OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----------x

In the Matter of the Improper Practice Proceedings

-between-

KENNETH WASHINGTON, Decision No. B-1-2003

Petitioner, Docket No. BCB-2178-01

-and-

NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondent.

----------x

LOCAL 1042, PAVERS & ROADBUILDERS DISTRICT COUNCIL, Docket No. BCB-2258-01

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondent.

----------x

DECISION AND ORDER

On January 17, 2001, Kenneth Washington, *pro se*, filed a verified improper practice petition, Docket No. BCB-2178-01, against the New York City Department of Buildings ("City" or "DOB") alleging that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), DOB has "continuously discriminated, harassed, and treated Petitioner . . . differently because he filed grievances against

Respondent [DOB] with Local 1042, Pavers and Roadbuilders District Council . . . and because he sought to apply the terms of the collective bargaining agreement between Local 1042 and the City of New York."[1]

Also on January 17, 2001, Washington sent a grievance directly to DOB with the same allegations as those in the petition. The trial examiner at OCB was subsequently informed that DOB was investigating Washington's claims, and OCB agreed to defer the improper practice petition until the grievance process was complete.

On or around June 15, 2001, Washington, DOB, and representatives of Local 1042, Pavers and Roadbuilders District Council ("Local 1042" or "Union") held a conference at DOB to try to resolve the dispute. Within a few days after the June 15 meeting, Washington served DOB with a *pro se* federal lawsuit charging racial discrimination. *Kenneth Washington v. City of New York, New York City Dep't of Buildings, Steve Hesse, Tarek Zeid, Ellen Fox, and Yelena Minevich*, No. 01 Civ. 3592 (S.D.N.Y. filed Apr. 27, 2001).

The Union asserts that in late August or early September 2001, DOB's Director of Labor Relations told the Union representative by phone message that DOB would not investigate the grievance "until Washington dropped his lawsuit and other proceedings." On December 11, 2001, the Union, on behalf of Washington (collectively "Petitioners"), filed a verified improper

[1] On January 30, 2001, the Executive Secretary of the New York City Office of Collective Bargaining ("OCB") dismissed the January 17, 2001, petition for insufficiency without prejudice to resubmit. *Washington*, Decision No. B-6-2001. On February 7, 2001, Washington submitted a supplemental verified statement, which, along with the original petition, was deemed timely as to conduct which occurred within four months of the original filing on January 17, 2001, and which is the subject of this decision.

practice petition, Docket No. BCB-2258-01, alleging that DOB violated Washington's rights in retaliation for engaging in protected activity.

Following the filing of this second petition, OCB reactivated the original petition on January 14, 2002, and, without objection, consolidated the two cases pending before the Board. On November 21, 2002, the trial examiner held a hearing limited to the issue of what the DOB representative said to the union representative over the phone in late August, early September 2001.

This Board finds that as to the first petition, Washington has not presented sufficient allegations of fact to make out a *prima facie* case that DOB discriminated or retaliated against him for his union activity. As to the second petition, the testimonial evidence does not support the claim that DOB interfered with Washington's protected activities.

BACKGROUND

Kenneth Washington began working as a Highway and Sewers Inspector for the Department of Transportation ("DOT") in January 1990. In October 1996, he was transferred within his title into DOB's Express Permitting Program. At that time Washington was assigned a vehicle. Just before April 1999, Tarek Zeid was appointed the new DOB Borough Commissioner of Brooklyn and changed various procedures. On May 17, 1999, when Washington returned from a week's vacation, Zeid informed him that he would be reassigned to DOB's Construction Inspectors Unit. According to Washington, Zeid complained that Washington had held up a job because of the vacation and had not made the City vehicle

available while he was away. Washington indicates that he was following standard procedure. On May 18, 1999, Washington wrote to Zeid to request an explanation for the reassignment; Zeid did not respond. That same day, Washington spoke to DOB Director of Labor Relations, Carlos Fortuno, who explained that DOB was starting to cross-train inspectors from DOT. For part of May 19 and on May 20 and 21, 1999, Washington took sick leave. On May 25, 1999, his first day in the field as a Construction Inspector, Washington fell and hurt his back and his knee when walking down a stoop. Out on sick leave for fourteen months, Washington returned to work at the DOB on July 24, 2000.

While he was on leave, Washington filed a grievance at Step I on June 4, 1999, claiming that his duties in the Construction Unit were substantially different from those stated in the Highway and Sewer Inspector job specifications. On July 19, 1999, Fortuno, after a Step II hearing, determined that the grievance was warranted, that all out-of-title Construction Inspector responsibilities cease and desist, and that the grievant should perform only functions consistent with his title.

