Benjamin, 4 OCB2d 6 (BCB 2011)

(IP) (Docket No. BCB-2793-09).

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3), by irresponsibly and unreasonably handling his grievances regarding overtime allocation and harassment by one of his supervisors. Further, Petitioner claimed that HHC violated NYCCBL § 12-306(a)(1), (2), and (3) by retaliating against him for Union activity and by dominating and interfering with his right to participate in the Union. Both the Union and HHC argued that the petition was untimely filed and that Petitioner failed to state a claim. The Board found that Petitioner's claims were timely filed but failed to state a cause of action under the NYCCBL. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

EARLAND S. BENJAMIN,

Petitioner,

- and -

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30, and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On August 31, 2009, Earland S. Benjamin ("Petitioner"), filed a *pro se* verified improper practice petition against Local 30, International Union of Operating Engineers ("Union") and the New York City Health and Hospitals Corporation ("HHC"). Petitioner alleges that the Union breached its duty of fair representation in violation of § 12-306 (b)(1), (2), and (3) of the New York

City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by irresponsibly and unreasonably handling his grievances regarding overtime allocation and harassment by one of his supervisors. Further, Petitioner claims that HHC violated NYCCBL § 12-306(a)(1), (2), and (3) by retaliating against him for Union activity and by dominating and interfering with his right to participate in the Union. Both the Union and HHC argue that the petition was untimely filed and that Petitioner fails to state a claim. The Board finds that Petitioner's claims were timely filed but fail to state a cause of action under the NYCCBL.

BACKGROUND

Petitioner was hired on March 3, 1987, as a Maintenance Worker in the Engineering Department ("Department") at Lincoln Hospital. He became a Plant Maintainer, Tender on February 1, 1999, and has worked in his current position, as a Plant Maintainer, Oiler, since July 3, 2006. His title is represented by the Union. The Department is responsible for maintaining the fire fighting equipment, air vacuums, and water system at Lincoln Hospital, as well as for operating the Hospital's high pressure boilers and chillers, and for maintaining the proper temperature throughout Lincoln Hospital. The Department operates on a 24 hour-a-day, seven-day-per-week basis, and the Hospital must have at least one Plant Maintainer, Oiler, or Tender present and on duty for every shift. Lincoln Hospital employs three Plant Maintainer, Oilers; Petitioner, Salvator Cannarozzo, and Eric Williams.

From February 17, 2009 to February 27, 2009, Petitioner was temporarily transferred from Lincoln Hospital to another location. Petitioner returned to Lincoln after the ten-day transfer.

On April 19, 2009, Petitioner sent John Donohoe, a Union Business Representative, a letter

asking that a grievance be filed on his behalf. Petitioner asserted that the Department was distributing overtime in an uneven manner, specifically, that other employees were being offered overtime but that Petitioner was not. Donohoe subsequently filed a grievance to this effect with the Department.

As a result of Petitioner's grievance, on May 28, 2009, the Senior Stationary Engineer, John Healy, issued a memorandum to all Stationary Engineers regarding overtime allocation. The memorandum stressed the importance of the even distribution of overtime and emphasized that all refusals by employees to work overtime should be documented. On June 4, 2009, Healy issued a 10-point memorandum as a "re-iteration of existing overtime rules." (Ans., Ex. 4). This memorandum indicated, in pertinent part, that employees who decline to work overtime when they are offered an opportunity to do so would be considered to have refused the overtime even if the refusal was due to the employee being on vacation or on sick leave. (*Id.*) The memorandum stated that the Department would assign overtime in seniority order beginning at the start of the year. Thereafter, overtime would be allocated according to the "overtime list," meaning that the employee with the lowest number of overtime hours would have the next opportunity to pick up overtime, then the next lowest and so forth. If an employee declined to work a particular overtime shift when requested, that employee would be moved to the bottom of the overtime list.

On June 12, 2009, Galina Nisman, Assistant Personnel Director, Generations+ Northern Manhattan Network Human Resources/Labor Relations, responded via letter to the grievance that Donohoe filed on Petitioner's behalf. Nisman's investigation showed that Petitioner had declined to work overtime on numerous occasions, that he failed to answer his phone when called about overtime assignments, and that he did not have a voicemail set up to receive messages. Nisman

informed Donohoe that overtime had been distributed evenly and in accordance with the Department's overtime policy for the prior 12 months and that a Step IA conference was unnecessary. Donohoe proceeded to investigate the charges himself by contacting Healy and Petitioner's Shop Steward John Bavoso.

Donohoe, on July 1, 2009, wrote a letter to Petitioner informing him that, after he received Nisman's letter denying Petitioner's overtime grievance, he spoke to Petitioner's Shop Steward and to Healy regarding the distribution of overtime in the Engineering Department. Donohoe wrote that it appeared that the Department had been evenly distributing overtime as per the Union's Non-Economic Agreement with the City and, as such, the Union would not pursue the matter further.

On July 21, 2009, Healy approved a request from Petitioner for "Vacation/Leave Used for Personal Reasons" from July 26 at 11:00 p.m. until 7:00 a.m., July 27. On the morning of July 27, Petitioner, believing that he was scheduled to work an overtime shift, arrived at work. Petitioner was asked to leave since Cannarozzo was scheduled to work the shift. Before Petitioner left, Healy showed Petitioner the June 4, 2009 memorandum regarding overtime, to which an additional, handwritten amendment had been added. The amendment stated that "[w]hen an employee is on sick or annual leave that employee will not be offered overtime or charged a refusal for twenty four hours of that day."[1] On July 29, 2009, Healy changed Petitioner's tour from Tour I to Tour II, writing that the workload during Tour 2 had grown "exponentially" and that his "expertise and assistance will be an asset" on that tour. (Pet., Ex. B).

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[1] Petitioner submitted his copy of the work schedule, which listed Petitioner as working on July 27, 2009. HHC claims that Petitioner was scheduled to work overtime on July 28th, not July 27th. Petitioner denies ever receiving a copy of the memorandum with the handwritten amendment.

On July 31, 2009, Petitioner sent two letters to Donohoe requesting that the Union file grievances on his behalf. Petitioner wished to grieve Healy's denial of overtime on July 27 and Healy's alleged ongoing retaliatory and abusive conduct, in part based on Healy's decision to temporarily transfer Petitioner for ten days in February 2009. (Pet., Ex. b1).

Donohoe spoke to Healy and Bavoso on August 4 regarding Petitioner's claims and determined that there was no basis to file a grievance. He determined that the Department's denial of Healy's overtime on the contested dates was consistent with the rules. In reaching that determination, the Union asserts that Donohoe considered the fact that other employees who did not report to work prior to scheduled overtime were also denied that overtime. Donohoe further concluded that the transfer claim was untimely and should not be pursued. Donohoe informed Petitioner of his decision not to pursue filing a grievance on August 12, 2009.

On August 14, 2009, Petitioner wrote a letter to John Ahern, the Union's Business Manager, to complain about Donohoe and to request a copy of the collective bargaining agreement ("Agreement") between the Union and HHC. Donohoe responded to the Petitioner's letter on behalf of Ahern and wrote two letters to Petitioner, dated August 19 and 26, to set up a time to meet with him to further discuss his allegations. Donohoe sent Petitioner the letters via certified mail and also mailed a copy of the Agreement to Petitioner on September 9, 2009. Both letters and the Agreement were returned as undeliverable.

On August 17, 2009, Petitioner submitted a form requesting emergency annual leave, known as an SR-70 form, to Healy, requesting that the leave commence on that day. Petitioner stated the reason for the leave as "unforseen circumstances beyond [his] control." (Rep., Ex. R-6). He also submitted a letter which stated that he had informed the Engineer on duty of his need to take leave

at 6:45 p.m. on August 16. Petitioner requested leave from August 17, 2009 through October 2, 2009. Healy denied Petitioner's request for paid leave on the basis that it was not submitted 72 hours in advance, per the Department's extended leave policy.[2] Healy coded the denied SR-70 form as "06," meaning that Petitioner would be unpaid for any leave time that he took.

On August 31, 2009, Petitioner filed this petition, alleging violations of §12-306(a)(1), (2) and (3) and §12-306(b)(1), (2), and (3).

On September 28, 2009, Petitioner sent a letter and an updated SR-70 form to Healy informing him that, due to his circumstances, he needed to extend his emergency annual leave through Friday, November 6, 2009. Healy denied the request and noted that Petitioner would be considered "AWOL" (Absent Without Official Leave).

On November 9, 2009, Petitioner received a letter from Maria Campos, Personnel Representative, indicating that Healy considered Petitioner to be AWOL. Campos required Petitioner to contact Healy by November 13. On November 10, 2009, Petitioner replied to Campos in writing that he considered her statements to be libelous and asked that she retract her comments. He also wrote that his "unforseen personal business, is no business" of Healy's, so he owed no further explanation for the reason for his leave. (Amend. Pet, Ex. 8). Petitioner has since been charged by the Department with misconduct as having been AWOL.

On November 30, 2009, Petitioner further amended his petition to include events subsequent

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[2] A memorandum from Healy to "Engineering Staff," dated June 26, 2008 states, "As a reminder, all employees requesting annual leave are to put in their SR-70 requests with me 72 hours in advance and if no schedule conflicts occur they will be granted." It further states, in pertinent part, "If you are requesting an emergency annual leave, you are to in addition to notifying the Engineers at x5683, leave me a voice-mail . . . .If an emergency annual leave is to be granted supporting documentation must be supplied. If medical in nature, I do not need to know any specifics."

to the filing of his petition. The Petitioner added the arguments that, by denying his emergency annual leave and charging him with being AWOL, the Department interfered with, dominated, restrained, and discriminated against his rights, and unilaterally changed his schedule, in violation of NYCCBL § 12-306(a)(1) through (5). He alleges that the Union aided and abetted HHC's conduct, interfered with his statutory rights, failed to bargain in good faith with HHC and breached its duty of fair representation to the Petitioner, in violation of NYCCBL § 12-306(b)(1) through (5). On December 22, 2009, HHC sent Petitioner a Notice and Statement of Charges of Misconduct, which accused Petitioner of being AWOL.

Petitioner further amended his petition to the Office of Collective Bargaining on February 8, 2010, alleging that the charges filed against him on December 22 were improper. HHC and the Union both responded to Petitioner's new allegations.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the Union failed to conduct a thorough, impartial, and independent investigation of his complaints of unequal distribution of overtime. As an example, Lincoln Hospital has eight Engineers and six Plant Tenders at Lincoln Hospital, yet Donohoe interviewed only Healy–who is biased against him–and the Shop Steward. Additionally, in his phone conversation with Donohoe, Donohoe stated that Healy had the right to engage in the abusive conduct. Further, Petitioner alleges that he wrote to Ahern to complain about Donohoe, but he never received a response from Ahern. He has also repeatedly requested a copy of the Agreement between HHC and the Union from his Shop Steward, but he has never received a copy. He claims that he was

eventually able to obtain the Agreement, but with no help from the Union.

Petitioner claims that he has no problems receiving his mail, so he is not sure why he did not receive the two letters from the Union. Petitioner claims that the portion of the NYCCBL pertaining to timeliness does not pertain to him because the Union has refused for years to provide him with a copy of the Agreement. He argues that unless he has access to, and knowledge of his rights as outlined in the Agreement, it is impossible for him to file a timely improper practice petition. Further, he is a layman who was forced to file the petition *pro se* as a result of the negligence and irresponsibility of the Union. Petitioner argues that it took him two weeks of making phone calls and traveling from City agency to City agency before he was directed to the Office of Collective Bargaining. After finding the proper forum, he then had to familiarize himself with the laws, policies, and procedures for filing a petition, and then prepare the petition.

As to his contentions against HHC, he claims that it is his right and responsibility as a Union member to assist in achieving and maintaining a work environment free from abuses and injustices by reporting and grieving, if necessary, such incidents should they occur. He argues that Healy's retaliatory actions interfere with, restrain, and dominate over the exercise of the right granted to him and the administration of the organization of which he is a member. He further claims that HHC discriminated against him by unilaterally subjecting him to a work schedule change and denying him overtime assignments. By engaging in this behavior, HHC intended to discourage him from participating in the grievance process and membership in the Union. Healy's actions also constitute a unilateral change to a mandatory subject of bargaining and his actions are indicative of a lack of good faith bargaining.

Petitioner contends that in January 2009, he complained about a co-worker's tardiness and

was subsequently falsely accused of insubordination.[3] He further claims that from February 17, 2009 to February 27, 2009, he was "illegally" transferred to another location. Although Healy claimed that he was transferred because he is the least senior, that is not true, because he is the most senior Plant Tender with 23 years experience.[4] Further, Petitioner claims that Healy both retaliated against him and deviated from past practice by changing his schedule from Tour I to Tour II. In the past, the Senior Stationary Engineer would create the tour schedules and the Engineering personnel would choose according to seniority. Petitioner had no choice in this schedule change.

Petitioner also asserts that he should not have been denied overtime on July 27, 2009. HHC claims that he was denied the overtime because he was on vacation, but his annual leave request clearly specifies that he would be on leave from 11:00 p.m. on July 26, 2009 through 7:00 a.m. on July 27, 2009.

Petitioner argues that although he had accumulated 148 hours and 28 minutes of vacation time and clearly stated why he needed to take such leave, Healy denied the request for retaliatory reasons, claiming that he needed 72 hours advance notice for emergency leave. Healy then violated the provisions of the HHC employee handbook by falsely coding the leave as AWOL. Since the leave was coded AWOL, Petitioner was not paid for the leave and the lack of pay has created a

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[3] In support of his claim that HHC has treated him differently than other employees, Petitioner claims that on June 16, 2009, he observed Cannorozzo, who works on Tour II, fail to complete his work assignments, fail to respond to an assignment during his tour, and not be disciplined. HHC asserted that due to the heavy workload during Tour II (3:00 p.m. to 11:00 p.m.), Tour II employees sometimes do not complete all of their work. In those cases, the Department expects that the workers on the next tour will complete any unfinished work left from Tour II.

[4] Petitioner claims that in 1985, the New York City Office of Labor Relations deemed the duties and experience requirements of the titles Plant Maintainer (Hospitals)/Tender and Plant Maintainer (Hospitals)/Oiler to be substantially equivalent.

financial hardship for him and his family. Further, the leave guidelines do not require Petitioner to receive permission before taking an emergency leave of absence. Petitioner claims that he does not owe HHC any further explanation for the reason behind why he took the emergency leave.

Union's Position

The Union argues that many of the actions complained of by Petitioner are untimely. Anything complained of which occurred prior to May 10, 2009, or more than four months before Petitioner's filing, should not be considered by the Board.

The Union contends that the Petitioner's pleadings do not present sufficient facts to state a prima facie case that the Union breached its duty of fair representation. The Union spoke with Petitioner on multiple occasions regarding potential grievances and, further, Donohoe contacted Petitioner's Shop Steward and Senior Stationary Engineer to ascertain whether a meritorious grievance existed. Donohoe further endeavored to meet with Petitioner to discuss actions which Petitioner believed constituted harassment, but Petitioner ignored, failed to respond, or simply did not receive this correspondence, through no fault of the Union's, and despite its good faith efforts.

The Union acted in good faith and chose not to process Petitioner's complaints because it investigated and came to the conclusion that the claims were not meritorious and because Petitioner did not substantiate what he believed to be continued abuse. Even assuming that Petitioner's complaints were grievable, the Union made a good faith determination not to pursue the grievances as it has wide latitude to do so. The fact that Petitioner is not satisfied with the disposition of his complaints is not an element of an improper practice charge claim against the Union.

Other than the simple statement that the Union interfered with Petitioner's rights, Petitioner did not state facts or claims which allege that it interfered with his rights. Thus, this conclusory

statement alone cannot constitute the basis for a § 12-306(b)(1) claim against the Union. Furthermore, Petitioner lacks the necessary standing to pursue a claim under § 12-306(b)(2) because the duty of a certified employee organization to bargain in good faith is a duty owed to the public employer and not the union's members. To the extent that Petitioner asserted any violation of § 12-306(a), the Union argues that it cannot commit a violation of that provision because it is not a public employer under the NYCCBL.

HHC's Position

HHC uses the date that Petitioner first amended his petition, February 10, 2010, as the date the Board should use as far as timeliness is concerned. Thus, HHC asks that the Board not consider any allegations that occurred prior to October 10, 2009, four months prior to the filing of the amended petition.

HHC argues that Petitioner fails to include or explain how the actions it took with regard to his extended unauthorized leave/AWOL was motivated or related to any union activity. Petitioner's letter demanding "emergency annual leave," dated August 16, 2009, and scheduled to commence on August 17, provided HHC with less than one day notice that he would be taking this leave for approximately six weeks. For this, Petitioner's request was denied and as a result, Petitioner was marked AWOL, as any other employee would be marked should he or she be absent from work without authorization. Ultimately, Petitioner's total unauthorized absence lasted over eleven weeks. Upon his return to work on November 6, HHC requested documentation to justify his extended unauthorized leave. As of May 12, 2010, Petitioner had yet to produce any explanation or documentation to support the extended leave.

Petitioner has failed to demonstrate that any action taken by HHC either interfered with

Petitioner in the exercise of his rights granted in NYCCBL § 12-305, in violation of § 12-306(a)(1) or that it dominated the union in a manner violative of § 12-306(a)(2). Finally, Petitioner lacks standing to bring a claim under § 12-306(a)(4) or (5) because the duty to bargain runs between the employer and the union, and not individual employees.

DISCUSSION

The Board must first decide whether the petition is timely. NYCCBL § 12-306(e) of the NYCCBL and § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) provide that a petition alleging an improper practice in violation of § 12-306 may be filed no later than four months after the disputed action took place. Failure to file a petition within this period renders the claims untimely, and this Board will not consider the substantive merits of those claims. *Morales,* 3 OCB2d 25, at 9 (BCB 2010); *Howe*, 77 OCB 32 at 16 (BCB 2006); *Castro*, 63 OCB 44 at 6 (BCB 1999). However, "factual statements comprising untimely claims may be admissible as background information." *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (quoting *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007) (citations omitted). Such allegations "are considered by this Board solely as background material, but not as remediable allegations of violations of the NYCCBL, as these factual allegations occurred outside the four month statute of limitations." *Id.* Thus, such allegations, "while not actionable, may have bearing upon the employer's motivation for subsequent acts occurring within the statute of limitations and included within the scope of the petition." *Id.* (quoting *PBA*, 77 OCB 10, at 10 (BCB 2006) (editing marks omitted)); *see also Rosioreanu*, 1 OCB2d 39, at 14 (BCB 2008), *affd*, *Matter of Rosioreanu v. NYC OCB,* Ind. No. 116796/08 (Sup. Ct. N.Y. Co. Mar. 30, 2009) (Sherwood, J.), *affd* __ A.D.3d __,

2010 NY Slip Op. 07797 (1st Dept. Nov. 4, 2010) ("[I]nformation regarding untimely allegations may be admissible as factual background, or to illuminate the intent of the employer."). Because the petition in the instant matter was filed on August 31, 2009, we consider Petitioner's allegations regarding acts that occurred after April 29, 2009 as timely. Evidence of acts committed before April 29, 2009, will be admitted solely for the purpose of establishing the background and context of timely alleged acts.

Thus, we find that the Petitioner's primary timely claims against the Union are that it decided not to pursue his original grievance beyond Step I, that it failed to file a grievance or improper practice on Petitioner's behalf regarding the denial of overtime for allegedly retaliatory reasons on July 27, 2009, that it did not provide him with a copy of the Agreement, that it did not contest the denial, for allegedly retaliatory reasons, of his emergency annual leave request, and that it has not contested the disciplinary charges that were filed against him for being AWOL. The timely allegations against HHC are that HHC retaliated against him by denying him overtime, denying his emergency annual leave request, and for proffering disciplinary charges against him for being AWOL.

We now move to address the substantive timely issues raised by Petitioner. Because this case has not proceeded to a hearing, our inquiry is not whether Petitioner has established the truth of his factual allegations, but rather "whether, taking the facts as alleged by petitioner, a cause of action within the meaning of the NYCCBL has been stated." *Howe,* 79 OCB 19, at 10 (BCB 2007); *Farina*, 31 OCB 20 (BCB 1983). In view of the fact that Petitioner is appearing *pro se,* "we will accord the petition every favorable inference and will construe it to allege whatever may be implied from its statements by reasonable and fair intendment." *Id.* Even under this standard, we find that

facts alleged, if proven, would not establish a valid claim under the NYCCBL.

Petitioner claims that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(3), by failing to file or further pursue a grievance or file an improper practice petition with this Board. However, the Union does not solely control access to the forum through which rights may be vindicated, whether it be through the filing of a grievance or an improper practice petition. *Morris*, 3 OCB2d 19, at 11-12 (BCB 2010); *Williams*, 59 OCB 48, at 9 (BCB 1997). In fact, the Petitioner has made use of this right by commencing an improper practice proceeding before this Board challenging the same actions by HHC of which he complained to the Union.[5]

Where, as here, the Union does not solely control access to the remedial forum, the bargaining representative's duty is limited to evenhanded treatment of the members of the unit. We have stated:

> a union's fundamental statutory duty of fair representation extends only to matters involving collective negotiations, the administration of collective bargaining agreements and the processing of grievances. With respect to other matters, the duty of fair representation merely prohibits discriminatory practices.

Id.; *see also Keyes*, 37 OCB 32, at 9 (BCB 1986) (citing *Barry*, 17 PERB 3102, at 3179 (1984)).

Petitioner has not alleged that the Union has represented other employees in similar situations. The Union responded to Petitioner and communicated its reasons for its decision not to process the Petitioner's grievance, which were that it found no violation of employer policies. As such, we find that the facts asserted in the instant petitions simply do not support a claim of a breach

[5] Additionally, Article XI, § 2 of the Agreement, titled "Grievance Procedure," allows an employee to file a grievance on his own behalf.

of the duty of fair representation. As there are no viable claims against the Union, any derivative claims against HHC for the Union's alleged breach of the duty of fair representation are dismissed. *Holmes*, 3 OCB2d 51, at 13 (BCB 2010).

Petitioner's allegations against HHC, which primarily concern a claim that Petitioner was retaliated against in violation of NYCCBL § 12-306(a)(1) and (3), likewise do not make out a claim. In resolving discrimination and retaliation claims under the NYCCBL, this Board, in Bowman, 39 OCB 51 (BCB 1987), 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." Local 2627, DC 37, 3 OCB2d 37, at 16 (BCB 2009); see also Local 237, CEU, IBT, 77 OCB 24, at 18-19 (BCB 2006).

Here, we find that Petitioner has satisfied the first element of the Bowman test, since HHC admits that it was aware of Petitioner's grievance. Even though the grievance was handled by Nisman, it is implausible that Healy, who was allegedly responsible for the actions taken against Petitioner, was not aware of the grievance. Nisman investigated the grievance before rendering her decision, which would have entailed speaking to Petitioner's supervisor–Healy–and it was Healy who composed the overtime memorandum that was distributed in response to Petitioner's claim.

Regarding the second prong of the Bowman 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." Local 2627, DC 37, 3 OCB2d 37, at 16; see also Local 1180, CWA, 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 test by deploying evidence of proximity in time, together with other relevant evidence.); Local 1180, CWA, 45 OCB 24, at 17 (BCB 1990).

The instant petition fails on the second element of the test. Although some of the alleged adverse actions taken against Petitioner occurred after he filed his overtime grievance, Petitioner's assertions that those actions were taken because of his Union activity are conclusory. Conclusory statements do not state a violation of the NYCCBL. *DEA*, 79 OCB 40 (BCB 2007); *see also Civ. Serv. Bar Assn.*, 71 OCB 5, at 8 (BCB 2003); *COBA*, 65 OCB 19, at 8 (BCB 2000). Here, in claiming that HHC retaliated against Petitioner by taking various actions against him, including the filing of disciplinary charges, Petitioner has not pleaded facts tending to support his contention that HHC was motivated by anti-union animus. Instead, Petitioner's contentions rely entirely on the proximity in time between the filing of his grievance and the alleged negative actions, and not any facts that would potentially give rise to a sustainable improper practice claim. Petitioner's assertions of improper motive must be based on specific, probative facts, not conclusions based upon surmise, conjecture, or suspicion. *Kaplin,* 3 OCB2d 28, at 14 (BCB 2010); *LBA*, 61 OCB 49, at 6 (BCB 1998).

In addition, we also note that one of the actions about which Petitioner complains, his temporary transfer in February 2009, occurred prior to the time that the Union filed Petitioner's overtime grievance in April 2009. Moreover, to the extent that Petitioner contends that HHC unlawfully enforced and applied the leave guidelines, we find that HHC's written annual leave policy appears to support its contention that Petitioner did not follow the guidelines when he submitted his request for an extended absence. Therefore, we dismiss Petitioner's claims under NYCCBL § 120306(a)(1) and (3).

We dismiss Petitioner's claims under § 12-306(b)(2) because he lacks standing to raise them. *Proctor,* 3 OCB2d 30, at 11-12 (BCB 2010) ("[A]n individual lacks standing to raise a failure to bargain claim under § 12-306(b)(2)"); *McAllan*, 31 OCB 15, at 15 (BCB 1983) ("[T]he duty of a certified employee organization to bargain in good faith is a duty owed to the public employer and not the union's members"). We also dismiss Petitioner's claims under NYCCBL § 12-306(a)(4) and (5) because he lacks standing to bring them. *Feder*, 1 OCB2d 41, at 6 (BCB 2008) ("[T]he duty to bargain runs only between the public employer and the designated bargaining representative.").

Petitioner's remaining claims of any collusion between the Union and employer, domination and interference are likewise speculative and conclusory, and are also dismissed. *DEA*, 79 OCB 40; *see also Civ. Serv. Bar Assn.*, 71 OCB 5, at 8; *COBA*, 65 OCB 19, at 8. 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 filed by Earland S. Benjamin, docketed as BCB-2793-09 be, and the same hereby is, dismissed in its entirety, without prejudice to re-file.

Dated: January 5, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

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