance).

[10] In addition, SHRs would no longer receive paid leave for the following: bereavement, jury duty, court attendance, health department required absence, civil service examination or interview, and attendance at a State or National veteran or volunteer firefighter organization's convention.

November 2007, the Unions filed the petitions which resulted in *Local 1157*, *DC 37*, 1 OCB2d 7, *Local 1157*, 2 OCB2d 10, and *DC 37*, 2 OCB2d 31.

Comptroller's May 14, 2009 Letter

On May 14, 2009, the Comptroller sent OLR a letter that reads, in pertinent part:

> While this office takes no position as to the propriety of OLR's unilateral and retroactive reduction of certain benefits previously provided to [SHRs], it has come to our attention that your office has represented in several administrative and legal proceedings that OLR was required to impose such unilateral reductions in order to comply with this office's Order and Determination dated March 2, 2006.
>
> I now write to clarify that the [Order] at issue does not, in any way, mandate that the City unilaterally reduce the benefits previously provided to [SHRs]. In fact, to my knowledge, this office has never ordered an employer to reduce its employees' benefits in connection with any Order and Determination that has been issued.
>
> In this regard, the [Order] establishes the minimum rates of wages and benefits for the relevant title, not the maximum. This construction is fully consistent with all other Orders and Determinations this office has issued, the Labor Law, and case law.

(Union, Ex. 9) (underscoring in original) (citations omitted).

The City submitted a court opinion from an Article 78 action filed by the Union that found that the May 14 letter "confirms there has been no final determination of the issue pursuant to procedures set forth in [§] 220(7) and no refusal of the [Comptroller] to adjudicate the matter." *McFarland v. City of New York*, Index No. 100452/2008 (Sup. Ct. N.Y. Co. Nov. 9, 2009).[11]

[11] In January 2008, Local 1157 filed a Article 78 petition that challenged both the prospective reduction of SHRs' leave accruals and the City's decision to recoup alleged overpayments of supplemental benefits. In April 2009, the court dismissed the part of Local 1157's action challenging the City's prospective reduction of SHR supplemental benefits for failure to exhaust administrative remedies. Local 1157 moved to Reargue and Renew based upon the May 14 Comptroller's letter. The court denied that motion. This Article 78 action was subsequently dismissed, pursuant to a stipulation between the parties, after the City notified the Union that it

Remedy Requested

Local 1157 filed the instant petition on May 26, 2009, and requests that the Board order the City to: rescind its decision to reduce and eliminate leave benefits provided SHRs; cease and desist from making any unilateral changes in leave or other benefits accrued by or provided to SHRs, whether retroactively or prospectively; continue to provide SHRs with the same leave provided to them under their most recent Consent Determination unless and until a new Consent Determination is agreed upon and in effect; make every SHR whole for any loss or reduction in benefits that they have suffered; and any other relief the Board deems just and proper.

POSITIONS OF THE PARTIES

Union's Position

Local 1157 argues that its NYCCBL § 12-306(a)(1), (2), and (3) claims are now ripe for review as the Comptroller's May 14 letter clearly establishes that the Comptroller did not mandate that the City reduce SHRs' leave accruals.[12] The Union argues that the *McFarland* court opinion

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would not seek to recoup any past overpayment of supplemental benefits.

[12] NYCCBL § 12-306(a)(1), (2), and (3) provide, in pertinent part, that it is 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;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

Section 12-305 provides, in pertinent part, that "[p]ublic employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively

is irrelevant as that Article 78 action has nothing to do with retaliation, discrimination, interference, or protected activity.

Regarding its NYCCBL § 12-306(a)(1) and (3) claims, Local 1157 argues that since only a union can file a prevailing rate complaint, it constitutes protected union activity. The City's decision to unilaterally cut SHRs' benefits was both retaliatory and discriminatory. No other title has ever unilaterally had their benefits reduced. The examples cited by the City were not unilateral actions but settlements reduced to Consent Determinations. Local 1157 argues that the City engaged in several other acts of discrimination. The City refused to offer DC 37 locals a prevailing rate and instead insisted on bargaining based upon the Citywide pattern, while non-DC 37 represented titles routinely reached Consent Determinations without litigation or an OATH proceeding. The City claimed it would be illegal to provide SHRs with benefits higher than the prevailing rate, while providing § 220 titles that agreed to the Citywide pattern benefits greater than the prevailing rate. Local 1157 cites as examples Highway Repairers and High Pressure Plant Tenders, the later receiving both higher benefits and higher wages than the prevailing rates. Further, the Union claims

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through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . ."

Local 1157 also alleges a derivative NYCCBL § 12-306(a)(1) violation based upon violations of NYCCBL § 12-306(a)(4) and (5), which provide, in pertinent part, that it is an improper practice for a public employer or its agents:

> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment . . .

that SHRs are the only title that the City claimed were not prevailing rate employees.

Local 1157 argues that anti union animus is established by temporal proximity and threats by City representatives. SHRs' benefits were reduced three months after the Order was upheld and two weeks after Local 1157 filed notice that it would sue the City for back pay and interest. The City threatened layoffs, reclassification, and seasonalization. Further, City representatives stated that the City would never acknowledge that SHRs had rights under § 220 and that the City would never offer SHRs more than the Citywide increases. These threats constitute the "smoking gun" that the City's motive for cutting SHR benefits was retaliatory. (Union Brief at 38). In addition, the City has dragged this case out for years.

Local 1157 contends that the City's stated legitimate business reason for its actions are pretextual. The City's first reason–that the cut was ordered by the Comptroller–is rebutted by the Comptroller's letter. The City's second rationale–that it would face criminal liability–is "transparently false." (*Id.* at 42). Both Commissioner Hanley and Assistant Commissioner Campese admitted that it is not illegal to provide City employees benefits greater than the prevailing benefits. The City's third rationale–that providing greater benefits than required by law would be an improper gift of City funds–"is a lie," as evidenced by the City's admissions that other titles receive greater then the prevailing rate. (*Id.* at 43). Further, the benefit cut was not raised until the SHRs received a favorable Order. That the City did not raise the possibility of a benefit cut during the process indicates that its professed concern about the comparative value of SHRs' benefits is pretextual. The City's witnesses are not credible. They acknowledged at the hearing that they had no foundation for their alleged fear of criminal prosecution, made in written representations to the Board and the courts. The City cannot rely upon the 1982 Laborers Decision as it never mentioned it prior to the

hearing. Further, that decision does not support the City's position. It established that it is the Comptroller, not the City, who determines if employees' benefits exceed the prevailing rate.

Local 1157 argues that the City gave preferential treatment to other unions in violation NYCCBL § 12-306(a)(2) and (3). The acts of retaliation described above also constitute acts of interference as they were intended to undermine Local 1157 by treating other unions more favorably.

City's Position

The City argues that the NYCCBL claims are still not ripe for consideration by the Board. The *McFarland* court found that the May 14, 2009 letter does not constitute a final determination by the Comptroller. Therefore, Local 1157 has not exhausted its administrative remedies. Further, the May 14 letter states that the Comptroller takes no position on the reduction of SHRs' benefits.

The City also argues that since the Board has ruled that it has no jurisdiction over the alleged NYCCBL § 12-306(a)(4) and (5) violations, it lacks jurisdiction over any alleged derivative NYCCBL § 12-306(a)(1) claim stemming from them. The Board also lacks jurisdiction over any claims of restraint, domination, interference, or discrimination arising from the same circumstances that gave rise to the alleged NYCCBL § 12-306(a)(4) and (5) violations. Alternatively, the City argues that the NYCCBL § 12-306(a)(1), (2), and (3) claims were litigated in *Local 1157*, 2 OCB2d 10, and *Local 1157*, *DC 37*, 1 OCB2d 7, and that Local 1157 should be collaterally estopped from re-litigating them here.

Moreover, the City argues that Local 1157 has failed to make a *prima facie* case of retaliation. Exercising § 220 rights is not a protected union activity. The record contains no evidence that the Union's participation in a § 220 prevailing wage determination was a motivating factor in the City's decision to reduce leave benefits. Assuming, *arguendo*, that the alleged

statements were made, they do not evidence retaliatory motive. Rather, they reflect candor from the City that the § 220 process would take years and that if required to implement higher wage rates, the City would need to look at funding mechanisms.

Further, the City had legitimate business reasons for prospectively reducing leave accrual rates. The situation of SHRs is not unique. The record contains the unrefuted testimony of City witnesses that the City has behaved similarly in other negotiations regarding § 220 titles. Where the Comptroller has issued an order finding that the City paid less then the prevailing wage rate but greater than the prevailing benefits rate, the City raised the wage rates and sought to lower the benefit rates. The 1982 Laborer's Report recognizes the City's right to do so.

The City argues that Local 1157 has offered no facts with direct relevance to NYCCBL § 12-306(a)(2), nor does any testimony at the hearing support such a charge.

DISCUSSION

We find that the alleged NYCCBL § 12-306(a)(1), (2), and (3) violations are now ripe for review and that this Board has jurisdiction over these claims. We find that while Local 1157 has established a *prima facie* case of a violation of NYCCBL § 12-306(a)(1) and (3), that case has been refuted by the City as the actions at issue were not motivated by anti union animus. We also find no NYCCBL § 12-306(a)(2) or derivative NYCCBL § 12-306(a)(1) violation.

Threshold Issues: Ripeness and Jurisdiction

In *Local 1157*, 2 OCB2d 10, at 16, we found that the adjudication of the NYCCBL § 12-306(a)(1), (2), and (3) claims would be premature since it could not be determined whether the City's reduction of leave accruals "comported with the Comptroller's intent." The May 14, 2010

Comptroller's letter clarifies that the Order did not compel a reduction of supplemental benefits. Thus, the NYCCBL § 12-306(a)(1), (2), and (3) claims are now ripe for review.[13]

This Board clearly has jurisdiction over the NYCCBL § 12-306(a)(1), (2), and (3) claims of § 220 employees. The source of the duty not to retaliate or discriminate based upon an employee's exercise of a protected right, and the duty not to interfere in the administration of a union, are found in NYCCBL § 12-306. The NYCCBL vests in this Board exclusive, non-delegable jurisdiction "to prevent and remedy improper public employer . . . practices [as] listed in [§] 12-306." NYCCBL § 12-309(a)(4); *see also SEIU, L. 371*, 79 OCB 31, at 10 (2007) (allegations of interference and discrimination raise statutory claims over which the Board has jurisdiction); *Local 376, DC 37*, 73 OCB 15, at 12 (BCB 2004) (questions of retaliatory motive are under the exclusive jurisdiction of this Board); *Fabbricante*, 71 OCB 30, at 23 (BCB 2003) (that conduct may also violate another statute is irrelevant to our jurisdiction); *see also Matter of Patrolmens Benev. Assn. v. City of New York*, 293 A.D.2d 253 (1st Dept. 2002). Further, as these claims were not previously addressed, the Union is not estopped from raising them.

Discrimination and Retaliation

In considering discrimination and/or 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. Under this test, to establish a *prima facie* case, a petitioner must demonstrate that:

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[13] The finding of the *McFarland* court that the Comptroller has not issued its final determination is not dispositive of the issue presented herein.

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.

Kaplin, 3 OCB2d 28, at 13 (BCB 2010). Should a petitioner make out 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." *DEA*, 2 OCB2d 21 at 12 (BCB 2009); see also Local 1757, DC37, 45 OCB 67, at 20 (BCB 1990).

Local 1157 alleges that the unilateral cutting of SHRs benefits was retaliatory and discriminatory, as no other § 220 title has had their benefits unilaterally reduced. Local 1157 argues that its pursuit of a prevailing wage for its members constitutes protected activity. We have long held that the filing of a lawsuit will constitute protected activity where it is related to the employment relationship and undertaken on behalf of the employee organization and not strictly personal. *See PBA*, 79 OCB 16, at 13-15 (2007)*; McNabb*, 41 OCB 48, at 13- 22 (BCB 1988). Local 1157's § 220 action clearly qualifies as protected activity. As it is undisputed that the City was aware of the § 220 action, the first prong is satisfied.

