OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding

-between-

JAMES E. ROBINSON,

Petitioner,

Decision No. B-43-2002
Docket No. BCB-2290-02

-and-

THE CITY OF NEW YORK,
THE NEW YORK CITY DEPARTMENT OF
HOMELESS SERVICES, AND THE
CITY EMPLOYEES UNION, LOCAL 237,

Respondents.
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DECISION AND ORDER

James E. Robinson, *pro se*, filed a verified improper practice petition against the City of New York, the New York City Department of Homeless Services ("City" or "DHS"), and the City Employees Union, Local 237 ("Union") on June 19, 2002. Petitioner alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), § 12-306(a)(4), (5) and (b)(2), (3), he was subjected to harassment by his commanding officer and discharged without a hearing, and the Union breached its duty of fair representation. The City argues that Petitioner has no standing to claim an improper practice under § 12-306(a)(4) and (5). Furthermore, both the City and the Union claim that Petitioner has no rights under the provisions of the collective bargaining agreement ("CBA") because he was a provisional employee who served less than two years. This Board finds that

Petitioner failed to assert allegations sufficient to indicate that his termination by the City was improperly motivated or that the Union violated its duty of fair representation. Accordingly, the petition is denied.

BACKGROUND

Petitioner was employed in September 2000, in the provisional title of Special Officer. For the evaluation period of March 11, 2001 to May 12, 2001, Petitioner received an overall performance evaluation of "unsatisfactory," and his Provisional Recommendation Form of May 2001, indicates a recommendation that he be terminated due to an unsatisfactory evaluation period based primarily upon instances of lateness. Subsequently, for May 13, 2001 to September 12, 2001, Petitioner received an evaluation of "conditional." Petitioner states that in September 2001, his commanding officer, Captain Wallace Butler, reprimanded him for taking days off to attend his grandmother's funeral and asked for Petitioner's resignation when he returned to work. Petitioner acknowledges, in a letter to the Union, dated March 13, 2002, that the Union helped to resolve this situation. In that same letter, however, Petitioner claims that since September 2001, Butler singled him out for harassment. In particular, Petitioner alleges that Butler tried to coerce Petitioner's immediate supervisor to change his performance rating from "good" to "unsatisfactory." On November 29, 2001, Petitioner received a letter issued by the Chief Disciplinary Counsel of DHS which indicated that Petitioner was suspended without pay for 15 days for disciplinary infractions of the DHS code of conduct. On January 29, 2002, Petitioner applied for a transfer which Butler denied. On March 6, 2002, Petitioner received two warnings regarding violations of DHS policy which were issued by supervisors other than Butler.

On April 12 or 14, 2002, Petitioner was terminated without being given a reason or a hearing. In a letter to the Union dated April 23, 2002, he stated that his termination was unjust and that he was entitled to grieve his termination, receive two weeks' notice, and have an option to resign. Although Petitioner has not requested a specific remedy in the instant petition, he has previously indicated a request for a hearing regarding his termination.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner claims that the City and the Union violated NYCCBL § 12-306 (a)(4), (5) and (b)(2), (3).[1] According to Petitioner, after he took a few days off to attend his grandmother's funeral, he was harassed by Butler, who asked for his resignation. Petitioner asked the Union for help and the Union resolved the matter. Petitioner claims that subsequently, Butler continued to harass him, threatened his job, and used his authority to "get him." Specifically, the allegation is

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[1] NYCCBL § 12-306(a)(4) and (5) provide:
It shall be an improper practice for a public employer or its agents:
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;
(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

§ 12-306(b)(2) and (3) provide:
It shall be an improper practice for a public employee organization or its agents:
(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer;
(3) to breach its duty of fair representation to public employees under this chapter.

that Butler made Petitioner's immediate supervisor change Petitioner's performance evaluations from "good" to "unsatisfactory" and "conditional," and coerced lieutenants to write "false write ups" about him. According to Petitioner, certain unnamed sergeants witnessed Butler's harassment and advised him to apply for a transfer. Petitioner did make an application for a transfer but it was denied by Butler. Petitioner also claims that the Union did not respond to his complaints regarding Butler and has not responded to his request to file a grievance concerning his termination. The only response he received was a form letter, dated May 10, 2002, in which the Union asked him to indicate the reason he was no longer listed on payroll.

City's Position

The City argues that Petitioner has not served the requisite two years as a provisional employee to seek a wrongful disciplinary hearing under Article VI, § 1(f), of the CBA.[2] Furthermore, he has no standing to claim that the City has unlawfully refused to bargain with the Union under § 12-306(a)(4) or to allege that the City has unilaterally changed a mandatory subject of bargaining during negotiations under § 12-306(a)(5). Even if he had standing, he has not alleged sufficient facts to establish a *prima facie* violation of these sections.

Nor has Petitioner claimed that the City violated NYCCBL § 12-306(a)(3). Had he done so, the petition fails to allege sufficient facts to satisfy the Board's *Salamanca* test to establish a *prima facie* violation of § 12-306(a)(3) because there is no evidence that the City was aware of Petitioner's union activity. Assuming that Petitioner met the two-part test, the City can establish

[2] Article VI, § 1(f) provides that the term "Grievance" shall mean:
A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

a legitimate business reason for Petitioner's termination because he failed to maintain a "satisfactory" level of performance.

