Fabbricante v. FDNY, 69 OCB 39 (BCB 2002) [Decision No. B-39-2002 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceedings

-between-

JOHN J. FABBRICANTE,

Petitioner,

-and-

NEW YORK CITY FIRE DEPARTMENT,

Respondent.

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Decision No. B-39-2002
Docket No. BCB-1708-94
Docket No. BCB-1774-95

JOHN J. FABBRICANTE,

Petitioner,

-and-

IBEW, LOCAL 3 & SHOP STEWARD AL SOMMA,

Respondents.

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Docket No. BCB-1781-95

JOHN J. FABBRICANTE,

Petitioner,

-and-

NEW YORK CITY FIRE DEPARTMENT & IBEW,
LOCAL 3,

Respondents.

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Docket No. BCB-1913-97
Docket No. BCB-1964-98

INTERIM DECISION AND ORDER

The instant cases arise from circumstances resulting from requests by Petitioner John J.

Fabbricante for assistance from the International Brotherhood of Electrical Workers, Local 3 ("Union"), in the processing of grievances he filed to protest the alleged denial of opportunities to work overtime as an Electrician and to be promoted.[1] Petitioner alleges that agents of the Union discriminated against him in the handling of these grievances, and, together with agents of the New York City Fire Department ("Department " or "FDNY"), retaliated and discriminated against him for seeking to file those grievances and for filing improper practice petitions under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

These cases were consolidated for hearing before a Trial Examiner. When Petitioner rested his case, Respondents moved to dismiss the petitions for failure to establish a *prima facie* case. We find that Petitioner has set forth sufficient evidence to state *prima facie* claims with respect to a number of charges of discrimination and retaliation which, if unrebutted, would support the conclusion that the conduct at issue was violative of the NYCCBL. Therefore, with a few exceptions, we deny the instant motions to dismiss as a matter of law.

PROCEDURAL HISTORY

An initial verified improper practice petition, not the subject of the instant motions, was filed in August 1994. In *Fabbricante v. City of New York & IBEW, Local 3,* Decision No. B-43-97, the Board of Collective Bargaining ("Board") determined that Petitioner had stated *prima facie* claims of retaliation by the Union and the Department for his filing grievances in

[1] Petitioner filed the instant petitions *pro se* but then hired counsel who filed a notice of appearance in October 1998.

accordance with the procedures in the parties' collective bargaining agreement ("CBA"). The grievance alleged that FDNY violated an Executive Order concerning equalization of overtime assignments. The Board directed FDNY to arbitrate and directed the Union either to process or to pay for processing the grievance.[2] The Board also retained jurisdiction for purposes of apportionment of relief.

From December 1994 through March 1998, Petitioner filed more petitions alleging continuing retaliation as a result of the initial grievances as well as the improper practice petition of August 1994 and subsequent improper practice petitions. The Union and the City filed motions to dismiss two of the five petitions, and the Board issued interim decisions, narrowing the issues to be addressed at a hearing. *Fabbricante*, Interim Decision No. B-46-98; *Fabbricante*, Interim Decision No. B-38-98.

Petitioner presented testimony during eight days of hearing. At the close of Petitioner's case, FDNY moved to dismiss the instant petitions as a matter of law for failure to establish a *prima facie* case of retaliation and discrimination under the NYCCBL. The Union also moved to dismiss as a matter of law arguing both that this Board lacks jurisdiction over Petitioner's complaints, which the Union argues constitute only contractual claims, and that Petitioner failed to provide sufficient evidence against the Union.

BACKGROUND

The basis of Petitioner's complaint about equalization of overtime is Executive Order ("EO") No. 7, promulgated March 26, 1990, which states at § 6 that "it is necessary and desirable

[2] To date, no arbitration has been held.

to control overtime abuses which might arise and to equalize the apportionment of overtime among similarly-titled employees." This language is identical to that in EO No. 56, § 2, promulgated April 2, 1976, which prohibits overtime assignments to any given employee in excess of a specified formula.

