OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----------x

In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICES EMPLOYEES UNION, LOCAL 371, and PHYLLIS MILLER,

Petitioner,

-and-

NEW YORK CITY HUMAN RESOURCES ADMINISTRATION AND THE CITY OF NEW YORK,

Respondents.

----------x

Decision No. B-19-2002
Docket No. BCB-2228-01

DECISION AND ORDER

On July 24, 2001, Social Services Employees Union, Local 371 ("Union") filed a verified improper practice petition against the New York City Human Resources Administration and the City of New York ("HRA" and "City"), alleging that Respondent harassed and discriminated against Phyllis Miller in violation of section 12-306a(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), because of her union activity. The Union asserts that after Miller spoke with her union representative, supervisors ostracized her, treated her with disrespect, and tried to transfer her against her will. HRA denies the allegations and asserts that Petitioner has not established a *prima facie* case of retaliation. This Board dismisses the improper practice petition because Petitioner has not proved that HRA retaliated or discriminated against Miller for engaging in

union activities.

BACKGROUND

Phyllis Miller was first employed at HRA in 1985. After she was functionally transferred to ACS in 1996, she voluntarily transferred back to HRA on August 1, 1999, as a Supervisor II (Welfare) in the Intensive Housing Unit of the Division of AIDS Services and Income Support ("DASIS"). No Supervisor III was assigned to that unit. Mensah Attikesse, Supervisor II (Welfare), having recently been promoted to Coordinator of the Intensive Housing Unit, became the supervisor of all Supervisors I and II, including Miller.

According to the Union, Miller called Union representative Lloyd Permaul in March 2000 to complain that her unit had no Supervisor III and that a person of equal rank was acting on her time and leave requests and conducting her performance evaluations. Documents supplied by the Union show that Attikesse approved Miller's time and leave for about two months from February 14 to April 21, 2000. Permaul then spoke with Anne Andrews, Deputy Director for Field Operations, after which Andrews began treating Miller differently from the way Andrews had before the call – she allegedly refused to speak with Miller about work and allegedly encouraged Attikesse to treat Miller with disrespect and criticize her in front of other workers.

Respondent, offering a different account, indicates that in September 1999, rather than March 2000, Andrews received a call not from Permaul but from Anthony Wells, another Union representative, concerning Miller's complaint that a person of equal civil service rank was overseeing her time and leave documents. In an affidavit attached to the City's answer, Andrews indicates that following the complaint, she herself signed Miller's time and leave slips from

October 1999 until March 1, 2001, at which point a Supervisor III in a different department from Miller's signed those papers. For two months in between, when Andrews was relocated to another building in February 2000, Attikesse acted on Miller's time and leave papers.

The Union alleges the following acts to show discrimination. In September of 2000, Andrews told Miller that HRA understood her complaint to the Union and "pressured" Miller to transfer to a different location, though Miller remained. Then, on January 4, 2001, the job of transferring all cases was given to another Supervisor II, thus removing Miller's authority over case transfers.

On March 26, 2001, Andrews sent a memorandum to Miller "requesting that you consider three DASIS locations" where a Supervisor III was in charge. (Petition Exhibit A.) Petitioner alleges that HRA was thus "seeking to force her to transfer to another location." (Petition ¶ 8.) On the other hand, according to Andrews's affidavit, Attikesse had indicated that Miller resisted taking direction from him. After speaking with a deputy commissioner and labor relations specialist, Andrews decided on March 26, 2001, to offer Miller a transfer to a center with a Supervisor III rather than discipline her for failing to follow her supervisor's orders. Both parties agree that Miller again chose not to transfer because she did not like the locations offered.

The Union also states that on June 25, 2001, Attikesse informed Miller that she would no longer be responsible for "autotime" supervision of one of her supervisees.

Respondent's answer and Petitioner's reply raise certain facts concerning insubordination charges that Attikesse filed against Miller on June 27, 2001, for Miller's refusal to train her staff and submit a verification by June 26. Petitioner does not allege that the charges were discriminatory, and the record is silent as to whether HRA pursued the disciplinary action.

In its reply the Union alleges that on August 21, 2001, HRA removed Miller's authority to approve expense disbursements and on August 29, 2001, removed her authority to approve vacation schedules for her supervisees.

Andrews states that she has not spoken to a Local 371 representative about Miller since her conversation with Wells in 1999 and that she never discriminated, harassed, or ostracized Miller or encouraged Attikesse to do so.