On November 30, 1999, DOB informed Washington that because he had not returned certain City property, he would not be allowed to utilize direct deposit, but instead he would have to go to the office for his check.

After clearance from his doctor, Washington was scheduled to return to work on January 24, 2000. Ellen Fox-Katine, Director of Personnel at DOB, had informed him to report to the Staten Island Borough office, but Washington sent a letter to Assistant Commissioner Patricia Ketterer explaining that a move to Staten Island would be a hardship since he had had a knee

operation and had family responsibilities in Brooklyn. On February 14, 2000, Fox-Katine responded that the only vacancy in Washington's title at that time was in Staten Island. Thereafter, new medical notes by Washington's doctor allowed him to remain on sick leave and then be placed on Worker's Compensation Leave status, and he did not return to work as planned.

On February 18, 2000, Washington filed a Step I grievance seeking to be restored to a position as Highway and Sewer Inspector in Brooklyn. Denying the grievance on March 6, 2000, Fortuno stated that placement into assignments is at the discretion of management. Washington says that he did not appeal because of his disability. On March 17, 2000, Albert Bosco, Union representative, wrote to Fortuno to ask for an outline of Washington's job duties once he returned to work. In his response on March 20, 2000, Fortuno stated that Washington would be performing pre-construction inspections in the Builders Pavement Plans ("BPP") section within the five boroughs. These responsibilities were within his title.

On July 24, 2000, Washington returned to work at the Staten Island location. He was assigned the task of reviewing pre-construction of builders pavement plans and was given a vehicle. Washington alleges that his immediate supervisor, Yelena Minevich, acted in an unprofessional manner by asking him to call from the other boroughs several times a day and by asking him to bring her records that were not part of his job from other boroughs. According to Washington, on October 13, 2000, when Minevich was not in her office to sign his time card, Stephen Hesse, Director of BPP and the Express Permitting Program in Staten Island, refused to sign it because he had been told that someone in the Inspector General's office had to do so.

Washington was forced to wait two hours before Minevich arrived and signed his card. He also asserts that his work space was in a common area. At a December 13, 2000, meeting concerning Washington's routine and his feeling disrespected by his supervisor, Staten Island Borough Commissioner Terrence Lin changed Washington's supervisor to Paresh Oza. On December 27, 2000, Hesse outlined work hours and procedures for Washington, including directing Washington to do office work in Staten Island until he left for inspections and permitting him to go home directly from the field. On some days, there possibly would be no inspections. According to Washington, but denied by the City, Hesse said that Washington was getting more clerical assignments for putting the Express Permitting Program in the spotlight and asked Washington whether he would grieve his assignment as an out-of-title claim.

Before the meeting with Lin, Washington had written to Fox-Katine on December 11, 2000, seeking a raise and again a transfer. He also sent letters to Hesse for a raise and, on December 18, 2000, to Ketterer for a transfer. Washington explained that most of his work was in Brooklyn and Queens and that there were no full-time BPP inspectors in either borough. In response, on December 27, 2000, Ketterer stated that since oversight for the BPP section is in Staten Island, she could not grant the request to transfer.

On December 28, 2000, Washington called Oza to say that he was suffering pain and swelling in his right knee and had received a doctor's note that he had to be out of work until January 11, 2001. Hesse instructed Washington by phone on December 29, 2000, to make the City vehicle available for a different inspector to use during his absence. The car was picked up on January 2, 2001, but Washington did not leave the E-Z Pass, since, he says, he was not so

instructed. On January 4, Washington was told that his check would be held until the E-Z Pass was returned. Washington states that on January 5, he made several calls to resolve the problem, received several different responses, and finally had to go to the central administration of DOB, where he was treated with disrespect. He was not allowed beyond the receptionist's desk even though he had his identification.

On January 17, 2001, Washington filed the instant improper practice petition and a third grievance contending that he was being harassed because he filed grievances. On January 25, 2001, Washington's E-Z Pass was deactivated allegedly as a result of inappropriate use. On April 4, 2001, Hesse assigned him to a project of checking DOB records for information to be put on microfilm.

A meeting based on the written January 17, 2001, grievance was held on or around June 15, 2001, to resolve Washington's complaints. Present were Stanley Helfeld, who had succeeded Fortuno as DOB Director of Labor Relations; John Reisinger, DOB counsel; Frank Mangio, EEO Director; Matthew Driscoll, counsel of the Office of Labor Relations; Albert Bosco, the Union's representative; Bruce Cooper, the Union's attorney; and Washington. The parties discussed Washington's allegations, including working out of title; not receiving pay increases as two others in his title had; having his car taken away; being transferred; and generally being harassed and discriminated against. At a hearing held at OCB on November 21, 2002, the only two witnesses, Helfeld and Bosco, agreed that the outcome of the June 15 meeting was that DOB would investigate Washington's complaints. Helfeld was to report to Bosco about the investigation. Although at the end of that meeting Helfeld asked whether there was "anything

else we should be aware of" on the matter, nothing else was raised. (T. 20.)[2] Neither Helfeld nor Bosco knew on June 15 that Washington had filed a lawsuit charging DOB with racial discrimination. Within a few days of the meeting, the City was served with the federal discrimination suit.[3]

On June 19, 2001, Washington again took sick leave, which lasted until November 26, 2001. At the end of August or early September 2001, while Washington was on leave, Bosco left a message on Helfeld's voice mail asking about the progress of the grievance. At the OCB hearing, Bosco testified that in a return message, Helfeld said, essentially, that DOB "was not prepared to go with this until the lawsuit is taken care of. . . ." (T. 15.) Bosco interpreted "this" to mean "the procedure we went through, the hearing that is," on June 15. (T. 16.) Bosco at that time did not know that Washington had filed a lawsuit in federal court.

Helfeld's testimony was that when DOB was served with the discrimination suit soon after June 15, he informed the Union that DOB "would not investigate on one specific grievance while the other suit was in practice [*sic*: progress]." (T. 21.) Nothing in the record indicates any further discussions on this topic between the parties.

On December 19, 2001, after he returned to work on November 26, Washington resigned from DOB.

As a remedy to the January 17, 2001, petition, Washington seeks an order directing DOB to cease and desist from interfering with his rights under NYCCBL § 12-305 by discriminating,

---

[2] Numbers in parentheses refer to the transcript of the hearing.

[3] On January 30, 2001, the Equal Employment Opportunity Commission issued Washington a Notice of Right to Sue. Washington filed the lawsuit on April 27, 2001.

harassing, and treating him differently from others in his title.[4] Concerning the December 11, 2001, petition, the Union seeks an order directing DOB to cease and desist from interfering with, restraining, or coercing employees in the exercise of their rights under NYCCBL § 12-305 by refusing to investigate and reply to grievances of employees because they have filed other grievances, improper practice petitions, or lawsuits.

POSITIONS OF THE PARTIES

Petitioners' Position

Concerning the initial petition, BCB-2178-01, Washington argues that because he filed grievances, he was assigned out-of-title work, was put in an intimidating, hostile environment, was harassed and discriminated against, and was denied transfer back to Brooklyn. DOB violated his §12-305 rights under the NYCCBL also by failing to follow Fortuno's July 1999 decision that DOB "cease and desist" from assigning Washington work inconsistent with his title of Highway and Sewer Inspector.

Washington says that all his supervisors knew that he had filed an out-of-title grievance on June 4, 1999, and a grievance protesting his transfer on February 28, 2000, and were retaliating against him for these claims. When he was assigned to the Staten Island office, he was harassed by being forced into an oppressive work environment, for he was given clerical duties inconsistent with the functions of his title and was given a desk in a common area. Furthermore, Minevich, his initial supervisor in Staten Island, treated him in an unprofessional manner.

[4] Because Washington has since resigned, any remedy would be to deter future violations.

Washington states that he was devastated on October 13, 2000, by Minevich's failure to be present to sign his time card and by Hesse's telling him that someone at the Inspector General's office had to sign it.

In addition, Washington contends, the retaliation continued in December 2000, when he was denied the raise received by other workers in his title and was denied the transfer even though, according to Washington, an opening in Brooklyn and Queens was available.

On January 5, 2001, while he was on sick leave and had not returned the E-Z Pass with the City vehicle, Washington argues, he was intimidated by DOB managers at the central office. According to him, the usual policy is that an employee must return City property only if the requested leave is for 30 days or more. Since he would be out for less time than that, DOB officials' withholding his check from direct deposit and then treating him in a hostile manner when he came to pick up the paper check demonstrate that DOB was retaliating against him for protected union activity.

Washington finally contends that his original transfer from DOT to DOB was governed by Local Law 65/96, which provides that he was not to lose any existing right or remedy in the transfer. He alleges that he lost rights that he had possessed while at DOT.

As to the second petition, BCB-2258-01, the Union, without citing to a particular section of the NYCCBL, argues that DOB is required to handle grievances, whether or not a federal lawsuit is pending. While a discrimination suit addresses constitutional issues, grievances address complaints under the parties' collective bargaining agreement ("CBA"), and one proceeding should not preclude the other. By saying that it would not pursue Washington's

grievance until the federal suit is "dealt with," DOB committed an improper practice. (T. 25.)

City's Position

As to the initial petition, the City urges the Board to dismiss as untimely all undated allegations and charges pertaining to events that occurred more than four months prior to the filing of that petition.

Since Washington has failed to claim that the City violated § 12-306(a)(1) and (a)(3),[5] the City argues, he has not stated a basis for his claim under the NYCCBL. Even if he had cited those provisions, the petition fails to allege sufficient facts to state a *prima facie* case of retaliation. The only union activity was the filing of two grievances, and it is unlikely that Washington's new supervisors in Staten Island knew about these. Even if the supervisors knew, the City contends, the facts do not show that the union activity was a motivating factor in DOB's actions. Furthermore, the decisions to transfer Washington and later direct him to return the City vehicle were based on legitimate business reasons under NYCCBL § 12-307(b).[6]

---

[5] 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.

§ 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 . . . .

[6] NYCCBL § 12-307(b) provides in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards

The City also argues that the Board has no jurisdiction to determine contractual claims such as out-of-title or transfer grievances and has no jurisdiction to interpret Local Law 65/96.

With respect to the second petition, the City argues that DOB did not say that it would never address Washington's grievance. Since the federal discrimination suit was of primary concern, DOB decided to focus on that proceeding before investigating the grievance. (T. 25, 26.) Furthermore, Article VI, § 9, of the CBA provides a remedy for those situations in which a grievance is not heard within the time limit provided by the contract. Specifically, either the grievant or the Union may invoke the next step of the grievance process, except that only the Union may invoke arbitration under Step IV.[7]

DISCUSSION

Addressing initially the issue of timeliness, this Board may not consider any claimed violation of the NYCCBL if that violation occurred more than four months prior to the filing of an improper practice petition. NYCCBL § 12-306(e); § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1); *see Social Services Employees Union, Local 371*, Decision No. B-19-2002 at 6. Here, since the petition was initially

---

of selection for employment; direct its employees . . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization . . . .

[7] Article VI, § 9, of the CBA provides:
If the Employer exceeds any time limit prescribed at any step in the Grievance Procedure, the grievant and/or the Union may invoke the next step of the procedure, except that only the Union may invoke impartial arbitration under Step IV.

filed on January 17, 2001, only claims involving events that occurred after September 17, 2000, are deemed timely. The Board will consider allegations regarding prior events only as background. *Id.; Krumholz*, Decision No. B-21-93 at 11.

To determine whether an alleged discrimination or retaliation violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and 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 alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See Rivers*, Decision No. B-32-2000.

This Board has found that proof of the filing of grievances or of an employer's knowledge of complaints to a union is sufficient to show protected union activity. *See Civil Service Bar Ass'n, Local* 237, Decision No. B-46-2001 at 6; *Rivers*, Decision No. B-32-2000; *Lieutenants Benevolent Ass'n*, Decision No. B-49-98. Here, Washington has presented ample evidence that his employer knew that he had filed two grievances and discussed his problems with his Union. Thus, Petitioner has satisfied the first element of the *Salamanca* test.

Proof of the second element – whether Washington's protected activity was a motivating

factor in his employer's challenged actions – must necessarily be circumstantial absent an outright admission. *City Employees Union, Local 237,* Decision No. B-13-2001 at 9; *Communications Workers of America, Local 1180*, Decision No. B-17-89 at 13. At the same time, this proof must include more than speculative or conclusory allegations. Alleging an improper motive without showing a causal link between the management act at issue and the union activity does not state a violation of the NYCCBL. *See Ottey*, Decision No. B-19-2001 at 8; *Correction Officers' Benevolent Ass'n,* B-19-2000 at 8; *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 5-6.