Union's Position

The Union argues that Petitioner has not provided sufficient allegations of facts to show that the Union did not negotiate in good faith under NYCCBL § 12-306(b)(2). Furthermore, the Union asserts that the NYCCBL does not contain a section 12-306(a)(5) or a section 12-306(b)(3).[3]

According to the Union, Petitioner does not provide sufficient facts to establish that the Union discriminated against him in violation of its duty of fair representation. The facts demonstrate that the Union acted properly and never told Petitioner that he would receive a due process hearing regarding his termination. In fact, Petitioner was not entitled to a due process hearing prior to termination under Article VI, § 1(f), because he served as a provisional Special Officer for less than two years. Therefore, Petitioner's claim that the Union violated § 12-306(b)(2) and (b)(3) because the Union did not obtain such a hearing must be dismissed.

DISCUSSION

This Board concludes that the claim asserted by Petitioner against the City must be dismissed because Petitioner fails to provide allegations of fact sufficient to support an improper employer practice claim under the NYCCBL. To establish a claim of an improper practice under NYCCBL § 12-306(a), an employee must allege facts that indicate that the employer interfered

[3] The Board calls to the Union's attention that subsections 12-306(a)(5) and (b)(3) were added to the Administrative Code in 1998.

with protected employee rights, such as the rights to form, join and organize public employee organizations, or discriminated against an employee because of union activities. *Gillard*, Decision No. B-35-2001 at 6. Here, Petitioner asserts only that the City violated § 12-306(a)(4) and (5), sections of the statute which are not relevant to his claims. This Board has recognized that an individual lacks standing to raise a claim under § 12-306(a)(4) because this section creates a duty to bargain in good faith between the employer and the union. *Lopez,* Decision No. B-31-97. In addition, § 12-306(a)(5), addresses an employer's duty towards a union concerning the maintenance of status quo during negotiations, a situation not relevant here.

Petitioner also claims that after he sought help from the Union, Butler continued to harass him in retaliation. Even if Petitioner made a claim under § 12-306(a)(3), which he does not expressly assert but which may be inferred from his allegations, he does not provide sufficient allegations of fact to indicate, under this Board's test, that the employer's action was discriminatory or retaliatory in violation of this section. This Board uses the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by the Board in *Bowman*, Decision No. B-51-87. *Bowman* requires that Petitioner show that:

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

If Petitioner shows both of these elements, then the employer may try to refute the evidence or attempt to establish that its actions were motivated by a legitimate business reason.

The mere assertion of retaliation is not sufficient to prove that management committed an improper practice. *Local 983, District Council 37,* Decision No. B-15-2001 at 6. Allegations of

improper motivation must be based on statements of probative facts, rather than conclusory allegations based upon surmise, conjecture or suspicion. *Lieutenants Benevolent Ass'n,* Decision No. B-49-98 at 6.

Here, the first prong of the test is satisfied because Petitioner's complaint to the Union requesting help regarding Butler's harassment and demand that Petitioner resign over the time taken to attend a funeral constitutes protected activity under the NYCCBL, *Doctors Council,* Decision No. B-12-97, and the City was aware of this activity. However, we find that Petitioner has not satisfied the second prong of the test because he has not supplied allegations of fact, such as dates and descriptions of specific incidents, sufficient to indicate that harassment occurred and was motivated by Petitioner's union activity. Furthermore, no alleged facts support a conclusion that Petitioner's termination was motivated by union animus. In the absence of a finding of improper motivation in violation of NYCCBL § 12-306(a)(3), we cannot say that DHS's termination of Petitioner, a provisional employee with less than two years of service, constitutes an improper practice. Therefore, this Board dismisses Petitioner's improper employer practice claims.

As to the claim against the Union, the duty of fair representation requires that a union act fairly, impartially, and non-arbitrarily in negotiating, administering, and enforcing collective bargaining agreements. *Gillard*, Decision No. B-35-2001 at 5; *Abdal-Rahim*, Decision No. B-19-97. A union does not breach its duty merely by refusing to advance a grievance if its refusal to act is made in good faith and in a manner which is neither arbitrary nor discriminatory. *Gillard*, Decision No. B-35-2001; *Daye*, Decision No. B-50-97.

In this case, Petitioner has not alleged facts sufficient to constitute a violation of the

Union's duty of fair representation. Petitioner provides evidence that in September 2001, the Union did address his complaints regarding his commanding officer. With regard to Petitioner's termination, the Union notes that a provisional employee with less than two years of service is not entitled to protection under the grievance procedures of the CBA. As we noted in *Swike,* Decision No. B-29-2000, a union does not breach its duty of fair representation merely because it refuses to process every complaint by a unit member. Thus, the Union's failure to assist Petitioner to obtain a hearing to challenge his termination was not arbitrary, discriminatory, or in bad faith. Accordingly, we dismiss the claims against the Union.

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 James E. Robinson and docketed as BCB–2290-02 be, and the same hereby is denied.

Dated: November 22, 2002
New York, New York

MARLENE A. GOLD
CHAIR

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