The remedy the Union seeks is for HRA to cease and desist from any further acts of harassment or discrimination against Miller in retaliation for her seeking the Union's assistance, and for HRA to designate an appropriate level supervisor to act on her time and leave requests and conduct agency performance appraisals.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union argues that Andrews's changed attitude toward Miller was a result of Miller's calling the Union to complain that her supervisor did not have a civil service title higher than hers. Having no Supervisor III at her facility and having to report to Attikesse, a Supervisor II, she was inappropriately working as a Supervisor I as well as a Supervisor II. She never refused to accept supervision. Rather, in violation of § 12-306a(1) and (3), she was ostracized, criticized, discriminated against, and pressured to transfer as a result of her complaint to her Union.[1]

---

[1] NYCCBL § 12-306a provides, in relevant part, that it shall be an improper practice for a public employer:

(1) to interfere with, restrain or coerce public employees in the exercise of

Respondent's Position

The City argues that Petitioner has failed to make out a *prima facie* case since the claims of harassment or discrimination by Andrews and Attikesse are unsupported by specific facts and since there is no causal connection between the union activity and any acts by HRA. As a result of Miller's complaint, HRA took two actions meant to accommodate, not harass, Miller – in October 1999 Andrews replaced Attikesse in taking over supervision of Miller's time and leave documents, and in March 2001 Andrews gave Miller a choice to transfer to any of three other locations in a good faith effort to solve her problem. In addition, NYCCBL § 12-307b gives the City the right to "determine the methods, means and personnel by which government operations are to be conducted"; therefore, the complaint concerning her supervisor may not have been protected activity.[2]

---

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. . . .

* * *

§ 12-305 provides in relevant part:

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

[2] NYCCBL § 307b provides, in relevant part:

It is the right of the city, or any other public employer, acting through its agencies, to . . . determine the standards of selection for employment; direct its employees . . . ; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization and the technology of performing its work.

DISCUSSION

The question before this Board is whether HRA's actions, in particular Andrews's March 26, 2001, memorandum suggesting a transfer, and Attikesse's June 25, 2001, removal of Miller's duties concerning one employee, demonstrate that HRA retaliated and discriminated against Miller in violation of the NYCCBL. We find no violation.

As a preliminary matter, this Board may not consider any claimed violation of the NYCCBL that occurred more than four months prior to the filing of an improper practice petition. NYCCBL § 306e; Section 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1); *see Colella*, Decision No. B-49-2001 at 6. Here, since the petition was filed on July 24, 2001, only claims involving events that occurred after March 24, 2001, are deemed timely. The Board will not consider allegations regarding events that occurred prior to March 24 (such as Andrews's allegedly pressuring Miller in September 2000 to transfer), except as background information. *See Krumholz*, Decision No B-21-93 at 11; *Dorham,* Decision No. B-25-84 at 4.

To determine whether an alleged discrimination or retaliation violates NYCCBL § 12-306a(3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, Decision No. B-51-87. 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.

If petitioner proves these two elements, the employer may refute petitioner's showing or demonstrate legitimate business motives that would have caused the employer to take the action

complained of even in the absence of the protected activity.

Here, no dispute exists as to the first prong of the test. Andrews knew that Miller spoke to her union representative, and Andrews herself attempted to solve the problem by approving Miller's time and leave slips and by offering her a voluntary transfer.

As to the second prong, whether Miller's complaining to her union representative occurred in October 1999, as Respondent claims, or in March 2000, as Petitioner asserts, the Union has failed to show that the employer's actions were retaliatory or discriminatory. *See Colella*, Decision No. B-49-2001 at 8; *Seabrook*, Decision No. B-8-95 at 6; *Procida*, Decision No. B-2-87 at 12. Andrews's March 26, 2001, memorandum, does not constitute a discriminatory action. Although the Union asserts that the memo was "seeking to force her to transfer," HRA merely asked that Miller "consider three DASIS locations" where she could have a supervisor with a civil service title higher than hers. Miller chose not to transfer and was permitted to stay.

Nor does Petitioner plead any specific facts indicating that HRA's removal of Miller's "autotime" supervision over one supervisee on June 25, 2001, was retaliatory. Allegations that HRA acted in a hostile manner because of Miller's complaint to the Union fifteen months earlier are contradicted by the evidence that HRA, in response to Miller's dissatisfaction, was giving her an opportunity to work in an office with a Supervisor III.

Further allegations that Andrews refused to talk to Miller about work, pressured her to transfer, and encouraged Attikesse to treat her with disrespect are also lacking in probative facts, such as when and where discussions took place and what people specifically said. *See Seabrook*,

Decision No. B-8-95 at 8.[3]

Finally, under limited circumstances, in which Petitioner alleges a pattern of conduct, we have accepted inclusion of claims which are similar to those originally pleaded but which occurred after the filing of the petition. *See McNabb*, Decision No. B-1-94. Here, in its reply, Petitioner asserts two claims that occurred in August 2001, several weeks following the July 24 filing. These allegations, even if true, are not sufficiently probative to support a finding that HRA's limitation of Miller's authority in August 2001 was a result of her union activity.

As to the Union's seeking an order from this Board that HRA designate a Supervisor III for her workplace, Petitioner has made no allegations under the NYCCBL to fashion such a remedy. Since Petitioner has failed to prove retaliation or discrimination under the *Salamanca* test, this Board dismisses the instant improper practice petition in its entirety.

[3] Had Petitioner asserted that the insubordination charge was discriminatory, we would similarly find insufficient facts to demonstrate that the action was motivated by union activity.

ORDER

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

ORDERED, that the improper practice petition docketed as BCB-2228-01 be, and the same hereby is, dismissed.

Dated: May 28, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER