Feder, 5 OCB2d 14 (BCB 2012)

(IP) (Docket No. BCB-2842-10)

Summary of Decision: Petitioner alleged that NYCHA violated NYCCBL § 12-306(a)(1), (2) and (3) when it denied his requests for paid release time, issued him a counseling memo for being absent without leave, denied his grievances, and denied his transfer requests because of his union activity. NYCHA claimed that certain issues raised by Petitioner are barred by the statute of limitations. To the extent any of Petitioner's claims are timely, NYCHA asserted that its actions were based not on anti-union animus but on its internal rules concerning use of leave and paid union release time, and were within its managerial rights. The Board held that certain claims were untimely filed. On the remaining claims, the Board found that NYCHA's actions were not motivated by Petitioner's union activity. Accordingly, the petition was dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

MITCHELL FEDER,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On March 10, 2010, Mitchell Feder ("Petitioner"), a member of District Council 37 ("DC 37"), Local 375 ("Union" or "Local 375"), filed a verified improper practice petition *pro se* against the New York City Housing Authority ("NYCHA") alleging that NYCHA violated § 12-306(a)(1), (2) and (3) of the New York City Collective Bargaining

Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Petitioner claims that NYCHA denied his requests for paid union release time, issued him a counseling memo for being absent without leave, denied his grievances, and denied his transfer requests, all because of his union activity. NYCHA claims that certain issues raised by Petitioner are barred by the statute of limitations. To the extent any claims are timely filed, NYCHA asserts that its actions were not based on Petitioner's union activity. Instead, in all instances it acted consistent with its rules concerning use of leave and paid union release time and within its rights to transfer and discipline its employees. The Board holds that certain claims are untimely filed. With respect to the timely allegations, the Board finds that the facts alleged are not sufficient to state a claim that NYCHA's actions were motivated by Petitioner's union activity. Accordingly, the petition is dismissed.

BACKGROUND

Petitioner is an Associate Housing Development Specialist and is a member of Local 375. He has worked at NYCHA since 1992.[1] As we have previously noted:

> Petitioner has been an active Union member during his employment with NYCHA. Since 1997, Petitioner has served in various Union positions, including delegate for Local 375's Chapter 25 ("Chapter 25"), Chapter 25 Treasurer, and Chapter 25 President. Since 2002, and

[1] Petitioner has appeared before the Board on five prior occasions: *Feder*, 1 OCB2d 23 (BCB 2008) ("*Feder I*"); *Feder*, 1 OCB2d 27 (BCB 2008) ("*Feder II*"); *Feder*, 1 OCB2d 41 (BCB 2008) ("*Feder III*"); *Feder*, 4 OCB2d 46 (BCB 2011) ("*Feder IV*"); and *Feder*, 4 OCB2d 61 (BCB 2011) (*"Feder V"*). Currently, he is also the subject of an improper practice petition filed by DC 37. In the petition, docketed as BCB-2939-11, DC 37 alleges that NYCHA discriminated against Petitioner in violation of NYCCBL § 12-306(a)(1) and (3) by issuing him a counseling memo in retaliation for sending emails to Union members during work hours.

> during the relevant time period, Petitioner served as Chapter 25 President. In this position, Petitioner filed grievances, represented employees at Step I hearings, responded to members' questions, organized and attended monthly Chapter 25 meetings, and disseminated information to the members.

Feder V, at 3; *see also Feder IV*, at 4.[2]

From February 2007 through July 2011, Petitioner was assigned to NYCHA's Office of Business and Revenue Development ("OBRD"). In July 2011, Petitioner was transferred to NYCHA's Department for Development ("DFD").

Procedural History

NYCHA filed its answer on May 17, 2010, and Petitioner filed a reply on July 13, 2010. After filing his reply, Petitioner requested that a hearing be conducted to afford him, among other things, an opportunity to submit additional evidence. The Trial Examiner granted Petitioner the opportunity to supplement his pleadings with additional evidence in support of his claims and gave NYCHA the opportunity to respond to Petitioner's supplemental submission. Petitioner's supplemental pleading was received on December 27, 2010 ("Petitioner's Supp. Submission"), as requested. Without seeking permission to file additional pleadings, Petitioner then filed an additional submission, entitled "Addendum to the Supplemental Submission," on January 18, 2011. On January 20, 2011, the Trial Examiner determined that Petitioner's January 18, 2011 submission would be made part of the record and extended NYCHA's time to respond. Petitioner was advised that no additional unsolicited submissions would be accepted in this matter.

On January 31, 2011, again without permission from the Office of Collective

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[2] Petitioner's term as Chapter 25 President ended sometime between February 2010 and June 2011.

Bargaining ("OCB"), Petitioner submitted another "Addendum/Amendment" to his reply. On February 1, 2011, Petitioner was advised that his January 31, 2011 filing was not authorized by § 1-07(c) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") or by the Trial Examiner and would not be made part of the record. Petitioner was further advised that he had been given ample opportunity to present documentary evidence and legal arguments in support of his claims and that no further pleadings would be admitted or considered. NYCHA filed its response to Petitioner's Supp. Submission and the Addendum to the Supp. Submission on February 14, 2011. On February 18, 2011, Petitioner submitted a "Rebuttal to NYCHA's Response." On February 20, 2011, consistent with prior notice, Petitioner was advised that his February 18, 2011 filing was not authorized by OCB Rules or the Trial Examiner and, therefore, would also not be made part of the record.

On September 8, 2011, a conference was held by the Trial Examiner, at which time the parties indicated that Petitioner had received a transfer from the OBRD to the DFD. The Trial Examiner requested that the parties simultaneously address the impact of the transfer on Petitioner's claim that NYCHA failed to grant his earlier transfer requests. Both parties addressed this issue in submissions received on January 6, 2012. On January 12, 2012, without permission, Petitioner submitted a "supplemental and rebuttal brief" to NYCHA's January 6, 2012 filing. On January 12, 2012, Petitioner was advised that his January 12, 2012 filing was not authorized by OCB Rules or the Trial Examiner and would not be made part of the record.

Petitioner's Improper Practice Claims

In the instant matter, Petitioner alleges that various improper acts by NYCHA

were taken because he is a union official or because he has engaged in union activity. Specifically, Petitioner alleges that NYCHA denied his requests for paid union release time, issued him a counseling memo for being absent without leave, and denied his grievances and transfer requests. Unless noted, the following facts relating to these claims are not disputed.

Transfer Requests

On March 27, 2009, Petitioner requested a transfer from OBRD to a "suitable assignment." (Pet. Ex. 8) This request was made in writing to the Chairman of NYCHA but was not in response to any particular departmental vacancy. Instead, Petitioner explained that he was requesting the transfer because his current assignment was a "stressful and hostile work environment" that caused him to "become ill, lose sleep, lose my appetite and experience dizziness." (*Id.*) Petitioner's request explained in detail examples of the harassment Petitioner alleged he had experienced, including having disciplinary charges filed against him in 2008.[3] NYCHA did not respond to Petitioner's request.

Petitioner alleges that, since 2004, at least two Housing Development Specialists and one Associate Housing Development Specialist were transferred to the DFD. In addition, the record reflects that, in July 2009, NYCHA posted vacancies for two

[3] Petitioner stated in his March 2009 transfer request that he had been forced to transfer three times since 2004, that each transfer caused him stress and anxiety, and that he has received diminishing levels of responsibility over time. Petitioner suggested that none of the transfers were for legitimate business reasons. In attachments to his Reply, he indicated that he grieved a 2006 transfer and the duties that he was assigned, and alleged that the transfer from OBRD was made to place him in a unit without any other bargaining unit members. (Pet. Ex. 8)

Associate Housing Development Specialist positions in DFD.[4]

The Union's collective bargaining agreement with NYCHA provides that supervisors must forward employee transfer requests to the Personnel Department, but is otherwise silent on any procedures NYCHA must follow relating to the filling of vacant positions or employee transfers. NYCHA argues that it is within its managerial rights to fill vacancies and grant transfers. Petitioner alleges that two different documents set forth procedures which govern employee transfers, one of which is a portion of a personnel manual that NYCHA contends was revised and revoked as early as 1998, and another that NYCHA contends was a Union bargaining proposal that it rejected.

In February 2010, Petitioner asserts that he again requested a transfer out of OBRD. He asserts that the reasons for the request were those stated in his March 2009 request and unspecified "additional personal and professional issues/reasons." (Pet. ¶ 29) At the time the petition was filed, Petitioner alleged that NYCHA had not responded to this request. (*Id.*) NYCHA admits that, in response to Petitioner's February 2010 transfer request, Petitioner met with the Special Assistant to NYCHA's General Manager. This meeting occurred sometime between March and May 2010. In June or early July 2011, Petitioner requested a meeting with NYCHA's Deputy General Manager for Finance. That meeting was held on July 6, 2011; thereafter Petitioner was transferred to DFD.

Requests for Paid Release Time to Conduct Union Business

Under certain circumstances, employee union representatives may request and

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[4] Petitioner claims there were vacant positions for many titles other than Associate Housing Development Specialist for which he was qualified. He requested the opportunity to develop a record at hearing to show that he was being prohibited from transferring to those positions.

obtain permission to conduct union business during work hours. Mayor's Executive Order No. 75 ("EO 75"), which was issued to all Mayoral agencies, sets forth standard time and leave policies for designated employee union representatives conducting union and labor-management activities.[5] EO 75 provides that certain "Labor Management Joint" activities may be conducted by union-designated employees "subject to conditions set forth in this Executive Order, without loss of pay or other employee benefits." The specified covered activities include investigation of grievances, grievance processing, attendance at labor-management committee meetings, negotiations or meetings with the City Director of Labor Relations, and appearance before departmental and other City officials and agencies, including the City Council, Civil Service Commission and OCB.

In addition, EO 75 lists activities performed by union-designated employees that are permitted, but must be performed on "time off without pay" or charged to annual leave or compensatory time credits. (Pet. Ex. 4) These activities include, in part, attendance at union meetings, conferences or conventions, organizing union members, solicitation of members, and keeping union records. (*Id.*)

NYCHA contends that its Human Resource Manual ("HR Manual") sets forth rules governing time and leave for union business and that these are the only rules that apply to Petitioner. Chapter X, § 14 of the HR Manual provides, in relevant part:

> Absences for Employee Representatives
>
> a. Regularly Designated Representatives
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> Absence with pay shall be granted for labor-management activities of employee-representatives, duly designated by

[5] NYCHA is a public authority created pursuant to New York State Public Housing Law and is not a Mayoral agency. NYCHA contends that, because it is not a Mayoral agency, it is not subject to Mayoral executive orders, such as EO 75. (Ans. ¶¶ 44, 46)

certified bargaining organizations (unions) operating under the Mayor's Executive Order No. 75, dated March 22, 1973, acting on matters related to the employees in their respective unions. The aforementioned labor-management activities are detailed in Section 2 of Executive Order 75.

b. Ad Hoc Representatives

Those unions which have been granted exclusive bargaining rights may, with the approval of the Department director, designate other employee representatives, on an ad hoc basis, to handle grievances and engage in activities referred to below. Division Chiefs and Managers will be notified when one of their employees has been so designated. They are authorized to permit these designated employee representatives to be released with pay for the purpose of:

Handling Grievances at work locations (Shop Steward function)
Participating in meetings of departmental joint labor-management activities
Participating in negotiations between the Authority and the employee's certified union

The employee representative must give at least 24 hours' notice, in writing to his/her supervisor, including the following information:

The date and hour when he/she is to be released
The approximate duration involved
The time when he/she expects to return to regular duty
A brief resume of the subject involved and the employees or officials with whom the matter is to be discussed.

*   *   *

c. Time Off Without Pay

Subject to the approval of the Manager/Division Chief, employee representatives may be permitted during normal working hours, to have time off for the following types of activity, which time shall either be without pay, or chargeable to their annual leave allowances.

Attendance at union meetings or conventions

> Organizing and recruitment
> Solicitation of members
> Collection of union dues
> Distribution of union pamphlets, circulars or other literature
> Other union activities covered by Section 3 of Executive Order No. 75.
> The employee must be given at least 24 hours advance notice, in writing, and must secure written authorization of the Manager/Division Chief.

(Ans. Ex. 1)

On October 1, 2009, Jon Forster, the Union's First Vice President, requested that Petitioner and another Union official, Joshua Barnett, be given release time on that date to attend a City Council hearing on NYCHA's use of federal stimulus money. NYCHA's then Chief of Labor Relations granted the request for leave, but advised Forster that the release was for "union activity," not "labor-management activity," and therefore was chargeable to the employees' leave balances. (Pet. Ex. 4; Ans. Ex. 7) Petitioner received a copy of the Chief of Labor Relations' response to the request on or before October 2, 2009.