Washington alleges that his reassignment, his transfer, and other acts indicating that he was being harassed were the result of his filing an out-of-title grievance on June 4, 1999, and a transfer grievance on February 18, 2000. First, claims concerning reassignment, which arose in May 1999, and claims concerning transfer, which arose in January 2000, are untimely. Even when considered as background, Washington's May 1999 reassignment to the Construction Inspector's Unit was the impetus for the June 1999 out-of-title grievance, not the result of that grievance. *See Ottey*, Decision No. B-19-2001 at 9. Nor has Washington shown that the transfer scheduled in January 2000 was in retaliation for the June 1999 grievance. Fortuno, who had granted Washington's first grievance, denied the grievance concerning transfer, and there is no demonstration of anti-union animus. No allegation contradicts DOB's statement that the only vacancy in Washington's title when he returned from sick leave was in Staten Island.

As to the timely allegations after September 17, 2000, the pleadings do not make clear whether Minevich, Washington's supervisor, knew of his prior grievances. Even if she did, no

conduct or statements show that Minevich discriminated against Washington for his union activities. The allegations make no causal connection between his filing grievances and her calling him during the day to check on his whereabouts, her failing to change his work space, her letting him wait on one occasion for two hours to sign his time card, or her making him feel "devastated" by saying that the Inspector General had to sign his time card. Further, the employer did try to address Washington's complaints. Borough Commissioner Lin met with him and agreed to change his supervisor. In any event, allegations concerning Minewich's actions do not rise to a claim of retaliation for union activity.

With respect to Hesse's December 27, 2000, memorandum detailing Washington's assignment to complete inspections on some days and perform office work on others, nothing in the pleadings indicates how the assigned work was beyond the scope of the normal duties of his title. Even if Hesse was annoyed at Washington for calling Lin's attention to a problem in the office, causal connection between the two prior grievances and Washington's assignments is not established. In addition, there is no claim that Hesse's asking whether Washington would bring an out-of-title grievance, if true, was done in a threatening or coercive manner.

Nor does DOB's failure at the end of December 2000 to grant Washington's second request to transfer to Brooklyn and to grant a raise demonstrate retaliation for union activity. Washington has not shown that the employer harbored anti-union animus for his filing grievances, and no allegations contradict Ketterer's response that she was unable to grant the transfer because the oversight section of BPP was in Staten Island. Although Washington alleges that two other inspectors in his title received raises, he has not shown that he was similarly

situated to the others and was entitled to receive an increase. He may not have received a raise for one of many reasons other than ones violating the NYCCBL. Thus, claims that he was not granted a raise because he filed two grievances are mere conjecture. To the extent Washington is alleging that he is entitled to pay increases covered by the CBA, salary issues are contractual and are subject to the parties' grievance procedure for resolution. *See Galleano*, Decision No. B-39-96.[8]

Moreover, Washington's surmise that DOB took the car, sought the E-Z Pass, and treated him disrespectfully at the central office because of union activity does not rise to a claim under the NYCCBL. *See Civil Service Bar Ass'n*, Decision No. B-46-2001 at 6 (allegations of improper motive must be based on statements of probative facts rather than assertions based on conjecture and speculation). No allegations indicate that DOB's desire to make a City vehicle available to others while Washington was on sick leave at the end of December 2000 to early January 2001 was a result of anti-union animus or was otherwise invalid.

Finally, as to the allegations concerning Local Law 65/96, this Board may not interpret statutes other than the NYCCBL. *See Doctors Council, SEIU*, Decision No. B-31-2002 at 9-10; *Correction Officers Benevolent Ass'n*, Decision No. B-39-88 at 5-6. Therefore, we will not attempt to do so or to assess what rights Washington may have possessed under that law.

Concerning the second petition, the Union claims that DOB retaliated against Washington in violation of the NYCCBL by stopping the investigation of Washington's grievance while the

---

[8] The claim that DOB failed to enforce Fortuno's July 1999 out-of-title finding is also contractual, and thus the Board has no jurisdiction to determine this allegation. *See Siegel*, Decision No. B-23-91.

federal discrimination suit was pending. While the petition alleges that DOB stated that it would not investigate the grievance "until Washington dropped his lawsuit and other proceedings," the testimony at the hearing demonstrates that the City's statement was limited to the lawsuit, and did not involve the other proceedings. To use Bosco's words, Helfeld's message was that DOB "was not prepared to go with this until the lawsuit is taken care of. . . ." (T. 15-16.) Thus, no testimony supports the allegations in the petition concerning the other proceedings.