In 1990, the Union filed a request to arbitrate a grievance brought by Shop Steward Al Somma who claimed that FDNY violated the requirement articulated in EO No. 56 (and in subsequent departmental memos) that overtime be assigned to Electricians on an equal basis. *Local 3, International Brotherhood of Electrical Workers*, A-3435-90 (April 12, 1991). The issue arose over the question of whether FDNY could require Somma to perform "an equal share of overtime work." Somma had refused to work overtime and was counseled that, if he again refused to work overtime, he could be disciplined. The counseling session was memorialized in writing and a copy of the memo was placed in his personnel file. Somma's grievance sought an interpretation of EO No. 56 and departmental memos that would preclude FDNY from imposing non-emergency overtime and, consequently, from disciplining Somma for refusing such overtime. (This contrasts with the instant Petitioner's desire to perform rather than avoid overtime work.)

The City challenged the arbitrability of Somma's grievance claiming not only that it had the right to assign overtime but also that no agreement or department rule was allegedly violated. The Union in Somma's case argued specifically that the requirement of equalization of overtime referred to the opportunity to work overtime, not overtime hours actually worked. The Department argued the converse. The Board of Collective Bargaining denied the City's petition, holding that the documents relied upon by the Union constituted rules of the agency and that both

the Union's and the Department's interpretations of the departmental directive to equalize overtime were plausible and thus raised an issue that was appropriate for submission to an arbitrator. *Local 3, IBEW*, Decision No. B-59-90, at 11. Ultimately, the arbitrator sustained the grievance on other grounds (holding that Somma could not be compelled to work overtime because of a conflict in FDNY's own written rules) and directed removal of the counseling memo from Somma's personnel file. The arbitrator found it unnecessary to reach the specific question of whether equalization of overtime referred to the opportunity to work overtime or actual overtime hours worked.[3]

Starting in June 1993 and continuing over several months, Petitioner in the instant proceeding complained to his supervisors, most of whom were members of Petitioner's bargaining unit, that they had violated EO No. 7 by failing to equalize the assignment of overtime among members of the Electricians' bargaining unit, a violation which resulted in less opportunity for Petitioner to earn overtime than other unit members favored by supervisors who made the assignments.

FDNY failed to consider Petitioner's earliest attempts to grieve this complaint for reasons which are in dispute here. In April 1994, however, Petitioner's grievance was accepted for processing; FDNY agents rejected the grievance through each step of the grievance procedure. Dissatisfied with the Union's failure to support him initially and FDNY's denial of the grievance, Petitioner sought a determination by this Board that the Union breached its duty of fair

[3] The Union in Somma's case also sought to arbitrate a question concerning the nature of "emergency" overtime work and whether an Electrician could be compelled to work such overtime. That question which the arbitration award also addressed is not at issue in the instant proceeding.

representation and that the Department had retaliated and discriminated against him because of his grievance. The Board, upholding the claims against the Union, found that the shop steward had vowed to stand in the way of Petitioner's grievance and had openly stated that he hated Petitioner because Petitioner had filed numerous grievances. Claims against the Department were found to be insufficiently pleaded and were dismissed. *Fabbricante*, Decision No. B-43-97.

Petitioner continued to pursue his claim for equalization of overtime even before the Board's determination of his first improper practice petition. As he did so, tension rose in the unit. Petitioner presented testimony that the following supervisors were, in part, to blame for fostering disparaging remarks and threatening conduct directed at him as a result of Petitioner's grievances. Such testimony included the following:

(1) Anthony Bianchino repeatedly derided Petitioner in discussions with other Electricians for, among other things, Petitioner's putative role in alerting FDNY to the practice in the Electricians' unit of performing out-of-title work on FDNY heating-ventilation-air-condition systems ("heat" work, performed on an overtime basis) (44, 1101-02)[4]; (2) Nicholas Becaccio threatened discipline for Petitioner's attempt on at least one occasion to clarify a work assignment (68-69, 819-22); (3) James Campbell screamed at Petitioner, threatened him with physical injury, and repeatedly denigrated him in conversation with other Electricians (including Shop Steward Somma) but never faced discipline for that conduct (42, 48, 78-83, 1191-92, 1309-10, 1406); (4) Bernard Gellman also denigrated Petitioner to other unit members and played a prank on him at a time when threats of physical violence were increasing (142, 294, 625, 1105,

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[4] Pages in the hearing transcript are cited parenthetically and are illustrative of the testimony made at the hearing rather than exhaustive on these points.

1199-1200); (5) Scupelitti singled out Petitioner for derisive comments and referred to physical violence against individuals whom he likened to Petitioner (1346); and (6) Joseph Mastropietro spoke in derogatory and dismissive terms to unit members and supervisors about Petitioner and his grievances. (1007-14, 1039, 1041, 1043, 1057-65.)

Petitioner also called Roy Katz, who during the relevant time period was Director of FDNY's Building Maintenance Division, as a hostile witness to prove management's dismissive and accusatory conduct toward Petitioner as a direct result of the grievances addressed to Katz. (553-54, 860-61, 899-911, 917-18, 925, 927, 935-40, 946-49, 962-63, 969-75.)

While Petitioner was pursuing his grievances about equalization of overtime, FDNY's Office of Labor Relations and the Department of Investigation learned about the out-of-title "heat" work in Department facilities, and FDNY stopped the practice. Some unit members who performed that work were angry at the loss of the overtime opportunities. Several, including but not limited to Bianchino and Campbell, openly accused Petitioner of revealing the practice and blamed him for the loss of this overtime work. (44-45, 1105-06, 1199-1201.) Electrician Brian Colella testified that he was actually the source of that information. (1101.)

Supervisors also singled out Petitioner for difficult and dangerous assignments and deprived him of safety equipment that other Electricians were allowed to use. (772-74, 1359-61.) In addition, Electricians other than Petitioner were notified routinely in advance that they would be working on weekends in contrast to last-minute notification to Petitioner. (1361-64, 1392-93.)

In another incident, when Petitioner took his complaint about equalization of overtime assignments to Director Katz, Supervisor Bianchino downgraded Petitioner's work performance

rating because Petitioner bypassed Bianchino. (52.) Petitioner successfully appealed the evaluation (twice, in fact, after Bianchino failed the first time to make changes which the FDNY Personnel Director directed him to make) on grounds that the evaluation was not supported by evidence. (59, 129-31, 133.) Petitioner later contended that both Bianchino and Director Katz attempted to interfere with the evaluation appeal by attempting to be present for the meeting and by threatening to interfere with Petitioner's attendance at the meeting. (743.)

Still another problem was that Petitioner was often called to meetings with supervisors to discuss matters which potentially carried disciplinary consequences. When Petitioner questioned the need for the meetings and demanded union representation, the meetings routinely ended without disciplinary action being taken. At the same time, Petitioner observed that Electricians who engaged in conduct that could have resulted in disciplinary action were not called in for questioning. On other occasions, Petitioner was docked wages and had time deducted from his time-and-leave banks for attending work-related meetings, hearings, and legal proceedings while at the same time other unit members attending some of the same events were not penalized. While Petitioner attempted to pursue his overtime claims, he sought information from FDNY under the Freedom of Information Law ("FOIL"). Petitioner protested the Department's demand for payment of hundreds of dollars in order to reproduce documents which he sought.

Union Shop Steward Al Somma made no secret of his own disparate treatment toward Petitioner, and he openly criticized Petitioner's grievance efforts. During part of the relevant time period, Somma monitored overtime worked by unit members, although Katz testified that FDNY did not sanction this monitoring activity and that he learned of it only through testimony in the instant proceeding. Somma was familiar with Petitioner's multiple efforts to grieve his

alleged failure to be assigned more overtime. Electricians Colella and Dowling were among others who also complained about equalization of overtime repeatedly but who heard Somma complaining only about Petitioner's grievances to unit members, including to supervisors. They also heard Somma vow to avoid helping Petitioner with those grievances. (1089-91, 1094, 1098, 1116-20, 1125-26, 1129, 1157-60, 1311, 1343-44, 1353-54, 1381-82, 1407-08.)

Petitioner contends – but Respondents deny – that his continuing discussions about overtime issues so incited supervisory and non-supervisory unit members that they denigrated not only Petitioner's continuing attempts to seek equalization of overtime but also his efforts to be promoted and to address other issues in the unit. These issues included application of time-and-leave rules, rules regarding time-keeping records, threatened disciplinary action, disparaging remarks on performance evaluations, and adequacy of working conditions in certain locations. Petitioner also claimed that disparaging remarks against him intensified at the time he testified in an internal Departmental investigation into a matter upon which his contract grievances touched. Somma represented Electricians – but not Petitioner or those who supported him – in their testimony before FDNY investigators. During one of Petitioner's later attempts to grieve claims about overtime equalization and failure to be considered for promotion, Somma and Union Vice President Gary Lane dismissively brushed off consideration of the claims and failed to respond to Petitioner's repeated inquiries about the outcome.

Petitioner filed additional improper practice petitions alleging various acts of retaliation and discrimination by disparate treatment in assignments and working conditions. Among other things, Petitioner seeks to have his claims regarding equalization of overtime arbitrated and his application for promotion considered without discrimination or bias.

POSITIONS OF THE PARTIES

Union's Position

According to the Union, this Board lacks jurisdiction to consider claims of retaliation for filing improper practice petitions "which have nothing to do with the collective bargaining process or the collectively bargained-for employment relationship," and claims of retaliation for "sending letters and memoranda." The Board lacks jurisdiction also to "enforce any Mayoral Regulations," including those relating to overtime, to "enforce any aspect of a Mayoral agency's promotion process," and to monitor a Union's attention to such regulations or process.

The Union argues that inequality in assignments of overtime is not a grievance under the applicable contract and that the Union had no duty to process such a claim for Petitioner. The Union also argues that no Union agents exhibited discriminatory conduct toward Petitioner in the processing of his overtime claims because no such grievances have been processed by the Union for any other unit members. Even if testimony were true that Somma functioned as overtime monitor, such monitoring was not an official "Union function"; thus, the Union had no duty toward Petitioner with respect to "Somma's discriminatory 'monitoring.'"

Further, the Union contends that Petitioner failed to substantiate allegations that he experienced retaliation by Union officials. Although the Union admits that Somma described Petitioner's grievance filings in derogatory terms and that Somma harbored animus toward Petitioner because of what Somma called Petitioner's "letters," the Union describes that animus as merely personal.

With respect to Petitioner's claim of retaliation in his efforts to be promoted, the Union

argues that personnel promotions are governed by the New York State Civil Service Law and rules of the Department of Personnel and are excluded as contractual grievances. Therefore, the Union has no duty to advance such a grievance. Even if Petitioner had stated a grievable claim concerning promotion, no Union agent retaliated against Petitioner "because he sought promotions or for any other reason."

Department's Position

Petitioner has failed to state *prima facie* claims that FDNY agents discriminated and retaliated against him because the evidence presented fails to establish a causal connection between the actions of those agents and any interference with Petitioner's protected activity. Moreover, the Department argues that requiring it to present a defense would be unfair, costly, and burdensome.

The Department argues that the actions of FDNY supervisors about which Petitioner complains were the result of personal animosity toward Petitioner which grew over the years and is not related to his grievances or improper practice petitions. Katz met with Petitioner each time Petitioner wanted to talk with Katz, took seriously Petitioner's complaints, investigated the complaints, but found them unsubstantiated. Katz and his successor, Mastropietro, addressed each problem Petitioner raised and questioned each employee about whose conduct Petitioner complained. When it was not the supervisors' "place to respond," Katz and Mastropietro referred Petitioner to the appropriate forum, such as the City's Equal Employment Opportunity Office and FDNY's Bureau of Investigations and Trials. The Department writes that Katz's reaction to Petitioner was developed through a number of years of "endless meetings" with Mr. Fabbricante during which management found that the majority of issues brought were

unsubstantiated. In any event, the City argues, Katz's personal beliefs – even those expressed to the Fire Commissioner – do not constitute management action. The conduct of Katz and Mastropietro can be attributed to Petitioner's characterization of them, the Department, and the Union with "offensive and insulting language."

At the same time, the Department argues that antipathy between a superior and a subordinate, in and of itself, does not constitute a violation of the NYCCBL. Petitioner's claims are based on a misconception of rights to which he is entitled. Moreover, the conduct which Petitioner found objectionable "will not be imputed to the employer when the supervisors are members of the same bargaining unit and there is no evidence to indicate that the employer encouraged, authorized or ratified such conduct." The Department argues that Petitioner has not demonstrated that FDNY encouraged, authorized, or ratified any objectionable conduct.

The Department also argues that Petitioner's claims regarding equalization of overtime are untimely, but that in any event the record demonstrates that Petitioner's overtime assignments were comparable to those of other Electricians in the unit. Katz and Mastropietro gave Petitioner the type of work he was seeking except that "plum" overtime assignments which Petitioner sought do not exist. Finally, the Department argues that NYCCBL § 12-307(b) gives FDNY the exclusive right to "determine the . . . personnel by which government operations are to be conducted" and that Petitioner failed to be promoted because he could not maintain amicable relationships with fellow Electricians, was unable to follow supervisors' directions, and responded emotionally when he disagreed with his supervisors.

Fabbricante's Position

Petitioner asserts that agents of the Department and the Union violated NYCCBL § 12-306(a) and (b) by discriminating and retaliating against him on account of his protected activity.[5] As for the Union's duty of fair representation, Union agents, including but not limited to Shop Steward Somma, retaliated, discriminated, and exhibited disparate treatment by obstructing Petitioner's efforts to pursue contract grievances and by denigrating Petitioner in the eyes of unit members and supervisors as a "letter-writer."[6] Somma and Union Officials Joseph Vicari and Gary Lane breached the Union's duty to Petitioner by retaliating against him for filing improper practice petitions which protested the mishandling of the contract claims.

FDNY agents independently retaliated against Petitioner because of his on-going efforts

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[5] Section 12-306(a) of the NYCCBL provides, in pertinent part, that 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.

Section 12-306(b) of the NYCCBL provides, in pertinent part, that it shall be an improper practice for a public employee organization or its agents:

> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so . . . ;
>
> * * *
>
> (3) to breach its duty of fair representation to public employees under this chapter.

[6] Somma had used that phrase pejoratively in April 1994 to describe Petitioner when Katz accepted Petitioner's grievance about equalization of overtime for processing. Katz had refused to accept Petitioner's initial grievances on the same subject, calling them "letters" rather than grievances because they were not submitted on a preprinted form, which the CBA did not require, but rather in memorandum format which the CBA did require.

to pursue equalization of overtime and his filing improper practice petitions related to those efforts. That retaliation took the form of accusations that he informed investigators about questionable overtime practices within the Buildings Maintenance Division. Retaliation also took the form of acquiescence in the verbal abuse and threats of personal injury made by unit members, some of whom became Petitioner's supervisors during the relevant time period.

Further, FDNY agents, that is, directors of the Buildings Maintenance Division and supervisors of Electricians and Mechanics, exhibited disparate treatment toward Petitioner by threatening to discipline him for allegedly violating rules regarding, among other matters, on-the-job conduct, work vehicle operation, time-and-leave, and recording-keeping while ignoring violations by other unit members; by docking Petitioner's pay and leave bank, but not that of others, for time spent in the conduct of business regarding contractual and statutory claims including the instant grievance and improper practice claims; by failing to consider his applications for supervisory positions while considering applications of individuals allied with Petitioner's grievance adversaries; and by rejecting his continuing demand for equalization of overtime assignments.

DISCUSSION

A motion to dismiss an improper practice petition as a matter of law, following the presentation of a petitioner's case, must be denied if the evidence adduced, including all reasonable inferences which may be drawn from it, is sufficient to warrant a finding that the charges should be sustained in the absence of rebuttal by respondents. *Olszewski*, Decision No. B-9-2001; *McNabb*, Decision No. B-67-90 at 16. The New York State Public Employment

Relations Board ("PERB") denies motions to dismiss after presentation of a charging party's evidence unless the evidence produced by the charging party, including all reasonable inferences therefrom, is plainly insufficient even in the absence of any rebuttal. *Public Employees Federation, AFL-CIO*, 33 PERB ¶ 3024, at 3027 (2000); *County of Nassau,* 17 PERB ¶ 3013, at 3029-30 (1984). *See also Prestia v. Mathur*, 293 A.D.2d 729, 742 N.Y.S.2d 80 (2002) (legal standard for court to decide motion for judgment as a matter of law at close of plaintiff's evidence is whether there was any rational basis by which a jury could find for plaintiff, drawing every favorable inference which reasonably could be drawn from plaintiff's evidence). The burden of proving that there is no rational process by which a trier of fact could find in favor of the non-moving party rests on the proponents of the motion to dismiss. *Szczerbiak v. Pilat,* 90 N.Y.2d 553, 556, 664 N.Y.S.2d 252, 254 (1997).

Here, Petitioner alleges that the retaliation and discrimination by supervisors included threatened discipline, failure to consider grievances filed at the lower steps of the grievance procedure, derogatory remarks, and failure to discipline unit members who made derogatory remarks about Petitioner.

We have considered the testimony of five witnesses, including Petitioner, as well as documentary evidence and the allegations set forth in the pleadings. Examining the facts presented in a light most favorable to Petitioner as we must, we find that Petitioner has established *prima facie* claims that FDNY committed improper practices by retaliation and discrimination in violation of § 12-306(a) of the NYCCBL and that the Union breached its duty of fair representation in violation of § 12-306(b) of the NYCCBL. *Olszewski*, Decision No. B-9-2001. We therefore deny the instant motions.

Claims Against the Union

We address initially the Union's argument that the Board lacks jurisdiction in this case. The improper practice claims arise from the processing of or failure to process Petitioner's contractual grievances, and thus these claims relate to the collective bargaining "process." The filing of contractual grievances and improper practice petitions claiming retaliation for such filings constitutes activity protected under our law. *Fabbricante*, Decision No. B-38-98 at 11. *Alisberg*, Interim Decision No. B-18-98 at 10–11. The Union offers no authority for its conclusion to the contrary.

In addition, the Union misstates the issue when it asserts that this Board lacks jurisdiction to enforce any mayoral regulations relating to overtime and promotion. The instant petitions do not seek to enforce mayoral regulations and such enforcement is not before us. The instant petitions address conduct by agents of the Union and FDNY which the NYCCBL authorizes this Board to address.

This Board also has jurisdiction to address claims of improper practice concerning the processing of grievances arising under an executive order when, as here, the applicable contract defines a grievance as "[a] claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer." *Social Service Employees Union*, Decision No. B-5-96; *see also District Council 37, AFSCME*, Decision No. B-64-91.[7] More recently in *Fabbricante*, Decision No. B-43-97, this Board determined that EO No. 7, relating to

[7] Even when a contract contains no grievance resolution procedure Executive Order No. 83 provides the basis for resolution of a claimed violation of an executive order. *International Brotherhood of Electrical Workers, Local 3*, Decision No. B-13-77, *aff'd sub nom. City of New York v. Arvid Anderson,* No. 40532, N.Y. Co. Sup. Ct. July 17, 1978) (EO No. 4, promotions).

equalization of overtime assignments among FDNY employees, provided an arguable basis for this Petitioner's claim that FDNY agents failed to abide by the requirements of the directive to his detriment. *Id*. at 10. That same Executive Order provides an arguable basis for Petitioner's claims that FDNY failed to equalize overtime assignments among members of the Electricians' bargaining unit. Thus, we retain jurisdiction.

We have long held that the duty of fair representation requires a union to act fairly, impartially, and non-arbitrarily in, the administration and enforcement of a collective bargaining agreement. *Smith*, Decision No. B-22-2000; *Cheatham*, Decision No. B- 13-81. This duty includes the investigation of breach-of-contract claims. A union has wide latitude in determining which contractual claims it will pursue at arbitration, but it must act in good faith and must not discriminate in its conduct from one member to another even in matters that lie outside the contractual context. *Edwards*, Decision No. B-35-2000 at 9; *Jones*, Decision No. B-34-96; *see generally Vaca v. Sipes*, 385 U.S. 895, 64 LRRM 2369 (1967); *Civil Service Employees Association v. PERB and Diaz*, 132 A.D.2d 430, 20 PERB ¶ 7024, at 7039 (3d Dep't 1987), *aff'd on other grounds*, 73 A.D.2d 796, 21 PERB ¶ 7017 (1988). Petitioner here argues that the Union was obligated to pursue his grievance not only because it was a proper subject for the contractual grievance procedure but also because the Union pursued a claim on the same subject – equalization of overtime – for Shop Steward Somma. The Union characterizes Somma's grievance as merely a disciplinary matter. We find, however, that, contrary to the Union's argument, the grievance was not a disciplinary matter. Somma received only a counseling; no disciplinary action was taken against him. The grievance at best was only pre-emptive of any future disciplinary action were he to refuse to work overtime at a future date. Although Somma's

refusal to comply with the directive requiring equalization of overtime potentially could have had disciplinary consequences, the Union's actual arguments in arbitration were not about the disciplinary aspect of that case but rather about the meaning of the word "overtime" and the mayoral mandate to equalize it. The Union in Somma's case successfully argued in opposing FDNY's petition challenging arbitrability that the claim requiring equalization of overtime was arbitrable. Thus, we find that unless the Union demonstrates facts justifying different treatment, the Union was obligated to pursue Petitioner's grievance as it did Somma's.

Petitioner testified credibly that not only Somma but also Union Vice President Lane brushed off Petitioner's February 1997 grievance complaining of several issues, including equalization of overtime, performance of unit work by non-unit employees, and failure to promote. Further, the Union's position that it had no duty to process Petitioner's claim is unpersuasive particularly since Petitioner credibly presented specific factual allegations that the Union's agents actively discouraged him from pursuing his continuing claim. Nor has the Union ever challenged our prior determination in *Fabbricante*, Decision No. B-43-97, that Somma intentionally obstructed the processing of Petitioner's grievance about equalization of overtime.

Despite the Union's argument that Somma's admitted animosity toward Petitioner was personal rather than related to his "official" union duties, Petitioner has presented corroborated testimony that, for at least several months as part of FDNY business, Somma did act as monitor of overtime assignments whether pursuant to a supervisory directive or under his own initiative. Yet the Union cannot evade responsibility for Somma's actions by attempting to cloak Somma in management's clothing. In fact, according to Katz's testimony, FDNY had not sanctioned any overtime monitoring which Somma performed.

Additionally, Petitioner has articulated sufficient factual allegations to indicate that Somma's animosity toward him directly arose from Petitioner's grievance activity. The testimony of Petitioner, as well as that of Electricians Brian Colella and Ken Dowling, credibly described Somma's repeated denigration of Petitioner specifically because of his grievance "letters." Even the Union's instant motion acknowledges that Somma's animus was based on Petitioner's grievance "letters."

Equally unpersuasive are the Union's arguments that it had no duty to process grievances concerning the failure to be promoted because this subject is not grievable under the CBA. In *Social Service Employees Union, Local 371,* 11 PERB ¶ 3004 (1978), in which a union had found no merit to the claim that a public employer refused to promote a grievant to a supervisory position, PERB stated that the union owed the grievant a duty either to process the grievance or to explain the basis for the union's decision not to process it. PERB held that the union's conduct in failing to do either was perfunctory and, therefore, violative of New York Civil Service Law ("Taylor Law"), Article 14, § 209-a.2(a), the correlative section to § 12-306(b)(1) of the NYCCBL. PERB did not limit the scope of the union's duty in this regard to a particular stage of the grievance resolution procedure.

Similarly, in *United Federation of Teachers*, 23 PERB ¶ 3042 (1990), PERB stated that a unit member's request to an employee organization for information about its decision not to pursue a grievance and about how to seek an internal appeal of that decision, if not redundant or onerous, requires a response. The absence of a response establishes a charge to the extent of requiring the presentation by the employee organization of an explanation for its failure to respond. *Id.* at 3084.

In the instant proceeding, Petitioner alleges that the Union failed to tell him whether it would grieve his failure-to-promote claim. He contends that the Union failed to address his request from February 1997 up to and including a phone conversation he had with Union Vice President Gary Lane on May 12, 1997. In the conversation, Lane told Petitioner that the Union would not grieve another complaint that Petitioner had about reverse out-of-title work in which maintenance personnel allegedly performed work of bargaining unit Electricians. Petitioner states that only when he asked Lane in that same phone call about the failure-to-promote claim did Lane inform him that the civil service promotional list had expired. Applying the rule of the cited PERB cases – that a union's duty to represent its members includes an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf without regard to the meritorious nature of the grievance – we find that Petitioner has articulated with sufficient specificity his claim that the Union's handling of his grievance concerning denial of promotion without regard to merit was perfunctory and thus violative of the Union's duty to process the grievance or to explain why it would not. There is no evidence that the Union took any action on behalf of Petitioner with respect to his request to be considered for promotion. Furthermore, we find that Petitioner has presented sufficient factual allegations to warrant a finding, if unrebutted, that the Union representatives' actions with regard to his continuing claim about equalization of overtime were taken not for personal reasons but for the purpose of discouraging Petitioner from exercising his statutory rights to pursue grievances, and were taken without the requisite good faith in violation of the duty of fair representation, that is, the obligation to treat similarly situated unit members in a non-discriminatory fashion. *Liebold*, Decision No. B-42-97. Since the Union has failed to meet its burden of proving that the evidence produced by the charging party,

including all reasonable inferences therefrom, is plainly insufficient or that there is no rational process by which a trier of fact could find in favor of the non-moving party, this Board denies the Union's motion to dismiss.

Claims Against the City

We find that, with a few exceptions, Petitioner has stated *prima facie* claims of retaliation, discrimination, and disparate treatment because his supervisors' actions were motivated by antipathy toward his grievance filings and improper practice petitions. Petitioner has presented credible evidence which, if unrebutted, would demonstrate that his supervisors were not only well aware of, but also annoyed by, his attempts to file grievances concerning equalization of overtime and failure to promote. Petitioner elicited testimony demonstrating that supervisors considered Petitioner's grievances to be attacks directed at them; threatened, cursed, screamed at Petitioner because of his demands to redress claims about unequal overtime opportunities, condoned such conduct, and derided Petitioner to other workers; blamed the loss of overtime "heat" work on Petitioner's grievances; were improperly motivated to deny him opportunities to perform certain types of assignments such as work with cameras as well as work in locations which were free from workplace hazards and where safety equipment was available, work which they gave to other similarly situated employees; retaliated and discriminated against Petitioner because of his grievance activity by threatening to discipline him on several occasions and by attempting to downgrade his performance evaluation but failed to discipline other employees for their questionable conduct such as engaging in threatening pranks against Petitioner; and docked Petitioner's pay for days that he attended hearings and meetings regarding the instant improper practice petitions while excusing other members of the Department to attend

the same proceedings.

This Board finds that the evidence presented by Petitioner, if unrebutted, shows that the animus which Petitioner's supervisors expressed and the conduct which they exhibited toward him arose as a result of his continuing pursuit of grievance claims regarding the equalization of overtime and the improper practice proceedings which he initiated because of the Union's and FDNY's failure to address those claims. Since FDNY has failed to meet its burden of proving that the evidence produced by the charging party, including all reasonable inferences therefrom, is plainly insufficient even in the absence of any rebuttal or that there is no rational process by which a trier of fact could find in favor of the non-moving party, this Board denies the Department's motion to dismiss. As such, we find that the evidence which Petitioner has presented articulates *prima facie* claims of retaliation and discrimination under the NYCCBL and direct that the hearing resume immediately.

By contrast, we find that Petitioner has failed to articulate *prima facie* claims of retaliation and discrimination with respect to Supervisor Bianchino's attempt to be present for Petitioner's performance-evaluation appeal, for Director Katz's attempt to contact Petitioner immediately before the meeting to appeal the performance evaluation, and for FDNY's response to Petitioner's requests for information under FOIL. Petitioner has failed to offer sufficient factual support that the actions of which he complains in this regard were related to his efforts to pursue contractual and statutory claims under the NYCCBL. With respect to these claims only therefore, we grant the instant motions to dismiss as a matter of law.

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 motions to dismiss as a matter of law filed by FDNY and Local 3, IBEW, be, and the same hereby are, granted in part and denied in part in accordance with the determination as prescribed herein, and it is further,

DIRECTED, that the evidentiary hearing in this matter resume immediately.

Dated: November 22, 2002
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

GEORGE NICOLAU
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

EUGENE MITTELMAN
MEMBER

RICHARD A. WILSKER
MEMBER