To establish the second prong of the *prima facie* case, anti-union animus, Local 1157 relies on temporal proximity combined with statements by City representatives. A petitioner may establish a *prima facie* case by "deploying evidence of proximity in time, together with other relevant evidence." *Colella*, 79 OCB 27, at 54 (BCB 2007); *CWA, L. 1182*, 57 OCB 26 at 22 (BCB 1996). The Comptroller issued its Order on March 2, 2006. The Appellate Division affirmed the Order on June 14, 2007. On September 11, 2007, Local 1157 filed notice with the Comptroller that it would

go to court to seek back pay and interest. On September 26, 2007, the City notified the Unions that it would reduce leave accruals. Thus, a close proximity in time between the protected activity and the adverse action has been established.

However, "temporal proximity alone is not sufficient" even to establish a *prima facie* case. *COBA*, 2 OCB2d 7, at 42 (BCB 2009); *see also Colella*, 79 OCB 27, at 55. The Union also asserts that the statements made during bargaining established improper motive. It is undisputed that City representatives stated that pursuing a prevailing rate would be a lengthy proceeding during which the City would avail itself of its legal rights and remedies. Indeed, testimony was adduced that City representatives stated that the SHRs "will never get the prevailing rate, it will be ten to twelve years, some of [you] will be retired before [you] even get it." (Tr. 33). It is also undisputed that City representatives informed Local 1157 that it would seek to offset costs associated with the City having to pay a higher prevailing wage. The Union relies upon a Southern District of New York opinion that arose when the City reclassified the Supervisors of Mechanics (Mechanical Engineer) ("SMME") title as a non-220 title and reduced wages and benefits after an unfavorable Comptroller's Order.[14] In that case, the union challenged the reclassification as retaliation and alleged that during

[14] The SMME title was created out of four predecessor § 220 titles in 1989. However, from 1970 through the creation of the SMME title, the wages and benefits of the four predecessor titles were based upon the Citywide pattern and than memorialized in Consent Determinations. When these Consent Determinations expired in 1990, a union–Local 621, SEIU–refused to accept the Citywide pattern and sought a prevailing rate. The Comptroller issued an Order in April 1998, which the Appellate Division affirmed in September 1998. SMMEs received on average over 28% raise in the hourly wage rate, translating into an average annual salary of over $70,000. In November 1998, Commissioner Hanley recommended a review of SMMEs' civil service status and, in April 1999, SMMEs were reclassified. As a result, employees appointed to the SMME title after April 1999 would receive an annual salary of approximately $58,000. Local 621 filed suit arguing, *inter alia*, that the reclassification of the SMME title was in retaliation for pursuing a prevailing rate and violated the Equal Protection clause of the Constitution.

the OATH hearings Commissioner Hanley "express[ed] his displeasure with the OATH proceedings and with [union] members" and stated that "he intended to 'tie [the proceedings] up for another seven years.'" *Local 621, S.E.I.U., AFL-CIO v. City of New York*, 2002 WL 31151355, * 9 (S.D.N.Y. 2002) (brackets in original). The Court denied the City's summary judgment motion as the timing of the City's actions and the alleged statements, along with other evidence, raised an issue of fact regarding the City's intent.

Similarly, we agree that the City's statements herein, standing alone, raise serious questions as to improper motivation. However, after a close examination of the context of the statements herein and the other evidence, we conclude that the City's motivation was not improper. It is undisputed that as early as 2004, at the beginning of the negotiations and years before Comptroller issued its Order, the City informed Local 1157 that it would seek to offset the costs associated with a Comptroller's Order awarding a prevailing wage rate that exceeded the Citywide pattern. Then, the City followed the procedures outline in § 220 and waited until the decision from the Appellate Division before it reduced benefit levels. As for the statements made prior to or during the OATH hearings, the record establishes that for the most part these were made during contentious contract negotiations. In this context, these statements tend to reflect the City's repeated position on Comptroller's determinations and the reality of the prevailing rate process and not an intent to punish the Union for seeking a prevailing rate determination. Indeed, the record establishes that, when faced with a prevailing wage rate that required a higher wage increase than the Citywide pattern, the City repeatedly sought to reduce supplemental benefits that exceeded those required by the Comptroller. Four examples of similar conduct involving other unions are in the record. That the City repeatedly sought to offset the costs of prevailing wage rate increases with leave reductions

undercuts the contention that the motivation for its action in the instant case was retaliatory. Moreover, the City's belief that under § 220 it is permitted to reduce leave accruals to match the amount of supplemental benefits determined by the Comptroller was not unreasonable. The 1982 Comptroller's Report plainly states that the City can recoup the difference when it provides benefits greater than the prevailing benefits.[15] Further, the Union has not identified anything in § 220 that would require an employer to pay more than the prevailing rate of supplements. Therefore, we do not find that the additional facts concerning statements about recouping costs establish improper motive, nor does the existence of temporal proximity alone suffice to establish improper intent. Accordingly, the NYCCBL § 12-306(a)(1) and (3) claims are dismissed.[16]

NYCCBL § 12-306(a)(2) Claim

Local 1157 argues that the City's discriminatory acts have interfered with and were intended to undermine the Union's administration in violation of NYCCBL § 12-306(a)(2). Local 1157 alleges several types of preferential treatment by the City of other unions.[17] Interference "is found

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[15] It is for the Comptroller to determine whether § 220 actually permits the unilateral reduction of supplemental benefits to match the prevailing rate. To date, the Comptroller has chosen not to resolve this issue.

[16] The Union argues that the City's statements about fear of criminal prosecution constitute evidence of pretext such that we should infer discriminatory motivation. Were we to find pretext, such a conclusion would not compel a finding of discrimination. Where one of several grounds advanced for an action is disbelieved but, as here, other credible and untainted evidence of non-discriminatory motive exists, such evidence suffices to dispel the *prima facie* case. *See DC 37, L. 1113*, 77 OCB 33, at 36 (BCB 2006); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

[17] Specifically, that non-DC 37 titles are routinely granted Consent Determinations based on the prevailing rate without being forced to go through an OATH proceeding. Also, that while with Local 1157 the City took the position that paying more than the prevailing rate would be illegal, the City agreed to provide titles represented by other unions wages and benefits greater than the prevailing rate. Finally, the Union alleges that SHRs are the only title that the City claimed were

where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges, or recognizing a favored union when another union has raised a real representation claim concerning the employees involved." Moriates, 1 OCB2d 34, at 10 (BCB 2008), affd, Matter of Moriates v. NYC OCB, Ind. No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.) (quoting DC 37, 51 OCB 36, at 18 (BCB 1993)).[18] In Moriates, 1 OCB2d 34, at 11, we found that petitioner failed to establish a NYCCBL § 12306(a)(2) violation where the record did not support finding that the employer favored one slate of candidates over another in a union election. See also CEU, L. 237, I.B.T., 77 OCB 24, at 22 (2006) (no NYCCBL § 12-306(a)(2) violation found where there was no "preferential treatment of one union over another."). Similarly, the Union herein has produced no evidence to sustain a finding of employer domination, interference, or grant of unlawful assistance to an employee organization. Accordingly, the NYCCBL § 12-306(a)(2) claim is dismissed.

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not prevailing rate employees.

[18] In DC 37, 51 OCB 36, the union argued conduct and threats similar to those alleged herein constituted a NYCCBL § 12306(a)(2) violation. The union alleged that New York City Off Track Betting Corporation ("OTB") had engaged in coercive bargaining, including threats of layoffs and converting full time positions into part time positions, and that such conduct violated NYCCBL § 12306(a)(2). OTB acknowledged that it threatened to, and intended to, convert the full time positions of DC 37 members to part time titles unless DC 37 agreed to a lower Sunday overtime rate. However, we rejected the union's NYCCBL § 12306(a)(2) argument as nothing in the record supported concluding that conversion of the titles was intended to, or that it did, interfere with or dominate the internal functions of DC 37.

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 filed by Local 1157, District Council 37, AFSCME, AFL-CIO, in the matter docketed as BCB-2770-09 be, and the same hereby is, dismissed in all respects.

Dated: New York, New York
September 22, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent

GABRIELLE SEMEL
MEMBER