Initially, this Board must determine whether the employer's actions were in retaliation for activity protected under NYCCBL § 12-305, which includes the right of public employees to form, join, or assist public employee organizations. The question here is whether Washington's filing a federal lawsuit falls under that conduct. This Board has enunciated a test to determine whether the initiation of a legal proceeding constitutes protected activity. To be protected, the participation in litigation:

> 1. must, at least, be indirectly related to the employment relationship between the City and the bargaining unit employees; and
>
> 2. must, at a minimum, be in furtherance of the collective welfare of employees, and not be strictly personal.

Correction Officers Benevolent Ass'n, Decision No. B-17-94 at 14; *United Probation Officers Ass'n on behalf of Werfel*, Decision No. B-71-90 at 8; *see also Procida*, Decision No. 2-87 at 10-12. The Board has adhered to the general proposition which the Court of Appeals established in *Rosen v. Pub. Employment Relations Bd.*, 72 N.Y.2d 42, 49-50, 21 PERB ¶ 7014, at 7021 (1988), that protections of the N.Y. Civil Service Law (Taylor Law) apply only in cases of adverse action arising out of participation in employee organizational activity.

In *United Probation Officers Ass'n*, Decision No. B-71-90, after petitioner instituted an Article 78 proceeding in Supreme Court to challenge a determination of his ineligibility on a civil service list, a supervisor denied him the expected superior rating allegedly because she had been named a defendant and because she sought to undercut his court claims. This Board found that although the litigation was related to his employment relationship in satisfaction of the first prong of the test, the litigation was not undertaken on behalf of the employee organization but for petitioner's own welfare. Thus, the Board found no improper practice under NYCCBL § 12-306(a)(1) and (a)(3) for the alleged retaliation since the activity was unprotected under NYCCBL § 12-305. *See Doctors Council*, Decision No. B-12-97 at 7-8; *Archibald*, Decision No. B-38-96 at 17-19 (oral or written complaints that are not formal grievances were strictly personal and therefore unprotected).[9]

In *McNabb*, Decision No. B-48-88, also a retaliation claim for filing an Article 78 proceeding, petitioners did satisfy the two-pronged test. The lawsuit was filed in the names of the president of the local and unit members "on behalf of themselves and all others similarly situated," and the union bore the litigation expenses, with its attorneys representing all of the petitioners.

Here, we find that the record does not contain allegations of fact to indicate that

---

[9] Our cases conform with those decided by the Public Employment Relations Board. *See, e.g., Village of Westhampton Beach*, 35 PERB ¶ 3026, *confirming* 35 PERB ¶ 4524 (2002) (threat to pursue litigation is not in furtherance of a union policy or the collective bargaining agreement); *Board of Education of the City School District (New York)*, 32 PERB ¶ 4596 (1999) (disability discrimination lawsuit is not protected activity); *Suburban Bus Authority*, 23 PERB ¶ 3006 (1990) (threat to file lawsuit is personal and unprotected).

Washington's initiation of a discrimination suit in federal court is a protected activity under the NYCCBL. While the lawsuit may be employment related, Petitioners have made no showing that the litigation is on behalf of other employees in the Union. Indeed, the allegation is that because of his race, Washington was not given a raise as others in his unit were. Furthermore, the Union was not involved in the discussions or filing of the lawsuit – Bosco testified that he knew nothing about the litigation until after the City was served. Therefore, the filing of the federal proceeding here is strictly personal and not protected activity.

Further, the Union has not presented sufficient facts to show that DOB failed to process the grievance. This Board has held that even though an employer has not timely processed the grievance, no improper practice exists if a contract expressly permits the grievant or the union to invoke the next step of the grievance procedure. *Local 1549, District Council 37*, Decision No. B-25-89 at 25; *Communications Workers of America, Local 1180*, Decision No. B-58-87 at 24; *Committee of Interns and Residents*, Decision no. B-8-85 at 13. Here, Article VI, § 9, of the CBA provides that either the grievant or the Union may invoke the next step of the grievance procedure. This is not a case in which the employer generally and systematically refused to process grievances. *See District Council 37, AFSCME*, Decision No. B-11-2001 (improper practice under NYCCBL § 12-306(a)(4) to refuse to process all pending grievances on a certain subject). Since the union did not allege that DOB interfered with Petitioners' contractual right to continue the grievance process, we find no improper practice.

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, BCB-2178-01, filed by Kenneth Washington be, and the same hereby is, dismissed; and it is further

ORDERED, that the improper practice petition, BCB-2258-01, filed by Local 1042, Pavers and Roadbuilders District Council be, and the same hereby is, dismissed.

Dated: January 27, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

GABRIELLE SEMEL
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER