Holmes, 4 OCB2d 14 (BCB 2011)

(IP) (Docket No. BCB-2824-10).

Summary of Decision: Petitioner alleged that HHC denied her right to Union representation in a meeting with management and interfered with her exercise of her protected rights by terminating her in the midst of the grievance process. Petitioner further alleged that HHC retaliated against her in violation of NYCCBL § 12-306(a)(1) and (3) by, among other adverse actions, terminating her employment for pursuing her contractual grievance rights. Petitioner also claims that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(1) and (3), by allegedly failing adequately to represent her in proceedings which led to her termination. HHC argues that it did not interfere with Petitioner's rights, or retaliate against her for any protected activity under the NYCCBL, and that her claims are contractual in nature, and not properly before the Board, and that it had legitimate business reasons to discipline her. The Union asserts that it did not breach its duty of fair representation. Finding no interference, retaliation or discrimination by HHC and no breach of the duty of fair representation by the Union, the Board denied the petition in its entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

AUDREY HOLMES,

Petitioner,

- and -

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and
THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On January 6, 2010, Audrey Holmes filed a *pro se* verified improper practice petition against District Council 37, AFSCME, AFL-CIO, ("DC 37" or "Union") and the New York City Health and

Hospitals Corporation ("HHC"), which was subsequently amended on January 14, 2010. Petitioner claims that HHC violated NYCCBL §§ 12-306(a)(1) and (3) by denying her right to Union representation at a meeting with management and interfering with her exercise of her protected rights by terminating her in the midst of the grievance process. Petitioner further alleged that HHC retaliated against her in violation of NYCCBL § 12-306(a)(1) and (3) by, among other adverse employment actions, terminating her employment. Petitioner also claims that the Union breached its duty of fair representation, in violation of NYCCBL §§ 12-306(b)(1) and (3) by failing to adequately represent her in proceedings which led to her termination. HHC argues that it did not interfere with Petitioner's rights, or retaliate against her for any protected activity under the NYCCBL, that her claims are contractual in nature, and not properly before the Board, and that it had legitimate business reasons to discipline her based on the complaints of her co-workers. HHC further denies that it deprived Petitioner of her right to union representation. The Union contends that Petitioner has failed to allege any facts which, if proven, would show that its representatives handled her complaints in bad faith. Because the undisputed facts do not support a finding of retaliation or discrimination by HHC, or a claim of breach of the duty of fair representation by the Union, the Board denied the petition in its entirety.

BACKGROUND

Petitioner was appointed to the position of Social Worker, Level II, a non-competitive title, on March 10, 2008. Petitioner's duties included conducting group sessions with patients in the Wellness and Recovery Service, a division of Kings County Hospital Center's ("KCHC") Behavioral Health Services Department ("Department"). Petitioner's title is covered by the Social Services

Collective Bargaining Agreement covering the time period from July 1, 2005, to March 2, 2008, and executed on April 2, 2008 ("Unit Agreement"). The terms of the Unit Agreement continue in effect pursuant to the *status quo* provisions of NYCCBL § 12-311(d), and were in effect during the events at issue. The Unit Agreement includes a procedure for resolving claims of wrongful discipline.[1]

On September 14, 2009, while Petitioner was conducting a group therapy session with patients, a licensed practical nurse ("LPN") employed in the Department tried to enter the room to check the blood sugar of two patients in Petitioner's meeting. Petitioner did not immediately open the locked door to admit the nurse, which led to that nurse and others, including Petitioner's supervisor, knocking on the glass wall of the room to gain admittance. Petitioner did not open the door until the scheduled end of the session, about five minutes from the initial effort by the nurse to enter. After Petitioner opened the door, her supervisor cautioned Petitioner against locking the door and discussed procedures for handling staff interruptions of group sessions in the future. The parties agree that the patients found this situation disturbing.

After the incident, Petitioner approached the nurse, who refused to give Petitioner her name, and removed her badge. By 2:00 p.m. that day, Petitioner wrote a memorandum to her supervisor complaining about what she contended was disciplinable misconduct by the nurse, whom she described as having "disrespected" Petitioner. (Am. Pet. Ex. 6H). At the end of the shift, at approximately 4:00 p.m., Petitioner encountered the nurse outside of the building, and each alleges

---

[1] The Unit Agreement, at Article VI, § 6, provides a multi-step grievance procedure starting with an informal conference chaired by an agency designee who reviews the charges and issues a written determination after five days, which may be appealed to the second step of the grievance procedure, for grievances defined as "[a] claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title . . .." (Article VI, § 1[f]).

that the other threatened her. By the next day, September 15, both reported the alleged threats to management, and Petitioner reported the matter to the HHC Police as well, after initially telephoning the New York City Police Department, after trying to first meet with her supervisor.

The First Set of Charges

After 5:00 p.m. on September 15, Petitioner received a call from the facility's Director of Social Work, who told Petitioner to report to her office the next day. When she did so, she was given a letter stating that she was suspended without pay for 30 days effective as of the close of business September 15, 2009. It is undisputed that Petitioner did not ask for Union representation either before or during the meeting in which she learned of her suspension.

On September 21, 2009, Petitioner requested the Union to file a grievance contesting her suspension without pay, claiming that as a permanent employee, she could not be suspended without pay.[2] She further requested copies of statements regarding the allegations made by the nurse and others regarding the suspension. Petitioner asked the Union's assistance in having the nurse suspended, alleging to the Union that the nurse was "not [registered as] a LPN" (Union Ex. G). On multiple occasions, Petitioner asked the Union to follow up on obtaining copies of security camera records which she contended would establish her account of events, as well as herself contacting the HHC police and the HHC Office of Labor Relations to obtain them.

---

[2] Petitioner's title was reclassified, as of August 10, 2006, from a competitive title to a non-competitive one, by Personnel Order HHC 06/11. (Union Ans. Ex. V). Under HHC Personnel Rules and Regulations ("HHC Rules"), an "employee continuously holding a non-competitive title for at least five years may not be suspended without pay for more than thirty days pending a hearing and determination of charges of incompetency or misconduct." (HHC Rules § 7.5.2). The Union informed Petitioner that it had confirmed her status as a permanent employee in a non-competitive title for under five years, and it represented her pursuant to the process applicable to such employees.

On September 24, Petitioner received the Notice and Statement of Charges alleging two specifications of insubordination against her (not allowing the nursing staff into the group session room and impeding the administration of the tests) and one of verbal threats against a member of the nursing staff. The Notice scheduled an informal conference for October 23, 2009. Petitioner asked the Union in a September 29 letter to ensure that the informal conference be held by October 15 to ensure her return to payroll within 30 days of the suspension.

From late September through October 2009, Petitioner met with multiple Union representatives including the Assistant Director of the Union's Professional Division, in order to prepare for the October 23, 2009, informal conference. Petitioner contends that the Assistant Director of the Professional Division was rude to her, and that the Union representatives advised her not to answer the charges in the informal conference. The Union acknowledges that it discouraged Petitioner from submitting her account of the events which it believed might further incriminate her, to preserve arguments for possible future defenses.

Petitioner asserts that the HHC Assistant Director of Labor Relations had told her that she could be arrested if she returned to HHC grounds without authorization. On October 16, 2009, Petitioner spoke with an attorney in the Union's legal division, requesting written authorization to return to work at the appointed time as protection against arrest. The Union requested such documentation. Petitioner was orally informed by HHC's Office of Labor Relations on October 19 that she was returned to the payroll effective October 15, 2009, and that she was expected to report to work on October 20, 2009. Absent written confirmation from HHC, Petitioner did not report to work on that date.

At the informal conference the Union appeared, opposing the proposed inclusion of

additional charge based on Petitioner's failure to appear for work on October 20. Petitioner submitted her written defenses to the charges which included her complaint that the nurse was not registered with the State as a LPN. During the conference, HHC proposed a settlement offer which would have resolved the charges based on her time out of work to date, and returning Petitioner to work as of October 15, 2009. The Union asserts that after Petitioner initially agreed to the settlement offer, she rejected it without giving a reason. On November 19, 2009, HHC issued its determination, finding Petitioner culpable and imposing as the penalty the 30-day suspension penalty she had already served. On December 4, 2009, the Union filed a Step II grievance seeking withdrawal of the charges, retroactive restoration of pay and benefits, and "make whole" relief.

The Second Set of Charges

After the October 23 informal conference, HHC revised Petitioner's return-to-work date as October 26, 2009. Upon her return on that date, Petitioner informed a clinician in charge of the clinical programs during a discussion about program changes that had taken place in her absence that she had torn up the schedule. Petitioner asserts that the tearing up of the schedule was inadvertent. When Petitioner went to hold a group session on that date, she interrupted a session already in progress, because, she contends, she was unaware that the session schedule had changed.

On November 10, 2009, Petitioner's group session was again interrupted for blood tests and for a patient meal, over her objection, leading her to complain to a supervisor. On November 13, HHC requested Petitioner to fill in for a co-worker who was out on medical leave, and, it asserts, she refused to do so. Petitioner admits that she was reluctant to do so, because she doubted her ability to perform the duties appropriately.

On November 17, Petitioner was denied the use of sick leave time for November 20 as she

had requested. Two days later, Petitioner told her supervisor that she would be taking off November 20, although she had already been denied permission to do so. Also on November 17, HHC issued the second set of disciplinary charges against Petitioner, based on the events of October 26 and November 10, 2009, which was subsequently amended to include her refusal, on November 13, to fill in for the co-worker on medical leave.[3]

The next day, Petitioner emailed the Union that although she knew that the informal conference in the second set of charges would be held on December 8, she would not be available to attend any such conference until after December 20. On December 7, Petitioner again requested that the Union adjourn the informal conference. The next day, Petitioner was informed that the conference had been rescheduled for December 17, and that Petitioner was obligated to attend. On December 11, Petitioner wrote the Union asking whether her presence was required at the conference. At this time, Petitioner informed the Union that she had filed a civil lawsuit against supervisory and administrative personnel at HHC.[4] Four days later, the Union general counsel told Union representatives that, notwithstanding any such litigation, Petitioner was obligated to fight the charges in the second disciplinary conference scheduled for December 17 if she believed them to be

---

[3] Petitioner was charged with insubordination for refusing on October 26 to discuss the schedule changes that had taken place during her suspension, for tearing up the department schedule of those changes, and for speaking in an "inappropriate and unprofessional" manner to a supervisor, and for disrupting the group session (Union Ans. Ex. J; HHC Ans. Ex. E). Finally, Petitioner was charged with insubordination on November 13 based on her disrupting a meeting that day to discuss these matters with supervisors and by failing to inform co-workers of a need to cover her shift due to her early departure that same day. (Union Ans. Ex. J).

[4] Petitioner has brought two actions involving these transactions. *Holmes v. Steiner & Alman-Charles*, Index No. 127276-09 (Civ) (Civil Ct. Kings Co.) (alleging "harassment, slander[, and] false allegations" against the Director of Social Work and her immediate supervisor), and *Holmes v. The NYC Health and Hospitals Corporation*, Index No. 30868/10 (Sup. Ct. Kings Co.), which includes the narrative portion of the improper practice petition).

false. Petitioner attended the informal conference. She claims that the continued presence of a witness at the conference for HHC after her testimony violated her right to privacy. On December 18, HHC issued the determination in the second set of charges, recommending termination of Petitioner's employment effective December 29, 2009. On December 30, the Union filed a corrected grievance, at Step II.

Petitioner's December 23 Grievance

Three days after the determination letter was issued, Petitioner sought the Union's assistance in appealing by filing a grievance complaining that neither her supervisor nor HHC Labor Relations personnel had addressed her concerns about being verbally abused by staff and made a scapegoat for events that transpired prior to the charges. On December 22, Petitioner asked the Union to file this grievance. The Union generated a grievance form, and told her she could file it herself and that the Union would follow up if she failed to get a response from HHC. Petitioner filed the grievance with her supervisor on December 23, 2009, but HHC did not respond. HHC asserts that neither Petitioner nor the Union moved the grievance to any subsequent steps of the grievance procedure. The Union asserts that it heard nothing more about it from Petitioner. Petitioner asserts that she emailed the Union on December 28 that she had filed the grievance five days earlier.

The Step II Hearings and The Dismissal of the Grievances

By letters dated January 5, 2010, the Union informed Petitioner that the Step II hearings would be held on both sets of disciplinary charges on January 20, 2010, at noon, and at 1p.m. respectively. In a January 14, 2010 letter to the Union, Petitioner acknowledged receipt of notice for the Step II hearings on January 20, and asked if she was required to attend. (Am. Pet. Ex. 30) By certified letter dated January 15, 2010, the Union representative confirmed the date and time of

the proceeding in the second set of disciplinary charges. On the date of the Step II hearing in each set of charges, Petitioner did not appear in either hearing. The Union appeared on her behalf, requesting that the hearing be rescheduled to allow Petitioner's participation. The Union representative denied the misconduct charges; however, the conference holder denied the appeal in each proceeding. On January 25, 2010, Petitioner sent the Union a letter claiming she had not been aware of the January 20, 2010, hearings. On February 4, 2010, HHC issued letters affirming both determinations and denying the Union's request that the Step II hearings be rescheduled, and dismissing the grievances. (Union Ans. Ex. Z, AA). The Union filed a Step III appeal on each. (Ex. CC, DD). On March 8, 2010, HHC re-issued the same letter from the conference Review Officer, affirming the determinations, denying the Union's requests at the Step II hearings that they be rescheduled to allow Petitioner to participate were denied, the grievances dismissed, and the files closed. (HHC Ans., Ex. H, I).

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that HHC's bringing disciplinary charges against her was in retaliation for her reporting that the nurse involved in the confrontation on September14, 2009 was not a licensed LPN in violation of Education Law §§ 6512 and 6513. (Reply to HHC Ans. ¶ 53). Petitioner asserts that this report constituted protected conduct under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.), 42 U.S.C. §§ 1981 and 1983, the New York State Human Rights Law (Executive Law § 296), the New York City Human Rights Law and Civil Service Law § 75-b(2). (*Id.*). Petitioner further asserts that the respondents "were aware of this protected activity

when I placed my response on the record on [October 23, 2009] and handed out to all staff in attendance at meeting" a memorandum containing this report. (*Id*.; citing Pet. Ex.6).