Thereafter, Petitioner was directed to submit a leave of absence request for his three-hour absence on October 1, 2009. On November 6, 2009, he was again reminded to submit a request. On November 9, 2009, he was advised that a request had not yet been received. On December 2, 2009, Petitioner submitted the request "under protest." (Pet. Ex. 4)

Petitioner alleges that Barnett was not "forced" to submit a three-hour leave request. (Pet. ¶18) NYCHA alleges that it was not aware until the filing of this petition that Barnett did not submit a leave request for October 1, 2009, because Barnett did not swipe out and therefore his absence was not recorded. Subsequent to the filing of this

petition, NYCHA requested, and Barnett submitted, a signed leave of absence request for two hours on October 1, 2009.

It is undisputed that some NYCHA employees are regularly designated union representatives who have been granted regular and reoccurring release time under EO 75 or a collective bargaining agreement. The Union has not sought, nor has Petitioner been granted, regular and reoccurring release time. It is also undisputed that prior to October 2009, Petitioner and other union representatives had been granted paid release time to participate in labor-management meetings and collective bargaining.

On October 20, 2009, Petitioner submitted a form requesting paid release time to attend physical therapy on October 27 and for paid release time to perform union-related duties on that day and the following two days.[6] Petitioner alleges that the purpose of the leave request was to "meet and greet my union members so that I could distribute union campaign related material and documents to them in relation to the election as well as other union related documents and materials." (Pet. ¶12) On October 22, 2009, Petitioner's request for leave was denied.

Again on November 9, 2009, Petitioner submitted a request for seven hours of paid leave for November 12, 2009, to conduct "personal business (union administrative activity for L.375 members covered by NYCHA H.R. Manual/E.O.75; to meet, greet and distribute union related documents to the union's upstate members covering the water-shed area.)" This request was denied on November 10, 2009. The reason for the denial stated on the Leave of Absence Request form was "office obligations." (Pet. Ex. 2)

[6] Petitioner does not contest the denial of requested leave to attend physical therapy.

Counseling Memo

On November 13, 2009, NYCHA issued a counseling memo to Petitioner regarding his absences without official leave ("AWOL"). The memo indicated that Petitioner did not report to work on October 27, 28, 29, and November 12, 2009, dates for which his requests for leave were denied. The memo also admonished Petitioner for being AWOL, instructed him on how to submit a timely request for leave, and warned him that, in the future, if he does not report to work on a date for which his leave request was denied, he will be docked pay and may face disciplinary action. The memo explained that Petitioner's AWOL followed:

> . . . a large number of absences during the past year (2009). You have been granted annual leave for a total of 25 work days. In addition, you have been granted excused time for partial or full day absences totaling over 21 work days. Eleven of those days were excused so you could attend your disciplinary hearing and another 10 full or partial work days were excused so you could attend an Improper Practice Hearing. Please note that under the HR Manual, you are not entitled to excused time for time spent at the improper practice hearing but rather, this time could have been charged against your annual leave balance.

(Pet. Ex. 3) Petitioner was not docked any pay for being AWOL on October 27, 28, 29, or November 12, 2009.

Petitioner claims that he did not notice that his October 2009 or November 2009 leave requests had been denied. He contends that customarily he was verbally advised that a request was denied, but in this instance he was not.

Denial of Petitioner's Grievances

On December 2, 2009, Petitioner filed two "personal" grievances pursuant to

§ 7A of the HR Manual.[7] (Pet. Ex. 6) The first grievance contested NYCHA's denial of his request for paid release time to conduct union business for October 1, 2009. The second grievance alleged that commencing on December 2, 2009, NYCHA assigned Petitioner to perform out-of-title duties, namely to "read" certain laundry vending smart-card dispenser machines. (*Id.*)

On December 3, 2009, Petitioner met with OBRD's Assistant Director and Deputy Director to discuss the grievances. On December 4, 2009, he appealed both issues to Step II of the grievance process. On December 21, 2009, NYCHA's Chief of Labor Relations denied both grievances. With respect to the issue of leave for October 1, 2009, the Chief of Labor Relations responded:

> First, you incorrectly state that "release-time . . . was approved by Labor Relations." The Labor Relations Division of the New York City Housing Authority (NYCHA) neither approves nor disapproves release time; only the Department Director where the employee works has this authority. Second, as you know, this matter has been addressed on numerous occasions over the course of the last few years. NYCHA's position on the matter has been consistent. Executive Order No. 75 (EO 75) applies to Mayoral agencies, not public benefit corporations such as NYCHA. The substance of Executive Orders applies to NYCHA only when such provisions are expressly adopted by Board Resolution either in whole or part or in modified form; NYCHA's Board has never adopted EO 75.

[7] Chapter 1 of the HR Manual states that "the processing of grievances for all employees of the Authority is patterned upon the provisions of Section 8(a) of Executive Order No. 52 of the City of New York, dated September 29, 1967, except as may otherwise be provided in a collective bargaining agreement." The HR Manual describes a four step procedure for employee grievances that includes a conference at Step I, responses by NYCHA at Steps II and III, and culminates in final and binding arbitration before a neutral appointed by the OCB. The definition of a grievance thereunder includes "[a] claimed violation, misinterpretation, or misapplication of the rules and regulations of the Authority affecting the terms and conditions of employment;" and "[a] claimed assignment of employees to duties substantially different from those stated in their job classification." (Ans. Ex. 13)

> Accordingly, Mr. Foster's request for your release on October 1, 2009 could be and was addressed only by application of Chapter X of the Human Resources Manual, the relevant portion of which is attached for your convenience. Pursuant to Section 14(b) of that chapter, excused time may be granted by the Department Director to ad hoc union representatives for very limited labor-management activities. Testifying at a City Council hearing is not a labor-management activity recognized in Section 14 (b). For this reason, your request for excused time was denied.

(Pet. Ex. 6) The Chief of Labor Relations then addressed Petitioner's claim that his assignment to read the laundry vending smart-card dispenser was out-of-title work. He stated:

> In order for your above allegation to meet the prima facie definition of grievance, you would have had to have claimed an assignment to duties "substantially different" from that stated in the title specification of the title in which you serve. By your own admission, this task has occurred or will occur too infrequently to possibly rise to the level of being "substantially different" from your Associate Housing Development Specialist job classification. For this reason, this matter is dismissed for failure to meet the definition of "grievance."

(Pet. Ex. 6)

On December 22, 2009, Petitioner emailed the Chief of Labor Relations and the Director of Human Resources, contesting the denial of his grievance, which he asserted was the result of NYCHA's misinterpretation or misapplication of the HR Manual. On January 8, 2010, the Chief of Labor Relations responded by email and stated that his original responses concerning Petitioner's claims remained the same. He added that, "On a related matter, I would like to take this opportunity to remind you that as a member of Local 375, Civil Service Technical Guild, your grievances must be submitted pursuant to the grievance procedures in the NYCHA-Local 375 collective bargaining agreement, not

the HR Manual.[8]

On January 11, 2010, Petitioner responded by email to the Chief of Labor Relations, stating that his claims regarding release time and whether he could file grievances under the HR Manual are issues "for OCB and an IPP." (Pet. Ex. 6) He also stated, "I formally request that HR reconsider item two (2) of your response," referring to the Chief of Labor Relations' response to Petitioner's out-of-title claim. In addition, he contested the assertion that his grievances should be brought under the collective bargaining agreement rather than the HR Manual.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that he has been a longstanding officer and activist within the Union. He argues that NYCHA has a long history of animus and discriminatory action against him based on his union activity. As evidence of NYCHA's discriminatory conduct, Petitioner mentions generally that he was forced to transfer three times, that permission for him to take two 15 minute breaks was rescinded, that all non-NYCHA documents were removed from his work space, that his voicemail was removed, and that NYCHA filed disciplinary charges against him for his union-related use of email. In

[8] Similar to the HR Manual, the collective bargaining agreement between NYCHA and the Union provides for an identical four step grievance process for employee grievances that includes a conference at Step III and culminates in final and binding arbitration before a neutral appointed by OCB. The definition of a grievance thereunder also includes "[a] claimed violation, misinterpretation, or misapplication of the rules and regulations of the Authority affecting the terms and conditions of employment;" and "[a] claimed assignment of employees to duties substantially different from those stated in their job classification." (Ans. Ex. 14)

addition, Petitioner requests to incorporate into this petition all previously filed petitions, exhibits, transcripts, NYCHA's answers and the Board's prior rulings in other cases involving Petitioner. However, he asserts that his request to incorporate all these documents and decisions into the record is for OCB "reference only," and therefore, the Board should incorporate and consider them all.[9] (Rep. ¶ 189)

Petitioner asserts that NYCHA's denials of his requests for leave on October 1, October 22, and November 10, 2009, were the result of discrimination based on his union activity, in violation of NYCCBL § 12-306(a)(1) and (3).[10] Further, Petitioner asserts that his claims regarding the leave requests are timely filed because NYCHA did not compel him to submit a request for leave for the October 1, 2009 absence until December 1, 2009. He also asserts that he first learned of the denial of his October and November

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[9] With the exception of the involuntary transfers, which occurred prior to 2007, the Board addressed all of the referenced incidents in its earlier noted decisions.

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

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

NYCCBL § 12-305 provides, in pertinent part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any of all of such activities.

2009 leave requests when he received the counseling memo on November 13, 2009. Petitioner argues that evidence of NYCHA's discrimination is its failure to abide by EO 75 which governs release time and its own HR Manual. Moreover, he asserts that NYCHA has granted other employees paid release time to perform union business. Specifically, he alleges that another union official, Barnett, who also attended the October 1, 2009 City Council hearing, was not forced to submit or use his own leave time for this absence. In this regard, Petitioner additionally argues that NYCHA's denial of his leave requests violates NYCCBL §12-306(a)(2) because the denial was meant to favor one candidate for union office over another and interfere with the election of the Union's officers, chairs and delegates.[11]

Petitioner contends that the November 13, 2009 counseling memo he received was motivated by his union activity and therefore discriminatory. He argues that this claim was timely filed because his petition was filed within four months of the date he received the memo, November 16, 2009. Petitioner argues that he was entitled to paid release time to conduct union business pursuant to EO 75 and the HR Manual. In addition, he contends that NYCHA did not follow the HR Manual concerning AWOL because no one called him when he did not report to work October 27, 28, and 29, 2009 or on November 12, 2009.[12] Therefore, Petitioner claims that NYCHA's issuance of the

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

> It shall be an improper practice for a public employer or its agents:
>
> (2) to dominate or interfere with the formation or administration of any public employee organization . . .

[12] The HR Manual, Ch. X, § XII, entitled, "Actions to be Taken when Employees are

counseling memo for his absences was discriminatory.

Petitioner claims that his grievances, initially filed on December 2, 2009, were rejected because of "anti-union animus and disparate treatment." (Pet. ¶ 27) He argues that he did not learn of the denial of the grievances until December 21, 2009, at the earliest, and therefore this claim was filed within the four month statute of limitations. Petitioner describes the denial of his grievances as a "refusal to process these claims" because NYCHA indicated that he should file his grievances pursuant to the collective bargaining agreement and not under the HR Manual. (Rep. ¶¶ 269-279) Petitioner notes that NYCHA did not schedule a Step I or Step II meeting and therefore his grievances were not processed. Petitioner argues that the Chief of Labor Relations incorrectly asserted that his grievance should have been filed under the collective bargaining agreement instead of the HR Manual. Although Petitioner concedes that the two grievance procedures are nearly identical, he contends that the Chief of Labor Relation's misrepresentation is continuing evidence of animus against Petitioner and his union activities. Moreover, Petitioner has filed grievances pursuant to the HR Manual instead of the collective bargaining agreement in the past. Therefore, there was no basis for NYCHA's summary denial of the grievances.

Further, he claims that NYCHA's denial of his request to transfer on March 27, 2009 and again in February 2010 was based on his union activity and disparate treatment. He argues that this discriminatory refusal continued from March 27, 2009, up through his

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Absent without Approved Leave," states that employees who are AWOL are not entitled to use annual leave for such absences, are subject to disciplinary action, including termination, and are to be "paydocked" for the period of their absence. It also sets forth steps that managers and division chiefs are to follow when an employee is AWOL. These steps include attempting to contact the employee by telephone for an explanation of the absence on the first day the employee is absent. (Rep. Ex. 39)

February 2010 request to transfer and is therefore timely filed within the four month statute of limitations. In addition, Petitioner argues that NYCHA's discriminatory refusal to grant his transfer requests in 2009 and 2010 are not rendered moot by his July 2011 transfer to DFD. He was no longer Chapter 25 President when he was transferred. NYCHA's decision to transfer him in 2011 does not negate its discriminatory failure to transfer him over 12 months earlier.

Petitioner asserts that his claims have raised enumerable factual disputes that warrant OCB to hold a hearing. In addition he argues that the Board must determine whether NYCHA's position on the application of EO 75 is discriminatory, whether EO 75 has been incorporated into NYCHA's HR manual, and whether this issue falls under the Board's jurisdiction. As a remedy to his claims, Petitioner asks the Board to order NYCHA to make him whole by restoring three hours of his annual leave, removing the counseling memo from his personnel file, and ceasing and desisting from discriminating against him based on his union activity.

NYCHA's Position

NYCHA asserts that Petitioner's request to incorporate all claims raised in earlier improper practice petitions filed by him or by the Union is barred by collateral estoppel. In this regard, it claims that none of the issues raised by Petitioner are new and therefore the petition should be dismissed in its entirety.

Further, NYCHA asserts that Petitioner's claims are untimely filed because the complained of actions occurred more than four months prior to the filing of the petition. Specifically, NYCHA identifies Petitioner's allegations concerning the transfer requests, October 2009 leave requests, release time granted to members of other unions, claims

relating to provisions of NYCHA's personnel manual concerning transfers that were modified in 1998, and all the claims Petitioner raises as evidence of NYCHA's animus and discrimination: involuntary transfer three times, rescission of permission to take two 15 minute breaks, removal of all non-NYCHA documents from his work space, removal of his voicemail, and the proffer of disciplinary charges against Petitioner for his union-related use of email.

With respect to any claims that the Board deems timely, NYCHA argues that none of its actions were motivated by anti-union animus. Petitioner's claims that NYCHA discriminated against him are based on conjecture and surmise, and are conclusory in nature. Instead, its conduct toward Petitioner has consistently been fair, reasonable, and in accordance with its rules and procedures. NYCHA contends that EO 75 does not apply to it as a matter of law or contract, because it is a public authority and therefore not subject to Mayoral Orders and because it did not elect to be covered by EO 75. Accordingly, the rules governing union release time are set forth in the HR Manual and NYCHA has applied these rules to Petitioner in a non-discriminatory manner.

In addition, NYCHA asserts that its denial of Petitioner's December 2009 grievances was in accordance with its rules and the applicable grievance procedure. Indeed, the Board lacks jurisdiction over alleged contractual violations. Here, Petitioner's grievances fall within the scope of those defined by the collective bargaining agreement. Therefore, the appropriate forum for these claims is the grievance procedure. Moreover, Petitioner has not alleged nor has NYCHA acted in any way to impede the processing of Petitioner's grievances. Petitioner has been a Union representative for many years and is fully aware of how to process a grievance. Finally, any claim that

Petitioner may have had that he was assigned to perform duties below his title is now moot since the only remedy for such a claim is a cease and desist remedy. Petitioner is no longer assigned to OBRD and, therefore, those duties are no longer in issue. Accordingly, the Board should dismiss Petitioner's claim.

Finally, with respect to Petitioner's transfer request, Petitioner has not shown that the failure to grant his request was motivated by his union activity. NYCHA alleges that there have been few, if any, vacancies for Associate Housing Development Specialists since 2004 and Petitioner has been repeatedly notified that there have been no funded vacancies in his title line. Moreover, NYCHA's decision to assign and transfer employees is a managerial right. Therefore, to the extent vacant positions were available, it was within NYCHA's discretion to assign the person best-suited to the position and the needs of the office. Further, in this instance, Petitioner was granted a transfer to DFD in July 2011 and therefore this issue is also moot.

DISCUSSION

In reviewing the sufficiency of the allegations in the pleadings, we will draw all permissible inferences in favor of Petitioner and assume, *arguendo,* that the factual allegations are true. *See Feder I,* at 13; *D'Onofrio*, 79 OCB 3, at 20 n. 11 (BCB 2007). Because Petitioner is *pro se* in this proceeding, we are especially cognizant that such review "should be exercised with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and not define such claims only by the form of words used by Petitioner." *Feder I*, at 15*; see also Morris,* 3 OCB2d 19, at 14 (BCB 2010).

We first address the timeliness of the instant petition. NYCHA contends that Petitioner failed to raise the instant claims within the four month statute of limitations. An improper practice charge must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence. *See Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (Beeler, J.) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)); *see also Tucker*, 51 OCB 24, at 5 (BCB 1993).[13] The petition was filed on March 10, 2010. Accordingly, those claims which arose on or after November 10, 2009 are timely. However, some of Petitioner's claims accrued prior to November 10, 2009, and are therefore untimely.

Specifically, Petitioner's claim that NYCHA's denial of the October 1, 2009 request for paid release time to attend a City Council hearing violated the NYCCBL is untimely. In an email that Petitioner received on October 2, 2009, the Chief of Labor Relations explicitly stated that permission for leave was granted, but the request was not

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[13] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

OCB Rule § 1-07(d) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . .

considered paid release time for union business and was instead "chargeable" to Petitioner's leave balance. (Pet. Ex. 4) This statement belies Petitioner's assertion that he did not know he would be compelled to submit a leave slip for the absence until it was requested in December 2009. Accordingly, we find that, as of October 2, 2009, Petitioner knew that NYCHA had denied his October 1, 2009 request for paid release time. The petition contesting this denial was not filed until more than four months later. Therefore, this claim was not filed within the statute of limitations and is dismissed.

With respect to Petitioner's claim that the denial of his October 20, 2009, request for paid release time violated the NYCCBL, this claim is also untimely. The undisputed facts show that NYCHA denied Petitioner's request for leave on October 22, 2009, more than four months prior to the filing of this petition. Petitioner claims that he did not realize that his request for leave was denied until November 13, 2009, when he was told he was AWOL for not appearing for work on October 27-29, 2009. He claims instead that customarily he was orally advised when a leave request was denied and in this instance he was not. However, Petitioner does not deny that he received a written response to his leave of absence request from his supervisor on or about October 22, 2009, and the leave of absence request form he submitted clearly states that the requested leave was denied. Under these circumstances, the Board does not find Petitioner's explanation a reasonable basis upon which to toll the statute of limitations. There is no procedure or policy that compels NYCHA to orally advise employees of leave denials. Instead, we find that Petitioner either knew or should have known that his request for leave had been denied on October 22, 2009. *See Feder V*, at 22 (claim that NYCHA's denial of 2007 request for voicemail based on anti-union animus was untimely because

petitioner knew or should have known that the request was not being granted by May 2009); *Raby*, 71 OCB 14, at 13 (petitioner knew or should have known more than four months before petition was filed that union had failed to act on her behalf). Therefore, this claim is untimely and is dismissed.

NYCHA argues that all of Petitioner's claims concerning his transfer requests are untimely because Petitioner's February 2010 request was merely a reassertion of his March 2009 request, which was well outside of the four month statute of limitations. Petitioner claims that the statute of limitations did not begin to run following NYCHA's failure to grant his request for a transfer on or about March 27, 2009, because "the continued abuse of not allowing a union representative the ability to transfer resulted in disparate treatment, does fall under anti-union animus and violation of the NYCCBL which was seen in Petitioner's second written request." (Rep., p. 26)

We find that the petition as it relates to the March 2009 transfer request was not timely filed. Petitioner asserts that he received no response to his March 2009 request to transfer. However, Petitioner should have known that the March 2009 request was not being granted when he failed to receive a response. There are no facts asserted by Petitioner which show that his nearly twelve month delay in filing a petition concerning NYCHA's failure to grant his March 2009 request was reasonable. *See Feder V*, at 22; *Raby*, 71 OCB 14, at 13. Therefore this claim is dismissed as untimely.

In addition to the reasons he alleged in support of his March 2009 transfer request, Petitioner asserts, without any specificity, that there were "additional personal and professional reasons" for his February 2010 transfer request. (Pet ¶ 29) Because Petitioner did not elaborate on these additional reasons, we cannot determine from his

pleadings whether they differ from the reasons which formed the basis for his March 2009 transfer request. In contrast to his March 2009 transfer request, however, Petitioner's February 2010 transfer request triggered a response from the Special Assistant to NYCHA's General Manager, who met with Petitioner sometime between March and May 2010. Although Petitioner did not provide details on the alleged new reasons for his February 2010 transfer request, the fact that he indicated that there were additional reasons, combined with the fact that NYCHA met with Petitioner to discuss his request, supports an inference that indeed the February 2010 request was not simply a reassertion of the prior request. For these reasons, we find that the February 2010 request was a new transfer request. Therefore, the statute of limitations on Petitioner's claim concerning the February 2010 transfer request began to run, at the earliest, on the date Petitioner made his request, and at the latest, on the date the meeting with the Special Assistant to the General Manager took place. Either way, the claim falls within the four month statute of limitations and therefore is timely.

The three remaining alleged violations of the NYCCBL all arose on or after November 10, 2009. They are: the November 10, 2009 denial of Petitioner's leave request, the issuance of the December 2009 counseling memo, and the denial of Petitioner's December 2009 grievances. Each of these claims was filed within the four month statute of limitations and is timely.

To establish discrimination under the NYCCBL, we apply the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, such as *State of New York (Division of State Police)*, 36 PERB P 4521 (2003), adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). Pursuant to the test, a petitioner must demonstrate that:

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

Bowman, 39 OCB 51, at 18-19; *see also DC* 37, 1 OCB2d 6, at 27 (BCB 2008).

Here, it is undisputed that Petitioner engaged in protected union activity on a regular basis both during and prior to the time the claims in this action arose. As we held in *Feder IV*:

> Petitioner was an elected official of Chapter 25; he had several positions within Local 375 and DC 37. At all relevant times, Petitioner was in regular contact with NYCHA regarding issues affecting employees' rights and participated in numerous union matters that constituted protected union activity. . . . NYCHA, itself, admits that it was aware of Petitioner's involvement with the Union.

(*Id.* at 46-47); *see also Feder V,* at 25. At the time of the relevant events herein, Petitioner was the Chapter 25 President and held other positions with the Union. Therefore, we find that Petitioner has satisfied the first prong of the *Bowman/Salamanca* standard.

Regarding the motivation behind the employment actions in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26 (BCB 2006); *see also CEU, L. 237*, 67 OCB 13, at 9 (BCB 2001); *CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). However, to establish motive, "a petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22 (BCB 2005), at 22. Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001); *Kaplin,* 3 OCB2d 28 (BCB 2010). In addition, while temporal proximity alone is not sufficient to

establish causation, the temporal proximity between the protected union activity and the allegedly retaliatory action, in conjunction with other facts supporting a finding of improper motivation, is sufficient to satisfy the second element of the *Bowman/Salamanca* test. *See Colella*, 79 OCB 27, at 55 (BCB 2008) (citing *SSEU, L. 371*, 77 OCB 35, at 15-16 (BCB 2006)).

As evidentiary support for his allegations of anti-union animus, discrimination and retaliation, Petitioner relies on the fact that the Board previously found that, in some instances in early 2008 and May 2009, NYCHA discriminated against him for union activity. For example, in *Feder IV*, the Board held that NYCHA violated NYCCBL §12-306(a) (1) and (3) when it investigated and disciplined Petitioner for improper use of email and storage of union documents on his computer. The Board found a causal connection between Petitioner's union activity and NYCHA's conduct based on the testimony of NYCHA's witness as well as other testimony that showed management disapproved of Petitioner's union-related emails. However, the Board ultimately found that the disciplinary penalty imposed by NYCHA was warranted because it had established a legitimate business reason for the discipline–Petitioner's use of his NYCHA computer for campaign purposes.

In *Feder V*, the Board held that NYCHA's order that Petitioner remove all non-NYCHA material from his workspace in May 2009 was retaliatory.[14] In finding that anti-union animus motivated NYCHA's action in this instance, the Board relied on the timing

[14] However, the Board rejected other allegations of violations of NYCCBL § 12-306(a)(1) and (3) in that case. It did not find that Petitioner's union activity was the motivating factor for NYCHA's rescission of Petitioner's break times or failure to provide him with voicemail. The Board did not find credible Petitioner's assertion that his break time had been rescinded. Further, it found that the failure to provide Petitioner with voicemail was consistent with OBRD policy.

of the action, along with other factors. Specifically, we noted that Petitioner's supervisors had condoned his storage of non-NYCHA materials in his workspace for two years and only instructed him to remove the material one month after he testified at an OCB improper practice hearing. Further, the Board found that Petitioner's hearing testimony was the impetus for the inspection of his workspace. In each of these instances where we found NYCHA discriminated against Petitioner, the temporal proximity between Petitioner's union activity and NYCHA's actions, combined with evidence that the motivation for NYCHA's actions was Petitioner's union activity, established the second prong of the *prima facie* case.

Petitioner seeks to incorporate into this petition all previously filed petitions, along with their exhibits, the corresponding transcript records, respondent answers, and Board decisions, under the premise that they are evidence of NYCHA's anti-union animus. The Board can, and often does, take notice of the record and findings made in related cases. However, notwithstanding our prior findings of discrimination by NYCHA, we have not previously held, nor do we find any basis to conclude based on the facts in this record, that NYCHA is or was hostile to all union activity. Indeed, just as we did not summarily conclude that all of NYCHA's actions prior to May 2009 were motivated by anti-union animus, we cannot summarily conclude that NYCHA's alleged actions thereafter were motivated by Petitioner's union activity. Similarly, the mere fact that the actions complained of in this matter, which occurred between November 2009 and March 2010, took place shortly after some of NYCHA's actions in early 2008 and May 2009 that were found to be unlawful, does not compel a finding of a *prima facie*

case here. In short, we will not infer the establishment of a *prima facie* case in this instance based solely on past findings of discriminatory acts by NYCHA.

As required in all claims of discrimination, the Board must conduct an analysis of each claim and examine whether sufficient evidence exists that the actions were motivated by the petitioner's union activity. Like the analysis which led to our findings of anti-union animus in *Feder IV* and *Feder V*, any finding of discriminatory motivation must be causally linked and proximate in time to a specific exercise of Petitioner's rights under NYCCBL § 12-305.

For these reasons, in addition to the reasons discussed below, we do not find that Petitioner established the second element of the *Bowman/Salamanca* test or a violation of the NYCCBL by pleading facts which, if true, would demonstrate that Petitioner's protected union activity was the motivation for NYCHA's November 2009 leave request denial, the December 2009 counseling memo, the December 2009 denial of his grievances, or the February 2010 transfer request.[15] We address each claim in turn.

November 2009 Leave Request Denial

Petitioner asserts that the denial of his November 2009 request for paid release time was inconsistent with EO 75 and the HR Manual and was therefore motivated by anti-union animus and in violation of NYCCBL §12-306(a) (1), (2) and (3). However, there is no basis to support Petitioner's claim that he was entitled to paid release time to perform union business.

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[15] In *Feder*, 4 OCB2d 46, we indicated that a hearing was being scheduled in the instant matter based on the pleadings that had been filed as of that date. (*Id.* at 32 n. 24) Subsequent to the issuance of that decision, the parties in this matter submitted additional pleadings. A review of the additional pleadings, in conjunction with the original pleadings, revealed that a hearing is not required to resolve Petitioner's claims.

There is no dispute that the HR Manual applies to all NYCHA employees. That manual explicitly sets forth instances when employees will be excused from work for union business, and describes different rules for employees who are "regularly designated union representatives," versus those who are "ad hoc representatives." (Ans. Ex. 1) In addition, while it is true that NYCHA is not a mayoral agency and therefore not necessarily bound by the Mayor's executive orders, by its own terms the HR Manual incorporates EO 75, but only for those employees who are "regularly designated union representatives." (*Id.*) Petitioner was not a regularly designated union representative. Instead, he is an *ad hoc* union representative subject to the release time rules set forth in the HR Manual.

The HR Manual specifies that paid release time will be authorized for *ad hoc* representatives in three circumstances: to handle grievances, to participate in departmental joint labor-management activities, and to participate in negotiations. Petitioner's November 2009 request for paid release time was to "meet, greet and distribute union related documents to the union's upstate members covering the water-shed area." (Pet. Ex. 2) Such activity does not fall within the activities enumerated in the HR Manual.[16] Accordingly, the denial of Petitioner's November 2009 request was consistent with the HR Manual. Further, it is undisputed that, consistent with the HR Manual, Petitioner and other union representatives have been granted paid release time to participate in labor-management meetings and collective bargaining. Therefore, we cannot conclude that denial of Petitioner's leave request was motivated by Petitioner's union activity.

[16] This activity is also not encompassed within the specified union activities under EO 75 that qualify for paid release time.

Further, although Petitioner asserts that the denial of his leave request was "disparate," he did not allege that another union representative's request for *ad hoc* release for similar types of union activities was granted. Accordingly, we cannot conclude that the denial of Petitioner's November 2009 leave request was motivated by his union activity. Petitioner's claim that NYCHA violated NYCCBL §§12-306 (a)(1) and (3) by denying his November 2009 leave request is dismissed.

Moreover, we do not find that the same alleged conduct violated NYCCBL § 12-306(a)(1) and (2). We have held that a labor organization may be considered "dominated" within the meaning of NYCCBL § 12-306(a)(2):

> if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found 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 11 (BCB 2008), *affd.*, *Matter of Moriates v. NYC Office of Collective Bargaining*, Index No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.) (quoting *DC 37*, 51 OCB 36, at 18 (BCB 1993)).

Here, Petitioner has not alleged facts sufficient to support a finding that NYCHA favored certain union representatives over others, or was attempting to influence employees' selection of their union representatives. At best, Petitioner has pleaded that NYCHA distinguishes between and applies different release time rules to regularly designated union representatives and *ad hoc* union representatives. However, these rules

do not distinguish based on individual employees or the union that they support. Accordingly, we dismiss Petitioner's claim that NYCHA violated NYCCBL § 12-306(a)(1) and (2).

Counseling Memo

We also cannot conclude that NYCHA's issuance of the November 13, 2009 counseling memo was motivated by Petitioner's union activity. The memo plainly states that Petitioner was AWOL on October 27, 28, 29 and November 12, 2009, all dates for which his requests for paid release time to conduct union business were denied. Petitioner does not dispute these absences, but instead asserts that he did not know that he was AWOL because he had not "noticed" that his leave requests had been denied, and because his supervisor did not orally advise him of the denial.

It is undisputed that Petitioner received formal written notification advising him that his leave requests had been denied. Moreover, while it may be true that Petitioner's supervisor routinely advised him orally when his requests were not approved, this does not negate his obligation to secure approval prior to taking leave. Likewise, Petitioner's claim that NYCHA did not contact him when he did not report to work on October 27th does not excuse his absences. As a Union representative, we have no doubt that Petitioner was familiar with the procedure to request leave and that he knew his absences required prior approval. Accordingly, we cannot convert Petitioner's failure to review his leave slip to ascertain whether his leave had been approved into a wrongful act on the part of NYCHA.

Further, Petitioner's claim that the issuance of the counseling memo violated the NYCCBL is predicated on the erroneous contention that he was entitled to paid release

time on the dates that he was marked AWOL. Petitioner's stated reason for the October leave request was to "meet and greet" union members and to distribute campaign and other union related material. (Pet. ¶ 12) Similar to the November 2009 leave request discussed above, Petitioner's October 2009 leave request did not fall within the categories of leave for which *ad hoc* leave is available pursuant to the HR Manual. Therefore, we must conclude that Petitioner was not entitled to paid release time for these leave requests and that he was AWOL on October 27, 28, 29 and November 12, 2009. An employer may reasonably expect that its employees will report to work when scheduled and an employee's failure to obtain permission for an absence is a reasonable basis for discipline.

We also find that Petitioner has not pleaded facts and circumstances to suggest that NYCHA had granted release time to other *ad hoc* representatives for similar purposes, or otherwise acted in a retaliatory manner on this occasion. *See DC 37, L 376*, 1 OCB2d 40 (BCB 2008). Indeed, the fact that NYCHA, in lieu of charging hours to Petitioner's annual leave for the unexcused absences, merely advised Petitioner that he must follow proper procedures to request leave, is inconsistent with Petitioner's assertion that the counseling memo was motivated by his union activity. Accordingly, we do not find that NYCHA's issuance of the counseling memo to Petitioner was motivated by anti-union animus and we dismiss this claim.

December 2009 Denial of Grievances

Petitioner appears to claim that the denial of his December 2009 grievances and/or the basis for the denial of these grievances was contrary to past practice and therefore based on his union activity. Specifically, he argues that the Chief of Labor

Relations was wrong to "summarily" deny his grievances because they were brought under the HR Manual. (Pet. ¶ 24) Petitioner asserts that the HR Manual provides employees with a grievance process separate and apart from the contractual grievance process and he has previously filed grievances under the HR manual. Therefore, Petitioner argues that the denial of his grievances on that basis was due to his union activity.

The Board does not find that NYCHA denied Petitioner's grievances based on his union activity. Both the HR Manual and the parties' collective bargaining agreements contain a grievance procedure.[17] Under both procedures, management has the discretion to grant or deny grievances at the steps leading up to arbitration, and only the certified bargaining representative, not the individual employee, may bring the issue to arbitration. Indeed, it is undisputed that the Chief of Labor Relations commented to Petitioner on which grievance process he should be utilizing. However, this comment was made only after he specifically responded to Petitioner's grievances and dismissed them for substantive reasons, namely that Petitioner was not entitled to receive paid release time to perform Union business on October 1, 2009, and because the complained-of assignment was not out-of-title. Therefore, the facts do not show that NYCHA summarily denied

[17] We need not reach the issue of whether Petitioner was limited to filing a grievance under the collective bargaining agreement since NYCHA processed Petitioner's grievances filed under the HR Manual. We note, however, that we have not previously determined whether a NYCHA employee covered by the terms of a collectively bargained grievance procedure also has grievance rights under the HR Manual. In the two prior cases cited by Petitioner, we held that the grievance procedure set forth in the HR Manual gave grievance rights to represented employees who were not subject to a collectively bargained grievance procedure. *See CSBA, L.237 IBT*, 75 OCB 5 (BCB 2005) (non-competitive employee could grieve disciplinary action where no collective bargaining agreement in existence); *CEU, L. 237, IBT*, 77 OCB 27, at 16 (BCB 2006) (probationary employee has the right to grieve disciplinary action under HR Manual because he was "not otherwise subject to grievance procedures.")

Petitioner's grievances. On the contrary, NYCHA responded promptly to the grievance and gave clear and reasonable bases upon which the grievances were denied. The mere fact that Petitioner disagreed with NYCHA's denial of his grievances is insufficient to establish that the denial was discriminatory.

Moreover, to the extent Petitioner claims that NYCHA failed to advance his grievances to the next step, we do not find that NYCHA's actions were motivated by anti-union animus. There is no evidence that the grievances were processed after NYCHA's denial at Step II in January 2011. However, it is unclear from Petitioner's e-mail correspondence to NYCHA following its Step II denial whether he sought to request a Step III hearing, file an improper practice claim with the OCB, or both. Even assuming that Petitioner intended that his e-mail messages be construed as a request to take the grievances to the next step and that NYCHA failed to do so, we cannot conclude that this failure was anything more than a misunderstanding of Petitioner's emails by management. The record reflects that NYCHA had processed Petitioner's grievances up until that point and had similarly processed many of his past grievances. In light of the above, we cannot conclude that NYCHA's failure to proceed, in this instance, was discriminatory. We therefore do not find that the denial of Petitioner's December 2009 grievances was motivated by Petitioner's union activity or violated § 12-306(a) (1) and (3) of the NYCCBL.

February 2010 Transfer Request

Petitioner claims that NYCHA denied his February 2010 transfer request as a result of his union activity.[18] To support this allegation, Petitioner claims that he was

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[18] NYCHA argues that, because Petitioner was transferred out of OBRD in July 2011, the

improperly placed in OBRD in 2007, and makes the broad assertion that he has been consistently treated in a hostile and discriminatory manner at OBRD since that time as a result of his union activity. He claims that NYCHA's denial of his February 2010 transfer request was part of the ongoing discrimination against him.

As we previously discussed, we will not presume anti-union animus on the part of an employer absent specific probative allegations of discriminatory conduct. Here, Petitioner relies solely upon his status as a union advocate and his continuous union activity to form the basis for the anti-union animus. These facts, with nothing more, are insufficient to make a finding of discrimination. Accordingly, we do not find that the facts alleged are sufficient to conclude that Petitioner's union activity was the motivating factor in NYCHA's denial of his February 2010 transfer request.

Moreover, even assuming the denial of the transfer request was motivated by Petitioner's union activity, we cannot conclude that, absent Petitioner's union involvement, his transfer request would have been granted. Petitioner did not allege that there were any vacancies in his title either immediately prior to or after his February 2010 request. The closest occurring vacancies he cited were from July 2009. The notices posted for these two vacancies clearly indicate that in order to apply, an applicant must complete Request for Transfer or Promotion and Qualification Review forms, obtain their supervisor's signature, indicate the vacancy for which they are applying, and submit a resume to the Human Resources Department. (Rep. Exs. 43, 44) There is no allegation or evidence that Petitioner ever followed this procedure or applied for a posted vacancy.

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issue is now moot. However, a subsequent employer action that resolves a petitioner's claim goes only to the remedy, not whether there was a violation of the NYCCBL. *See, e.g., PBA*, 2 OCB2d 36, at 14 (BCB 2009). Therefore, we must consider the merits of this claim.

Moreover, there is no contractual limitation on NYCHA's right to assign and/or transfer employees. Accordingly, we find no evidence that NYCHA would have granted Petitioner's transfer request even if he was not active in the Union. For all the reasons stated, we dismiss Petitioner's claim that the denial of his February 2010 transfer request was discriminatory.

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 Mitchell Feder in the matter docketed as BCB-2842-10 be, and hereby is, dismissed in its entirety.

Dated: New York, New York
April 18, 2012

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER B. PEPPER
MEMBER