Petitioner also asserts that the subsequent charges were brought "in an attempt to stop my grievance process" (Am. Pet. at 7, ¶ (C); *see also id*; ¶ (D)). Among other alleged acts of retaliation, Petitioner contends that HHC encouraged her co-workers to complain against her, and then charged her, that her work was singled out for changes while she was absent on suspension; that HHC failed to follow HHC Policy and Procedure 20-10, pertaining to "employee performance and conduct," by failing to bring disciplinary charges against the other employees involved in confrontations with Petitioner.

Petitioner likewise points to a series of alleged contractual breaches in the disciplinary process to date, and contends that such contractual violations breach the NYCCBL. For example, Petitioner contends that HHC and the Union treated her as an employee "under a non-competitive title as oppose[d] to a permanent civil service employee." (Am Pet. at 7 ¶ (D)). Additionally, HHC failed to conduct the disciplinary conferences in accordance with the contractual provisions.

Finally, Petitioner asserts that HHC interfered with her rights under the NYCCBL in two ways. First, she contends that she was not afforded a right to union representation in the September 15 meeting with the Assistant Director of Labor Relations. Second, she asserts that HHC imposed improper delays in the Step process, scheduled hearing dates without her direct involvement or sufficient notification, and terminated her employment after the Step 1(a) determination issued. Petitioner asserts that the termination at that time constituted interference with her ability to pursue the grievance process because "I don't believe the collective bargaining agreement was developed to have employees to complete [the] grievance process after termination." (Rep. To Union Ans. ¶

55).

Petitioner claims that the Union and the City did not bargain in good faith regarding her disciplinary grievance, as well as her other grievances. She contends that, by failing to do so, both violated NYCCBL § 12-306(c).

Petitioner alleges that the Union violated NYCCBL § 12-306(b)(1) and (3) by breaching its duty of fair representation.[5] Petitioner claims that the Union's representation of her was deficient in several ways. First, she claims, the Union did not pursue her request for the security tapes of the incident and her confrontation with the nurse on September 14, represent her in her December 23 grievance or address her concerns regarding HHC's denial of her requests for leave. Second, Petitioner asserts that the Union advised her "not to say too much" at the informal conference, and made other tactical and strategic decisions at that conference which she contends prejudiced her, including not allowing her to read her response to the charges (Pet. Ex. 6), which was, however, submitted to the conference holder at the conference. Third, Petitioner asserts that the Union did not enforce the appropriate grievance procedures, particularly as to scheduling step hearings without her input, which she deems coercive, providing evidence, and service of charges, as well as affording her the rights pertaining to her as a permanent employee, instead allowing her to be treated as a non-competitive employee. Petitioner also contends that her Union representatives treated her in an unpleasant and disrespectful manner. Nor did the Union investigate the nurse's licensure and obtain acknowledgment of the false statements made against Petitioner by her coworkers. Finally,

---

[5] NYCCBL § 12-306(b)(1) provides that it shall be an improper practice for a public employee organization to "interfere with, restrain or coerce public employees in the exercise of rights" under the NYCCBL; § 12-306(b)(3) defines as an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter, or to cause, or attempt to cause, a public employer to do so." *Id.*

Petitioner asserts that the Union did not pursue her retaliation claims as a defense to the charges against her in the Step process.

Petitioner asserts that, taken as a whole, these errors and missteps render the Union's representation of her to have been in bad faith and arbitrary "in that I can assume that most of the union members that they represented were represented under the proper grievance process under the collective bargaining agreement." (Am. Pet, Amendment at 1).

HHC's Position

HHC asserts that Petitioner's allegations that it violated the collective bargaining agreement by bringing unfounded disciplinary charges, failing to adhere the time limits set forth in the agreement in issuing the charges and the Step 1(a) determinations, and bringing charges in violation of HHC Operating Procedure 20-10 are not properly before the Board. These claimed violations should be resolved through the parties' grievance process, and do not make out not an improper practice under the NYCCBL.

HHC also denies interfering with Petitioner's rights under the NYCCBL. Because Petitioner did not invoke her right to union representation in the September 15 meeting with the Assistant Director of Labor Relations, no violation of her right to representation took place, even if the meeting were deemed to be one which could reasonably have led to discipline, which HHC denies. Similarly, HHC denies that it failed to respond to her November 10 complaint against her co-workers, but asserts that, in any event, this complaint had nothing to do with her status as a bargaining unit member but was an expression of her personal displeasure with her co-workers' treatment of her.

Further, HHC did not retaliate against Petitioner for her protected activity. Petitioner does

not allege any protected union activity which antedates her suspension on September 15, 2009, and alleges no basis for claiming that the charges arising out of the confrontation between her, the nurse, and her supervisor were in any way motivated by anti-union animus. Nor can Petitioner claim that her protected activity of filing the December 23, 2009 grievance had a causal relationship to her termination, as the Step 1(a) decision terminating her issued on December 18, 2009.[6]

Moreover, Petitioner does not deny the factual basis for the charges, but disagrees that this behavior constitutes misconduct. Thus, even if the complaints she made regarding co-workers were treated as protected activity, Petitioner would not have established a causal relationship between these acts and the disciplinary action against her. Similarly, the direction that Petitioner assist in the performance of her absent co-worker's duties and the amendments to Petitioner's time sheets by the Director of Social Work were done for legitimate business reasons and without regard to any Union activity. Petitioner's conjectural statements do not suffice to plead a causal link between the act complained of and her protected activity.

Similarly, the disciplinary charges brought against Petitioner were brought prior to her contractual grievance, which she in fact admits in her December 23, 2009 grievance. Notably, Petitioner does not deny that she engaged in the behavior for which she was charged; her disagreement is with HHC's conclusion that such behavior constitutes misconduct.

Finally, HHC contends that it had no obligation to return Petitioner to work within 30 days

---

[6] HHC asserts that, pursuant to Article IV, § 6 of the parties' collective bargaining agreement and Section 7.5 of HHC's Personnel Rules and Regulations, the employer had the right to terminate the employment of a permanent non-competitive employee such as Petitioner immediately after the Step 1(a) decision issued, as opposed to a permanent competitive employee, whose employment cannot be terminated until a Step II appeal has been heard, as expressly provided for in Article VI, § 5 of the collective bargaining agreement.

of the suspension because that limitation does not apply to non-competitive employees with less than five years service in the title. (HHC Rules § 7.5).

DISCUSSION

Petitioner's claims in this matter assert several different theories under which HHC and the Union are alleged to have violated her rights. At the outset, we note that several of these claims are not properly brought by Petitioner before this Board. Thus, Petitioner claims that HHC brought disciplinary charges against her in retaliation for her alleged protected whistle-blowing activity in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.), 42 U.S.C. §§ 1981 and 1983, the New York State Human Rights Law (Executive Law § 296), the New York City Human Rights Law and Civil Service Law § 75-b(2). These allegations, even if proven, would not state a claim under the NYCCBL because "[t]hough our statute mentions discrimination, it explicitly requires that the alleged discrimination be based upon union membership or activity." *Babayeva*, 1 OCB2d 15, at 8 (BCB 2008); *Smith*, 3 OCB2d 17, at 10 (BCB 2010). As we explained in *Smith*, claims of "retaliation for safety-related reports," or of discrimination based on race or gender may be actionable under other statutes, but do not constitute improper practices under the NYCCBL, to which our jurisdiction is limited. *Smith*, 3 OCB2d 17, at 10. We dismiss such claims without prejudice to their being brought before an appropriate forum. *Babayeva*, 1 OCB2d 15, at 8-9.

Similarly, we dismiss the failure to bargain in good faith claims against both the Union and HHC, over which the Board does have jurisdiction, but which Petitioner does not have standing to assert. *Johnson*, 4 OCB2d 11, at 11 (BCB 2011) (quoting *Holmes*, 3 OCB2d 48, at 11 (BCB 2010)); *McAllan*, 31 OCB 15, at 15 (BCB 1983) (same). This is because "[t]he duty to bargain runs only

between the public employer and the designated bargaining representative." *Benjamin*, 4 OCB2d 6, at 17 (BCB 2011).

Petitioner's claims that HHC independently violated NYCCBL § 12-306(a)(1) by interfering with the Union's representation of her are likewise without merit. The first such claim is that HHC denied her the right to Union representation at the September 15, 2009 meeting with the Director of Social Work. It is an improper practice, violative of § 12-306(a)(1), "for an employer to refuse a public employee the right, *upon the employee's demand*, to representation by a representative of the [Union]" at a meeting or interview with the employer where the employee reasonably believes that the interview could result in disciplinary measures. *DC37, L. 1549*, 3 OCB2d 2, at 21, 20-21 (BCB 2010) (emphasis added); *ADW*, 71 OCB9 (BCB 2003). However, as we have consistently held, "the duty on the part of management to allow union representation does not arise until the right to such representation is invoked by the employee, even where the employee entertains a reasonable belief that disciplinary action may ensue as a result of the supervisory conference which he or she is called to attend." *DC 37, CSTG, L. 375*, 79 OCB 1, at 9 (BCB 2007). Thus, "failure to request representation is fatal to a claim that *Weingarten* rights have been violated."[7] *Id.; DC 37, L. 1549*, 3 OCB2d at 21-22 (requiring proof of invocation to establish claim). In this case, Petitioner does not allege that she invoked her right to Union representation at the meeting, and has not contradicted HHC's assertion that she did not request representation. Accordingly, this claim is denied.

Petitioner's claim that HHC interfered with Petitioner's exercise of her rights under the

---

[7] The right to union representation at such meetings was first enunciated under the National Labor Relations Act by the Supreme Court in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and is commonly referred to by that name in cases decided under the Taylor Law and the NYCCBL.

NYCCBL in the grievance process is likewise unavailing. Petitioner asserts two variants of interference. First, she contends that HHC did not process her grievance in conformity with the Step process, inflicting delays on her outside of the time limits provided for, and scheduling hearing dates without her direct involvement or sufficient notification. Second, she contends that HHC's termination of her employment after the Step 1(a) determination issued constituted interference with her ability to pursue the grievance process. Neither of these contentions arising from alleged deviations from the grievance procedure in the parties' agreement amounts to a claim of interference, as opposed to a breach of the agreement. As we explained in *SSEU, L. 371*, 77 OCB 35 (BCB 2006):

> We have held that systematically disregarding a quintessential aspect of the parties' collective bargaining agreement, such as the grievance procedure, constitutes a deliberate interference with employees rights and amounts to a failure to bargain in good faith. *See District Council 37, Local 1508*, Decision No. B-11-2001 at 6, *citing Addison Central School District*, 17 PERB ¶ 3076 (1984) (repudiation of the grievance procedure, through a pattern of behavior, constitutes a breach of the duty to bargain). This holding does not, however, elevate to the level of a violation of NYCCBL § 12-306(a)(4) any mere isolated act of retaliation or discrimination; rather it is limited to an ongoing course of behavior that essentially *de facto* carves out a provision of a collective bargaining agreement for willful non-enforcement. *Id.*

Id. at 21; *see also D'Onofrio*, 1 OCB2d 38, at 7-8 (BCB 2008).

This case does not involve, as did *SSEU*, a "pattern of behavior designed to frustrate the contractually-mandated arbitral process component of the grievance procedure." 77 OCB 35 at 21. None of the alleged breaches of the agreement had the effect of, or can be taken as having attempted to, deprive Petitioner of her right to participate in the grievance process, or to render any decision in her favor a nullity. Petitioner has not rebutted the evidence submitted by HHC and the Union that

she was a permanent employee in the title of Social Worker, Level II, a non-competitive title. The collective bargaining agreement provides for different disciplinary processes for permanent competitive employees (Art. VI, § 5) than for permanent non-competitive employees such as Petitioner (Art. VI, § 6). Based on that showing, we are unable to conclude that Petitioner's termination after the issuance of the Step 1(a) decision constituted an act of interference, in view of the lack of a specific provision limiting the power to impose discipline at this stage in the applicable section, and the continued availability of the grievance process to Petitioner to resolve her claim that the termination was both meritless and premature. *D'Onofrio*, 1 OCB2d 38, at 7-8.[8]

Similarly, HHC apprised the Union of the hearing dates at each Step, and Petitioner in fact attended the Step 1(a) conference. Petitioner's own communications to the Union, appended by her as exhibits, establish that she received notice of the Step II hearings. (Am. Pet. Ex. 30). Petitioner claims to have not received the notice of hearings in a timely manner, and asserts that she informed the Union that she received mail at her house in an untimely fashion. However, no act or omission on the part of HHC is asserted which could be considered to be designed to frustrate her ability to participate in the process. *D'Onofrio*, 1 OCB2d 38, at 7-8.

The final claim remaining against HHC is that it retaliated against Petitioner for her protected activity by a series of adverse employment actions, including denying her request for leave, assigning her to cover an absent co-worker's duties, falsifying her timesheets, and, ultimately, terminating her.

---

[8] The same reasoning requires denial of Petitioner's claim that the greater than 30-day gap between Petitioner's suspension and her return to work constitutes interference, especially as the record reflects that her effective date of her return to work was adjusted to comply with the contractually mandated suspension period. We note that claimed violations of the collective bargaining agreement are outside of this Board's jurisdiction. *See Nardiello*, 2 OCB2d 5, at 41, n. 35 (BCB 2009).

In resolving discrimination or retaliation claims under the NYCCBL, this Board requires a petitioner to 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.

Morris, 3 OCB2d 19, at 14 (BCB 2010) (quoting *Bowman*, 39 OCB 51, at 18-19 (BCB 1987) (adopting rule of *City of Salamanca*, 18 PERB ¶ 3012 (1985)).

Where a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer "may attempt to refute the 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." *Howe*, 79 OCB 19, at 11 (BCB 2007); *Morris*, 3 OCB2d at 14.

In the instant case, Petitioner has failed to make out a *prima facie* case, and the claim must be dismissed. First, as noted above, Petitioner has not even alleged that her complaint regarding the nurse's license status is protected under the NYCCBL, but asserts that it is protected under a series of other statutes, which do not give rise to claims within the jurisdiction of this Board. Second, and more fundamentally, as we have repeatedly held, "[f]or activity to be protected under the NYCCBL, it must not only pertain to the relationship between the employer and the bargaining unit employee but must, at a minimum, be in furtherance of the collective welfare of employees, as distinguished from the welfare of an individual." *Vazquez*, 75 OCB 36, at 11 (BCB 2005); *see also Procida*, 39 OCB 2 at 11-12 (BCB 1987). The complaint regarding the nurse's license status did not pertain to the employment relationship of the Petitioner or her fellow bargaining unit members and the

employee, and cannot be said to be in furtherance of the collective welfare of employees, whatever other value it may hold. Therefore, any alleged causal relationship between that complaint and the adverse employment actions taken against Petitioner cannot support a claim under the NYCCBL. *Id.*

Petitioner did file a grievance on December 23, 2009. However, all of the adverse actions of which she complains had taken place prior to that date, even the termination of her employment in the Step 1(a) decision, which issued on December 18, 2009. Thus, no causal relationship can be shown to exist between the December 23 grievance and Petitioner's termination. *See DEA*, 79 OCB 40, at 22 (BCB 2007) ("Where the decision to take adverse employment action is reached prior to a [petitioner's] protected activity, the causal connection necessary to link the adverse action to that protected activity is lacking") (citing cases); see also *SSEU, L. 371*, 3 OCB2d 22, at 14 (BCB 2010) (same; following *Edwards*, 1 OCB2d 22, at 18 (BCB 2008) (allegedly retaliatory and/or discriminatory action which antedated protected union activity cannot violate the NYCCBL)).[9]

Nor does Petitioner's allegation that the second set of charges was brought to discourage her from pursuing her right to grieve the initial set of charges state a tenable claim. Petitioner has not pleaded facts which, if proven, would establish that the second set of charges was motivated by anti-union animus. A petitioner may establish a *prima facie* case by "deploying evidence of proximity

[9] For similar reasons, we cannot find any causal relationship between Petitioner's protected activity of obtaining Union representation with respect to the first set of charges and HHC's seeking to discipline her on that set of charges. *See Turner*, 3 OCB2d 48, at 12-13 (BCB 2010) (citing *Rosioreanu*, 1 OCB2d 39, at 18, *n*. 15 (BCB 2008), *affd., Matter of Rosioreanu v. NYC Off. of Coll. Barg.*, Ind. No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd.*, 78 A.D.3d 401 (1st Dept. 2010). We also note that HHC's demonstrated willingness to resolve the first set of charges for, essentially, "time served," in negotiations with the Union dispels any inference of anti-union animus that could be drawn from the alleged contractual or procedural irregularities of which Petitioner complains. *Id.* at 13 & n. 7.

in time, together with other relevant evidence." *Local 1157*, 3 OCB2d 40, at 16 (BCB 2010) (quoting *Colella*, 79 OCB 27, at 54 (BCB 2007)). However, it is well established that temporal proximity alone does not suffice to make out a *prima facie* case. *Local 1157*, 3 OCB2d 40 at 17 (quoting *COBA* 2 OCB2d 7, at 42 (BCB 2009). Petitioner's conclusory allegations of retaliatory and discriminatory intent do not suffice. *See Turner*, 3 OCB2d 48, at 13 (citing *Rosioreanu*, 1 OCB2d 39, at 18, *n*. 15).

Second, far from supporting a claim of anti-union animus, the undisputed facts support only an inference that HHC displayed a willingness to negotiate with the Union in its efforts on behalf of petitioner. Thus, Petitioner's failure to report to work when she was initially to return, albeit without written authorization to do so, was resolved without discipline when HHC adjourned Petitioner's return date and provided her with the requested memorandum. Moreover, HHC offered the Union a settlement of the first set of disciplinary charges for the time she had already been out of work, and, after Petitioner rejected that offer, imposed that same 30-day suspension. These facts are not consistent with anti-union animus on the part of HHC or its supervisors against Petitioner stemming from the Union's appearances on her behalf, regardless of whatever other animosity toward petitioner her supervisors or co-workers might have harbored.

No other ground for linking the second set of charges to anti-union animus has been identified by Petitioner. Petitioner admits that each of the incidents which is the basis of the charges was the subject of a complaint to management, while asserting that her own behavior was not culpable.[10] A showing of animosity arising from unprotected activity, regardless of the rights or

[10] Petitioner also asserts that she complained about the conduct of her accusers in the second finger-stick testing incident which management did not pursue. Again, such an accusation of misconduct leveled against co-workers, without more, does not constitute protected

wrongs of the cause, does not provide grounds for a claim under the NYCCBL. *SSEU, L. 371*, 3 OCB2d 22, at 15 (quoting *Local 1087, DC 37*, 1 OCB2d 44, at 29 (BCB 2008)) (citing *Warlick*, 29 OCB 1, at 7 (BCB 1982)).

Similarly, we find Petitioner's claim that the Union breached its duty of fair representation lacks merit. We have long held that "the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Morales*, 3 OCB2 25, at 10 (BCB 2010). To establish a breach of the duty of fair representation, Petitioner must establish that the Union's actions or omissions in representing her were "arbitrary, discriminatory, or in bad faith." *Porter*, 4 OCB2d 9, at 14 (BCB 2011) (quoting *Morales*, *supra*). Mere dissatisfaction with the outcome of Union representation is insufficient. *Smith*, 3 OCB2d 17, at 9 (BCB 2010) (citing *James-Reid*, 77 OCB 29, at 16 (BCB 2006)). In short, Petitioner "must allege more than negligence, mistake or incompetence to [establish] a *prima facie* showing of a union's breach." *Proctor*, 3 OCB2d 30, at 12-13 (BCB 2010) (quoting *DelRio*, 75 OCB 6, at 13 (BCB 2005). A union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty and the Board will not substitute its judgment for that of a union or evaluate its strategic determinations." *Turner*, 3 OCB2d 48, at 15 (quoting *Edwards*, 1 OCB2d 22, at 21 (2008) (citations and editing marks omitted). Also, while a "union is not obligated to advance every grievance . . . it has 'an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf.'" *Id*. (quoting *Nardiello*, 2 OCB2d 5, at 40 (BCB 2009) (emphasis in original)).

Petitioner asserts that the Union did not allow her to read out her written defense, which both

---

activity under the NYCCBL.

she and the Union allege it informed her was a tactical decision on its part, or aggressively challenge the evidence at the Step 1(a) conference. These tactical decisions are within the Union's "wide discretion" and are not subject to this Board's review, as long as the Union exercised that discretion in good faith. *Rosioreanu*, 1 OCB2d 39, at 15 (finding that the Union did not breach its duty of fair representation when it applied its general policy of "advis[ing] the employees not to present in writing their arguments at all steps during the grievance procedure" to the petitioner's case); *Porter*, 4 OCB2d 9, at 15-16 (same; advising petitioner to not file written statement at informal conference). Petitioner has not alleged any concrete grounds upon which the Board could conclude that the Union did not render this advice in good faith.

Likewise, Petitioner's claims that the Union did not represent her adequately in the subsequent steps of the grievance process fail to state a claim. Petitioner's own attachments establish that she was provided notice of the Step II hearings.

Similarly, Petitioner's complaint that the Union improperly allowed the City to terminate her after the Step 1(a) decision is unavailing, in that the Union did grieve the decision to terminate her, seeking "restoration of pay and benefits retroactive to 9/15/09." (Union Ans. Ex. E). Moreover, the parties have provided documentary evidence establishing that Petitioner's title is classified as non-competitive and that the Union grieved her disciplinary complaints pursuant to the applicable procedure. Even if the Union were in error on this point, its good faith belief that the procedure it invoked on behalf of Petitioner was the correct course would not establish a breach of the duty of fair representation.[11] *Sicular*, 77 OCB33, at 15 (BCB 2006); *Porter*, 4 OCB2d 9, at 16.

---

[11] Similarly, Petitioner's claim that the Union breached its duty of fair representation by not pursuing a claim for her 30-day suspension to be served with pay is likewise insufficient to state a claim. Petitioner's claim does not establish that the Union arbitrarily or in a

Finally, we note that Petitioner's claims of collusion are entirely conclusory and based on no specific factual allegations, and, as such, fail to state a cause of action under NYCCBL §§ 12-306(a)(1) and (b) (3). *See Nardiello*, 2 OCB2d 5, at 39, n. 33; *D'Onofrio*, 79 OCB 26, at 13 (BCB 2007) ("claim of collusion between [employer] and the Union" dismissed where based only upon "speculative and conclusory" allegations); *Gertskis*, 77 OCB 11, at 13 (BCB 2006) ("assertions that the Union attorney was in collusion with the City attorney because of her conduct at the arbitration are speculative and conclusory and, without more, do not state a claim.").

As the Board finds no assertions on which to base any finding of interference, retaliation or discrimination under NYCCBL § 12-306(a)(1) or (3), or 12-306 (b)(3), and similarly no assertions on which to find a breach of the Union's duty of fair representation under NYCCBL § 12-306(b)(1) or (3), the instant petition is denied in its entirety.

---

discriminatory manner failed to press a meritorious position on her behalf. Indeed, she grounds her claim on a seeming reference to HHC Rules applying to employees in *competitive* titles (as opposed to her own non-competitive title), who are entitled to pay during suspension. Nor has she substantiated her claim that the Union was obliged to grieve HHC's refusal to pursue disciplinary charges against other employees. Absent any concrete allegation that the Union had pressed similar claims on behalf of other members, Petitioner's allegations as to these purported grievances state no basis for a breach of the duty of fair representation. *Sicular*, 77 OCB33, at 15 (BCB 2006); *Porter*, 4 OCB2d 9, at 16.

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 Audrey Holmes, *pro se*, docketed as BCB-2824-10 be, and the same hereby is, denied in its entirety.

Dated: March 30, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER