Fabbricante v. FDNY, L. 3 IBEW & Somma, 71 OCB 30 (BCB 2003) [Decision No. B-30-2003 (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,

Decision No. B-30-2003

Docket No. BCB-1708-94
Docket No. BCB-1774-95

-and-

NEW YORK CITY FIRE DEPARTMENT,

Respondent.

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JOHN J. FABBRICANTE,

Petitioner,

-and-

Docket No. BCB-1781-95

IBEW, LOCAL 3 & SHOP STEWARD AL SOMMA,

Respondents.

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JOHN J. FABBRICANTE,

Petitioner,

-and-

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

NEW YORK CITY FIRE DEPARTMENT & IBEW, LOCAL 3,

Respondents.

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DECISION AND ORDER

This determination arises out of five improper practice petitions filed by John J.

Fabbricante charging that the International Brotherhood of Electrical Workers, Local 3 ("Union") and Shop Steward Al Somma[1] breached their duty of fair representation by failing and refusing to process grievances he filed to protest (a) the alleged denial of equal opportunities to work overtime as an Electrician and (b) the improper failure to grant him a promotion. The petitions also charge that agents of the New York City Fire Department ("FDNY" or "Department") retaliated and discriminated against Fabbricante for filing grievances and improper practice petitions. Petitioner asserts that the actions of FDNY and the Union, respectively, are in violation of § 12-306(a)(1) and (3) and § 12-306(b)(1) and (3) of the NYCCBL. Upon the record of seven days of hearings and consideration of the pleadings, briefs, and various motions, this Board finds that Petitioner has sustained his claims that the Union breached its duty of fair representation and interfered with Petitioner's attempts to pursue grievances and that the Department retaliated and discriminated against him because of his protected activity.

PROCEDURAL HISTORY

Petitioner filed his first improper practice petition (not the subject of this decision) against the Union and FDNY in August 1994. After the Union failed to submit an answer, the Board unanimously held that Petitioner had stated a *prima facie* claim that the Union breached its duty of fair representation by refusing to handle Petitioner's contract grievance concerning

[1] While a public employer or a public employee organization may be held responsible for the acts of its agents, an individual cannot commit an improper practice in his or her personal capacity. *See* § 12-306 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"); *Hassay*, Decision No. B-2-2003 at 2. As Somma was acting as an agent of the Union, the proper party to this proceeding is the Union, not the named individual, and we dismiss the action as to him.

equalization of overtime after having processed a similar grievance of another employee. *Fabbricante,* Decision No. B-43-97 at 10-11. The Board dismissed Petitioner's claim of retaliation by an agent of FDNY on grounds that the claim was devoid of probative facts and failed to state a claim under the NYCCBL. *Id*. at 12. The Board directed the Union to arbitrate Petitioner's grievance and, at Petitioner's discretion, either to represent Petitioner in arbitrating his claim or to pay the cost of legal representation for Petitioner throughout the arbitration process. To date, no arbitration of this grievance has taken place.

Between December 1994 and August 1995, Petitioner filed three more petitions, Docket Nos. BCB-1708-94, BCB-1774-95, and BCB-1781-95. These alleged that (a) agents of the Union and the Department retaliated and discriminated against Petitioner for his continuing complaints about equalization of overtime and about the failure to consider him for promotion, (b) agents of the Department disparately threatened disciplinary action for his grievance-related activity while failing to discipline other electricians for conduct that violated departmental rules of conduct and unit operating procedures, and (c) agents of the Union interfered with, coerced, and restrained him in violation of § 12-306 of the NYCCBL.

Pending determination of these three petitions, Petitioner filed a fourth improper practice petition, Docket No. BCB-1913-97, in June 1997. He claimed additional instances of retaliation involving the Department's failure to consider him for a supervisory position as a result of his filing overtime grievances and improper practice petitions. Petitioner also asserted that the Union breached its duty of fair representation and continued to retaliate against him by failing to represent him with respect to grievances claiming the performance of unit work by non-unit employees, the failure to equalize the assignment of overtime, and the failure to promote the

Petitioner. The Union's motion to dismiss this petition alleged that the Board lacked jurisdiction to entertain the retaliation claim and that the matter should be heard by the New York City Office of Administrative Trials and Hearings. The Board dismissed the claims regarding the Union's failure to process the reverse out-of-title and overtime grievances for failure to state a claim because, in that case, Petitioner failed to identify any contractual limitation on these subjects; in the absence of such limitation, these are matters of management prerogative. *Fabbricante*, Interim Decision No. B-38-98 at 9-10; *cf. Fabbricante,* Decision No. B-43-97 at 10 (executive order cited by petitioner states arguable contractual limitation on overtime assignments). However, because the alleged retaliation related to the employment relationship between Petitioner and the public employer, the Board asserted jurisdiction and unanimously held that Petitioner had stated *prima facie* claims that Respondents had retaliated against him for filing grievances – the FDNY by passing over him for promotion and the Union by refusing to represent him on the promotion claim. *Fabbricante*, Interim Decision No. B-38-98 at 10–11.

In March 1998, Petitioner filed a fifth improper practice petition, Docket No. BCB-1964-98, alleging further incidents of retaliation, first, by the Union for preventing him from discussing the Board's findings in *Fabbricante*, Decision No. B-43-97 at certain Union meetings; and second, by the Department for a continuing failure to equalize overtime assignments and to consider Petitioner for promotion. The Board granted the Union's motion to dismiss on the ground that Petitioner's attempt to discuss the Board's Decision at a Union meeting was internal union business over which the Board had no jurisdiction. *Fabbricante*, Decision No. B-46-98 at 8. However, the Board unanimously found that Petitioner's claim of retaliation by the Department involved material factual disputes that should proceed to a hearing. *Fabbricante,*

Decision No. B-46-98 at 9.

Petitioner's five improper practice petitions were consolidated for purposes of hearing before a Trial Examiner. Petitioner presented his case during eight days of hearing. At the conclusion of Petitioner's case, both Respondents filed motions to dismiss.[2]

In November 2002, the Board unanimously denied the Union's motion to dismiss and found that Petitioner had presented sufficient evidence that the Union's actions concerning the overtime grievance were intended to discourage him from exercising his statutory rights and that the Union's handling of the promotion grievance, regardless of merit, was perfunctory and violated the Union's duty to process it or to explain why it would not do so. *Fabbricante*, Interim Decision No. B-39-2002 at 20.

The Board granted, in part, the City's motion to dismiss with respect to claims that supervisory personnel retaliated and discriminated against Petitioner before and during a meeting between Petitioner and FDNY's personnel director to discuss a negative performance evaluation and in its response to requests for departmental records under the Freedom of Information Law ("FOIL"). In all other respects, the Board denied the City's motion and found that Petitioner had presented sufficient evidence of discrimination and retaliation which, if unrebutted, would establish that the Department's conduct was violative of the NYCCBL. *Id.* at 21-22. The Board ordered that the hearing in the matter proceed.

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[2] While the motions to dismiss were pending, in August 2001, Petitioner filed a complaint in federal district court against the City of New York, FDNY, and certain employees, alleging violations of free speech rights, liberty and property interests, equal protection rights, and conspiracy claims under 42 U.S.C. §§ 1985(3) and 1986, as well as rights under state and city law including "whistleblower" retaliation, defamation, tortious interference with an employment relationship, negligence, and intentional infliction of emotional distress. As of the date the record in the instant case was closed, the federal claim was still pending.

In January 2003, the hearing resumed with Respondents' cases. After its conclusion, the parties submitted post-hearing briefs in March and April 2003.

BACKGROUND

Except as otherwise noted below, the uncontested evidence shows the following:

John J. Fabbricante has been employed by FDNY as an electrician since 1986. During the period covered by the improper practice petitions, he worked and continues to work in FDNY's Buildings Maintenance Division. Petitioner and other FDNY electricians are members of a bargaining unit represented by the Union which contains supervisory and as well as non-supervisory personnel.

In June 1993, Petitioner began filing grievances which alleged that supervisors in FDNY's Buildings Maintenance Division had violated Executive Order No. 7 by failing to equalize the assignment of overtime among members of the electricians' bargaining unit.[3] Petitioner complained that the method by which overtime was assigned in the Division resulted in less opportunity for him to earn overtime than members who were favored by supervisors who made the assignments. Most of the supervisors, themselves, were eligible for and did receive overtime assignments.

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[3] Executive Order ("EO") No. 7, promulgated March 26, 1990, states that "it is necessary and desirable to control overtime abuses which might arise and to equalize the apportionment of overtime among similarly-titled employees." The language in EO No. 7 is identical to EO No. 56, promulgated 14 years earlier. The earlier EO was the basis of a grievance which the Union arbitrated in 1990 on behalf of electrician and Union Shop Steward Al Somma. *Local 3, Int'l Brotherhood of Electrical Workers*, Decision No. B-59-90 (holding arbitrable a contract grievance, which arose from mandatory assignment of overtime in October 1989 and which claimed that EO No. 56 constituted a written rule of FDNY).

Division Director Roy Katz refused to accept the grievances Petitioner attempted to file in 1993 and March 1994, rejecting them on the ground that they were not submitted on a preprinted form with the shop steward's signature.[4] Katz also told Petitioner that he thought Petitioner was trying to "micromanage" his supervisor, Anthony Bianchino, and that the grievances were nothing more than a personal attack on the latter. In April 1994, Petitioner filed another assignment of overtime grievance. This time, Petitioner used a preprinted form and obtained Union Shop Steward Somma's signature on it. Katz accepted this grievance, but FDNY denied it at the lower levels of the multi-step grievance procedure.

While Petitioner was pursuing his equalization of overtime grievances, Somma told Petitioner and others that he would "sign nothing" that Petitioner presented to him and that he would use his "union clout" to stand in the way of Petitioner's attempt to have what he characterized as the "letter" grievances processed. Somma called Petitioner a "fucking letter writer" to his face and to other electricians in the shop. Petitioner filed his first improper practice petition, docketed as BCB-1672-94, in August 1994, because he was dissatisfied with the Union's failure to support his grievances and with FDNY's denial of the grievance.

Until December 1994, FDNY electricians were given lucrative overtime assignments performing heating/air-conditioning work, which allegedly was out-of-title for electricians. That month, FDNY's Office of Labor Relations ordered the assignment of so-called "heat work" to electricians to stop. Supervisor Bianchino told electricians that Petitioner was to blame for the removal of this work.

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[4] Article V (Grievance Procedure) of the collective bargaining agreement between Local 3 and the City ("Agreement") provides that a grievance may be submitted "in the form of a memorandum to the person designated for such purpose by the agency head."

That same month, Petitioner was interviewed, along with Nicholas Becaccio and another electrician, for a vacancy in the position of Supervisor of Electricians. Becaccio was chosen. When Petitioner asked Supervisor Jim Scupelitti (who, together with Katz, selected Becaccio) why he was not chosen, Scupelitti told him, "Read between the lines." Petitioner then filed his second improper practice petition, BCB-1708-94, alleging that Supervisor Bianchino and others, in retaliation for his grievances and his improper practice petition, spread rumors that Petitioner was telling departmental investigators about overtime issues in the division.

On January 5, 1995, at a shop meeting, Petitioner again spoke about overtime. Electrician Jim Campbell yelled and cursed at Petitioner for bringing up the subject. Afterwards, a number of electricians, including Campbell, gathered for coffee at a nearby diner. Some who were present, including electricians Brian Colella and Ken Dowling, heard Campbell threaten to break Petitioner's legs for bringing up the overtime issue and told Petitioner about the threat. Petitioner complained to Scupelitti, who in turn told Petitioner to submit a formal affidavit. Petitioner asked Scupelitti what sort of information should be in the affidavit and to whom it would be submitted. Scupelitti did not respond and Petitioner did not submit the affidavit.

In that same month, Brian Colella also complained about a lack of equal opportunities to work overtime. Colella called Chief of Department Donald Devine on January 11, 1995, to discuss this subject and the Chief in turn called Katz. Petitioner testified that Katz called him at home on that day to blame him for calling the Chief. According to Petitioner, it was unusual to receive a call from Katz at home and Katz was insistent in his accusation. Katz testified that he remembered getting a call from Chief Devine regarding complaints about a lack of equalization of overtime opportunities, but he could not recall whether he accused Petitioner of placing a call

to the Chief.

On January 12, 1995, Supervisor Bianchino evaluated Petitioner's work performance. Prior to that time, electrician performance had been evaluated only sporadically. Bianchino graded Petitioner's work performance as "very good" but criticized Petitioner for going over his supervisor's head about an unspecified matter and stated that Petitioner needed to improve his working relationship with supervisors. Petitioner appealed this evaluation, and FDNY's personnel director determined that the criticism was unfounded and required Bianchino to delete the comment.

During February and March 1995, Petitioner complained of continuing harassment, including: another person's opening Petitioner's mail, criticism of the way Petitioner filled out time sheets, and warnings not to use his personal letterhead with the words "Fire Department" but no departmental emblem on it.

On April 20, 1995, electricians attended a seminar on harassment in the workplace. After the seminar, as Petitioner headed down a hallway with Dowling and Colella, Colella tapped on the window of a room where Somma was meeting with Joseph Berardi and Becaccio. Somma charged out of the room accusing Petitioner of interrupting his meeting. Petitioner denied that it was he. The next day, Petitioner asked Becaccio to take action to address Somma's conduct. Becaccio told Petitioner to talk to Scupelitti, who, in turn, told him to talk to Katz, which Petitioner did on or about April 25, 1995. With Somma present, Katz told Petitioner that he would credit Becaccio's eyewitness account of the incident with Somma, that he did not need to interview any other electricians, and that he would not take action against Somma. Somma asked Petitioner how it felt "to have the world closing in," and added, "You write letters, we're going

to be writing letters on you now." When Petitioner started to respond to Somma, Katz cut him off and told Petitioner to go to Somma's house to resolve their differences over beer.

About this time, Katz recommended to Petitioner that he take his complaints to FDNY's equal employment opportunity office and internal departmental investigators. Petitioner did so. Thereafter, on several occasions, Petitioner heard fellow electricians say that he was "cooperating" with investigators and "working for" the inspector general. A rumor circulated that Petitioner was helping investigators look into overtime irregularities within the division. Petitioner experienced verbal attacks from fellow electricians as well as supervisors who heard this rumor.

On May 24, 1995, Petitioner wrote to Katz and Chief , stating that it was because of verbal attacks, as well as threats of physical injury, that he rejected a particular overtime assignment. Campbell, with whom he would have worked had he accepted this overtime assignment, had earlier told a number of members that he wanted to break Petitioner's legs because of the overtime matter. Katz forwarded a copy of Petitioner's letter to Supervisor Bianchino, who then circulated copies of the letter among members of the shop. Katz admitted at the hearing that he was aware Bianchino had circulated the letter and that the comments of other individuals in response to the letter were a source of embarrassment to Petitioner.

On June 1, 1995, Katz appointed electrician Bernard Gelman to succeed Supervisor Becaccio who left the Department following an investigation concerning his use of time and leave, overtime pay, and an alleged residency requirement violation. Within a week of Gelman's appointment, Petitioner received a note at his home with keys to a Department vehicle which he was to use for an assignment. The note said, "Remain 'loyal'! To thy supervisor and ye too shall

be rewarded the kingdom of heaven." Gelman admitted that he had been the source of the note. Gelman told electricians that Petitioner was to blame for the loss of overtime attributable to "heat work." He stated to one electrician that the loss of overtime affected his own earnings, and that he was "pissed off."

On June 19, 1995, Petitioner complained to Scupelitti about continuing comments from co-workers referring to Petitioner's May 24 letter to Katz and the Chief of the Department. Scupelitti told Petitioner that he saw nothing wrong with management's decision to circulate the letter to members of the shop. On June 20, Scupelitti ordered Petitioner to a meeting. This required Petitioner to forego a meeting he had scheduled with Chief Devine at about the same time to discuss his complaints about the conduct in the shop since May 24. When Petitioner met with Scupelitti, he was told that the meeting to which he had been summoned was cancelled because Katz and Bianchino, who were also planning to be there, could not be present.

On June 24, 1995, co-workers continued to taunt Petitioner, calling him a "rat" and "letter writer." Electrician Ray DelGaudio, in the presence of other workers, told Petitioner, "We're taking bets on when you're going to die." The City asserts that Supervisor Scupelitti attempted to investigate the death-pool remark, but it offered no further details. On June 26, Petitioner wrote to the Chief Devine, telling him that, even before they had a chance to meet again to discuss the incidents, "everyone" in the shop knew about their meeting to discuss confidential matters.

Shop Steward Somma openly criticized Petitioner's overtime grievance efforts to managers, to supervisors and to non-supervisory members of the shop. On June 30, 1995, Somma wrote to Katz about Petitioner's May 24 letter and expressed his disdain for Petitioner's

grievance activity. Somma's letter described Petitioner as having a "history" of writing "numerous, virtually meaningless letters" about "his many complaints which are invalid and pointless."

On July 11, 1995, Petitioner and Colella spoke about a job assignment. Scupelitti directed Petitioner not to discuss job assignments with other electricians. Petitioner told Scupelitti that he had observed that other electricians carry on such conversations.

Petitioner filed two additional improper practice petitions, BCB-1774-95 and BCB-1781-95, alleging continuing retaliation and discrimination. On or about February 17, 1996, Scupelitti and other electricians , including Petitioner, stopped work for a coffee break. Scupelitti asked Petitioner, "Don't you have anything to do?" Petitioner responded, "Why are you singling me out when there are 12 other guys having coffee?" Scupelitti ordered Petitioner back to work. Later that day, Scupelitti told Dowling that, in his neighborhood "they take guys like John and throw them off the roof." On March 29, 1996, Director Katz wrote to the Fire Commissioner describing Petitioner as "paranoid" and "disturbed" and stating that Petitioner made issues out of "trivial" situations. Katz later testified variously that he found all of Petitioner's complaints to be unsubstantiated, but that he did not consider Petitioner's complaints about equalization of overtime and threats by other employees as trivial, and that he believed a complaint about the assignment of men "had some validity." (Tr. 946, 951-954.)

In January 1997, Katz was promoted to Assistant Commissioner and Joseph Mastopietro succeeded him as Director. Mastropietro was aware of Petitioner's overtime-related grievances. When asked if and how his knowledge of Petitioner's grievances affected the Department's assignment of overtime to Petitioner, he responded, "It really hasn't changed the process. The

process works."

Katz had told Mastropietro that Petitioner was a "rabble rouser," "irrational," and a "character." Nevertheless, Mastropietro said he did "not have a problem" with considering Petitioner for a supervisory position if it were to become available. In February 1998, the position of supervisor of electricians became available. On the day Mastropietro was scheduled to interview Petitioner, Gelman sent Petitioner on a search across town for light bulbs, which required him to leave the job that he was originally assigned to do, which was near Mastropietro's office. Petitioner arrived on time for the interview but did not have time to change from his work clothes. Campbell, who also applied for the job, was present in a suit. Mastropietro found Petitioner, a certified Master Electrician, not qualified for the job. Campbell was chosen instead. Mastropietro admitted that Campbell did not have the requisite licenses and had not passed the requisite examinations for the supervisory position. Campbell remained in the position.

In February 1997, one month after Mastropietro took over Katz's position as Director of the Buildings Maintenance Division, Petitioner filed another grievance reiterating his claim about overtime and also failure to be promoted. Petitioner repeatedly called the Union in May 1997 to check on the progress of his grievances. Union officials Lane and Vicari failed to respond to his requests and only when Petitioner got Lane on the phone did Lane tell him that the Union would not process the promotion claim because the civil service list for the position had expired. In June 1997, Petitioner filed another improper practice petition, BCB-1913-97, alleging retaliation and discrimination as a result of his grievance activity and his filing of improper practice petitions.

In October 1997, the Board decided Petitioner's first improper practice petition in *Fabbricante*, Decision No. B-43-97. When he received the decision, Petitioner displayed the posting order in a window of his work vehicle. Subsequently, his opportunities to work overtime dropped. In December 1997, Supervisor Gelman and another electrician testified at a worker's compensation hearing concerning an injury Petitioner sustained. Gelman required Petitioner to use personal leave time to attend the hearing but did not require the other electrician to do so.

In January 1998, Gelman ordered Petitioner to remove the posting order of *Fabbricante*, Decision No. B-43-97, from the window of his departmental work vehicle.[5] Petitioner refused. Gelman ordered him to discuss the matter with Mastropietro. Petitioner asked if the meeting was a supervisory conference because if it were, he wanted Union representation. Gelman told Petitioner that he was not entitled to Union representation. Without responding to Petitioner's question concerning the nature of the meeting (although he later testified that it was a supervisory conference), Mastropietro proceeded with the meeting and threatened to take away the keys to Petitioner's work vehicle and dock him a day's pay if he refused to take down the posting order. Petitioner complied.

Petitioner was called to additional meetings with supervisors. When he questioned the need for the meetings and demanded union representation, the supervisors ended the meetings without taking or recommending disciplinary action. For example, at a February 18, 1998, meeting, which Gelman told him would be only a "shop meeting," Petitioner was questioned about a stop he had made for a phone call between assignments. When Petitioner complained to

[5] The Order in that case, issued on October 28, 1997, required that the Notice attached thereto be posted by the Union for 30 consecutive days at all locations used by the Union for written communication with unit employees.

Gelman and Mastropietro that he had not been given adequate notice and had been deprived of "due process," the supervisors declined to take any disciplinary action against him.

Other electricians who engaged in conduct that could have been the subject of disciplinary action often were not called in for questioning or were not disciplined. Petitioner testified to the following examples: verbal disrespect and threats of physical harm against a member of the Department, use of Department property and equipment for personal use and for personal financial gain, traffic violations committed with Department vehicles, displays of unauthorized literature such as bumper stickers on Department vehicles, non-emergency use of FDNY emergency radio equipment, use of a Department vehicle allegedly to subvert residency requirements, and vandalism of electrical equipment used in the fighting of fires. This evidence were not refuted by the City.

Also in 1998, Petitioner found a hangman's noose above his work area at Fort Totten, and an FDNY promotional sign ("Picture yourself here") moved from its authorized position on Petitioner's work vehicle to a position immediately in front of a rear tire. He also repeatedly found parking lot lights extinguished and his parking space blocked when returning his work vehicle to Fort Totten.

On March 23, 1998, Petitioner filed another improper practice petition, BCB-1964-98, alleging discrimination by the Department due to his grievances and improper practice petitions. Petitioner amended this petition to incorporate additional allegations of retaliation and discrimination related to his continuing pursuit of his overtime and promotion-related grievances.

In September 1998, following interlocutory motions, attempts were made to settle the improper practice cases. Petitioner was docked pay for his absence from the job to attend a

settlement meeting despite Mastropietro's assertion that he would not be docked for it.

The remedy sought by Petitioner is an order directing the Union and FDNY to arbitrate Petitioner's grievances about equalization of overtime and for FDNY to consider his application for promotion without retaliation or discrimination. Petitioner also seeks restoration of pay and leave time that were docked due to his participation in these proceedings. Petitioner further seeks an order directing the Union and the Department to cease and desist from retaliation and discrimination against him arising from his grievance activity and improper practice proceedings.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner asserts the Union violated NYCCBL § 12-306(b)(1) and (3) by discriminating and retaliating against him on account of his protected activity and by breaching its duty of fair representation with respect to his grievances.[6] Petitioner contends that the Union through its agents, including but not limited to Shop Steward Somma, not only failed to assist him but

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[6] NYCCBL § 12-306(b) provides in pertinent part:

> It shall be an improper practice for a public employee organization or its agents:
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> (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.

NYCCBL § 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 . . . .

instead discriminated and retaliated against him, and treated him in a disparate manner, by obstructing Petitioner's efforts to pursue contract grievances and by denigrating him in the eyes of unit members and supervisors as a "letter-writer." All these actions were intended to interfere with Petitioner's exercise of rights protected under NYCCBL § 12-305.

Petitioner further asserts that FDNY violated NYCCBL § 12-306(a)(1) and (3) by interfering with his protected activity and discriminating and retaliating against him because of his filing grievances and improper practice petitions.[7] Specifically, FDNY's agents interfered with Petitioner's efforts to pursue through grievances the equalization of overtime as required under EO No. 7, by refusing to accept his grievances based on technical objections with no contractual basis; by leaking Petitioner's overtime complaints to other unit employees whose accrual of overtime assignments might be adversely affected by Petitioner's grievances; and by repeatedly belittling Petitioner and his grievances to other members of the bargaining unit. FDNY, through its agents, also discriminated and retaliated against Petitioner because of his grievance activity and his filing improper practice petitions challenging FDNY's actions that interfered with those efforts. The retaliation included the spreading of false accusations that Petitioner informed investigators about such issues as the out-of-title "heat work"; the

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

> It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> * * *
>
> (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;
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> * * *

distribution to co-workers of his written complaints to management, which resulted in verbal abuse, and threats of personal injury to Petitioner; and the failure to act to penalize such abuse and threats of which agents of FDNY were aware. Further, Department supervisors treated Petitioner in a disparate manner by threatening to discipline him for allegedly violating rules regarding on-the-job conduct, work vehicle operation, and time-and-leave, while ignoring violations by other unit members in the same circumstances; by docking Petitioner's pay and leave bank, but not that of others, for time spent in the conduct of business regarding his grievance and improper practice claims; by failing to consider his applications for supervisory positions without discrimination while considering applications of less qualified individuals who openly criticized Petitioner's grievance activity; and by rejecting Petitioner's continuing demand for equalization of overtime assignments.

Union's Position

The Union argues that the subjects of Petitioner's grievances – assignment of overtime and selection for promotion – are management prerogatives which are not grievable. Therefore, there can be no duty to pursue these claims, and the Board lacks jurisdiction to order the Union to arbitrate Petitioner's claims.

The Union takes exception to the Board's earlier decisions in cases involving Petitioner. First, the Board's finding in favor of Petitioner in *Fabbricante*, Decision No. B-43-97, was improper because the Board did not hold a hearing. The Board "merely" issued a determination based upon the "assumption" that Petitioner's "evidence" was accurate. Also, the Union contends that it was deprived of an opportunity to challenge that determination in court because the Board did not seek enforcement of its order.

Furthermore, the Union claims that the Board's decision in *Fabbricante*, Interim Decision No. B-39-2002, was tainted by findings based upon "non-evidence" and "mis-statements." The Union contends that improper practice petitions, other pleadings and attached exhibits should not be considered evidence. Moreover, according to the Union, the Board did not properly consider the Union's arguments that (a) Petitioner's contract grievances equate with whistleblower complaints and, thus, are not protected under the NYCCBL; and (b) the improper practice petitions as well as the Board's ruling in *Fabbricante*, Interim Decision No. B-39-2002, unlawfully seek to enforce mayoral regulations with regard to overtime and promotion, and such regulations are not grievable under the parties' Agreement. The Union also contends that the Board misinterpreted the contract claim which the Union arbitrated on Somma's behalf. While Petitioner's grievances are about overtime, Somma's case was disciplinary in nature since he had received a warning letter and, in the private sector, warning letters are "often" the first step in a process culminating in termination. Therefore, Somma's case does not constitute evidence that the Union ever grieved the issue of overtime.

The Union further argues that in *Fabbricante*, Interim Decision No. B-39-2002, the Board incorrectly determined that Somma retaliated against Petitioner because of the latter's grievance "letters." *Id*. at 19. The Union contends that those "letters" were not grievances at all but merely letters raising "whistleblower" claims. Finally, the Union claims that the Board made no credibility findings with respect to two management employees whom Petitioner called to testify as hostile witnesses.

The Union also contends as well that the Trial Examiner deprived it of due process by her directive that Respondents produce a list of witnesses and their expected dates of appearance

before the resumption of the hearing in January 2003. The Union argues that this directive imposed "*ultra vires* restrictions" on Somma's "ability" to testify. Moreover, the Union was further deprived of due process by the Trial Examiner's evidentiary rulings which were *ultra vires*, and also "inconsistent." The Trial Examiner prohibited the Union from eliciting testimony about Petitioner's "whistleblower" litigation in federal court while permitting (a) Petitioner's testimony that Supervisor Becaccio parked an FDNY vehicle on Somma's private property to avoid detection of Becaccio's alleged unlawful, out-of-city residence; (b) Katz's testimony about his response to allegations of vandalism of Department property ("supply depots"); and (c) Petitioner's testimony about his complaints concerning FDNY internal investigations, workers' compensation proceedings, and safety complaints. In addition, the Trial Examiner did not allow testimony on the merits of Petitioner's overtime claim. The Union argues that the topics on which the Trial Examiner precluded the Union from eliciting testimony were identical to those topics which the Trial Examiner allowed Petitioner to elicit testimony. Accordingly, the Union elected not to produce Somma or any other witnesses of its own, calling only Petitioner.

As to the substance of the improper practice claims, the Union argues that even if the Board possesses jurisdiction, Petitioner has failed to produce evidence that Somma retaliated against Petitioner for filing any grievances. In any event, the Union contends that in *Fabbricante*, Interim Decision No. B-38-98 at 10, this Board absolved the Union of any duty to process Petitioner's grievance of February 21, 1997, concerning equalization of overtime.

City's Position

The City submits that Petitioner has failed to present evidence sufficient to demonstrate that any action by FDNY agents was taken for the purpose of interfering with Petitioner's rights

under NYCCBL § 12-305. The actions of supervisors complained of by Petitioner arose from personal animosity toward Petitioner which grew over the years and is not related to Petitioner's grievances or improper practice petitions. Antipathy between a superior and a subordinate, in and of itself, does not constitute a violation of the NYCCBL. 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." Each electrician and supervisor referred to during the course of these proceedings is or was a member of Petitioner's Union. Petitioner has failed to demonstrate that FDNY encouraged, authorized, or ratified any objectionable conduct by any of electricians or supervisors.

Members of management made efforts to assist Petitioner, and these efforts cannot be characterized as interference with his right to engage in protected union activity. Katz met with Petitioner about his complaints about harassment and retaliation and referred Petitioner to FDNY's equal employment opportunity office to address the harassment issue and to FDNY's Bureau of Investigations and Trials to address other complaints. Mastropietro, who succeeded Katz as director of the division, also met with Petitioner on these issues and addressed them as they arose.

The City contends, for example, that when Petitioner complained to Katz about threats of physical injury, Petitioner refused to tell Katz who had made the threats. Katz' March 29, 1996, letter to the Fire Commissioner, in which Katz referred to Petitioner's state of mind, was merely personal. His remarks about Petitioner resulted from years of meetings in which management found that the majority of issues which Petitioner brought up were either petty or

unsubstantiated. Issues that had merit were addressed by management and remedied. The record demonstrates that Petitioner's overtime assignments were comparable to those of other electricians both in terms of amount and types of assignments. Petitioner refused assignments on occasion.

In conclusion, Petitioner has misconstrued the rights to which he is entitled and has failed to substantiate claims arising under the NYCCBL. He has not shown that conduct towards him by any member of FDNY management was motivated by anti-union animus.

DISCUSSION

I. Appeal from Trial Examiner's Rulings

As a preliminary matter, we find that the Union's exceptions to the Trial Examiner's evidentiary and discovery rulings made during the course of the hearing are not meritorious. As to the evidentiary rulings concerning testimony about Petitioner's pending litigation in federal court, the complaint in that litigation was admitted into evidence, without objection, as a Union exhibit. Counsel for the Union then asked the witness, "Mr. Fabbricante, are the statements in this document, this complaint, true and accurate?" (Tr. 1457.) Counsel for Petitioner objected to the question on the ground that any information about Petitioner's whistleblower claim was irrelevant to the improper practice claims in the instant matter and might be prejudicial to Petitioner's federal claims. Counsel for the City joined in the objection, asserting that any evidence concerning the whistleblower claim would be outside the scope of this improper practice proceeding. The Trial Examiner sustained the objections. On review of the record, we find that the ruling sustaining the objections was correct. Even if the claims in the federal case

arose from the same factual circumstances as those in the instant proceedings, they are based on the assertion of legal rights that are entirely different from the claims asserted here. Petitioner has consistently and clearly cited the improper practice provisions of the NYCCBL as the source of his rights in the proceedings before us. This Board has exclusive original jurisdiction over these claims, pursuant to NYCCBL § 12-309(a)(4);[8] it does not have jurisdiction over the statutory and constitutional claims raised in the federal court action. For this reason, evidence and testimony about the federal claims was irrelevant.

Moreover, the Union's contention that Petitioner's complaints about overtime were "whistleblower" complaints, and that any abuse and retaliation that he experienced was directed toward his "whistleblower" activity, is unavailing. Since we find, as will be explained below, that Petitioner's pursuit of equalization of overtime grievances was protected activity under NYCCBL § 12-305, the question whether his conduct also qualifies as "whistleblower" activity under some other statute is irrelevant to our determination of this matter. In any event, Counsel for the Union was permitted to ask questions about specific matters referred to in the federal complaint that were relevant to the instant case, so we find that no prejudice to the Union resulted from the Trial Examiner's ruling.

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[8] NYCCBL § 12-309(a) provides, in pertinent part:

> The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
>
> * * *
>
> (4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders . . . .

Regarding the Trial Examiner's evidentiary rulings precluding testimony about the "merits" of Petitioner's overtime claim, we observe that what the Union characterizes as the "merits" really involves the issue of whether the equalization of overtime claim is grievable and/or arbitrable. The Union has argued throughout these proceedings that assignment of overtime is a management prerogative and is not grievable, so that the Union did not have a duty to pursue Petitioner's grievances. We reject that argument on the ground that the Union has argued previously, and this Board has held, that the equalization of overtime provisions of EO No. 56 arguably limit management's discretion and provide a basis for arbitration of a dispute over its application. *Local 3, Int'l Brotherhood of Electrical Workers*, Decision No. B-59-90. The equalization of overtime provisions of EO No. 7 relied on by Petitioner are identical to those of EO No. 56. Therefore, the Trial Examiner was correct in refusing to permit testimony on this subject because the Union's attempt to introduce such evidence was inconsistent with its previous position as well as a prior ruling of this Board, and could not have be made in good faith.

The Union's argument that it was deprived of due process because the Trial Examiner required Respondents to name their witnesses and expected dates of appearance before the hearing resumed in January 2003 is without merit. The Trial Examiner's directive was squarely within her discretion under the Rules of the Office of Collective Bargaining to control the receipt of evidence and to compile a record.[9] The production of witness lists is commonplace in legal

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[9] Section 1-10(c), Rules of the City of New York, Title 61, Chapter 1, provides:

> During the course of any hearing, the trial examiner, in addition to the other powers specifically conferred upon him/her, and subject to the limitations imposed upon him/her by these rules, shall have full authority to control the conduct and procedure of the

proceedings. Throughout the course of the proceedings, the Trial Examiner requested that the parties identify their witnesses and provide the dates on which they would appear. Counsel for Petitioner and the City complied, but Counsel for the Union repeatedly refused. The Trial Examiner's directive was a reasonable attempt to conduct the proceedings as expeditiously and efficiently as possible. The Union does not explain how this ruling violated due process, and it has not shown that it suffered any prejudice as a result thereof.

Finally, we reject the Union's contention that it was deprived of due process and an opportunity to appeal the Board's determination in an earlier case, *Fabbricante*, Decision No. B-43-97, merely because the Board did not seek judicial enforcement of that Decision and Order. The Union wilfully failed to file an answer or any other papers in that case. The Board's Decision and Order was duly served on the Union. The Union has offered no explanation as to why, if it disputed that decision, it did not seek review of that final determination in State Supreme Court under Article 78 of the Civil Practice Law and Rules, as authorized by law.[10]

> hearing and the record thereof, to admit or exclude testimony or other evidence, and to rule upon all motions and objections. It shall be the duty of the trial examiner to see that a full inquiry is made into all the facts in issue and to obtain a complete record of all facts necessary for a fair determination of the issues. The trial examiner shall have the right to call and examine witnesses, to issue subpoenas, to direct the production of papers or other matter present in the hearing room and to introduce documentary or other evidence, except as may otherwise be limited herein.

[10] NYCCBL § 12-308(a) provides, in pertinent part:

> Any order of the board of collective bargaining or the board of certification shall be (1) reviewable under article seventy-eight of the civil practice law and rules upon petition filed by an aggrieved party within thirty days after service by registered or certified mail of a copy of such order upon such party, and (2) enforceable by the supreme court in a special proceeding, upon petition of the board of collective bargaining, board of certification or any aggrieved party. . . .

This Board is not obliged to commence a court proceeding for the purpose of giving a dissatisfied party a forum to argue its appeal. The Union, having failed to commence an appeal within the time permitted by law, cannot be heard to challenge a six year old final determination collaterally in the present case.

II. Merits of Petitioner's Claims

We now turn to the substantive issues of this case, which are whether the Union breached its duty of fair representation by failing to represent Petitioner in a fair and non-arbitrary manner and whether the Union and the City interfered with Petitioner's protected activity and retaliated against him because of that activity. This Board finds that the Petitioner has sustained his burden of proving that both the Union and the City committed acts that constitute improper practices in violation of the NYCCBL.

In denying the Respondents' motions to dismiss at the close of the Petitioner's case, *Fabbricante*, Interim Decision No. B-39-2002, this Board determined that Petitioner had presented sufficient evidence which, if unrebutted, would warrant a finding that the Union representatives' actions with regard to his claims about equalization of overtime were taken for the purpose of discouraging Petitioner from exercising his statutory rights to pursue grievances, and that the Union's actions lacked the requisite good faith, in violation of the duty of fair representation, because it had not treated similarly situated unit members in a non-discriminatory fashion. *Fabbricante*, Interim Decision No. B-39-2002 at 20.

We granted the City's motion in part, only as to claims relating to a meeting between Petitioner and FDNY's personnel director to discuss a negative performance evaluation, and concerning FDNY's response to Petitioner's FOIL requests. Denying the City's motion as to all

other claims, we held that Petitioner had presented sufficient evidence of discrimination and retaliation by FDNY which, if unrebutted, would establish that the Department's conduct was violative of the NYCCBL. *Id.* at 21-22. We directed that the hearing resume so that the respondents could attempt to rebut Petitioner's evidence. Now, on a full record, and against the backdrop of our prior rulings in this matter, we consider the Petitioner's claims.

A. Claims against the Union

Pursuant to NYCCBL § 12-306(b)(1), it is an improper practice for a public employee organization "to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter . . . ." These include the right to participate in union activities. Filing grievances is one such protected activity. *Civil Service Bar Association*, Decision No. B-24-03 at 12; *Doctors Council*, Decision No. B-12-97.

Pursuant to NYCCBL § 12-306(b)(3), it is an improper practice for a public employee organization "to breach its duty of fair representation to public employees under this chapter." The duty of fair representation requires a union to refrain from arbitrary, discriminatory and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements. *Yovino*, Decision No. B-40-2002 at 9; *Hug*, Decision No. B-5-91 at 14. While a union is not obligated to advance every grievance, *see Keyes*, Decision No. B-32-86 at 7, it has "an affirmative duty to inform a member *whether or not* it will pursue a grievance on his behalf." *Minervini*, Decision No. B-29-2003 at 15; *see Social Service Employees Union, Local 371,* 11 PERB ¶ 3004 (1978). The reason for a union's failure to process a grievance must not be arbitrary, discriminatory or in bad faith. *See Urban*, Decision No. B-20-97 at 9. 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. *Yovino*, Decision No. B-40-2002 at 9; *Wooten*, Decision No. B-23-94 at 19. Petitioner has the burden of pleading and proving that the Union has breached its duty of fair representation. *Yovino*, B-40-2002 at 9; *Barry*, Decision No. B-38-2001 at 8.

For its defense, the Union called only Petitioner to testify and presented no other witnesses to refute or rebut the evidence adduced by Petitioner. We find that the uncontested evidence and testimony shows that Union Shop Steward Somma interfered with and coerced Petitioner in the processing of his grievances concerning equalization of overtime. Examples of this interference include Somma's initial refusal to sign Petitioner's grievances, his statement to Petitioner and others that he would use his "union clout" to stand in the way of Petitioner's attempt to have his grievances processed, his repeatedly denigrating Petitioner and his grievances (which he characterized as "letters)" in front of other unit employees and supervisors, and his falsely accusing Petitioner of interfering with the conduct of Somma's business affairs.

Petitioner has characterized some of these acts as constituting "retaliation" as well as interference and coercion. We note that NYCCBL § 12-306(b)(1) does not use that term and that, unlike the employer improper practice provisions of § 12-306(a)(3), the employee organization improper practice provisions of NYCCBL § 12-306(b) do not include a separate offense of discrimination, which would encompass a claim of retaliation. Instead, as explained above, discriminatory conduct by a Union, if proven, constitutes a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3).

The evidence shows that the Union discriminated against Petitioner by refusing to process

his grievance concerning equalization of overtime not long after it arbitrated a claim for Somma based on identical language contained in a previously issued executive order on the same subject, *i.e.*, equalization of overtime. The Union's successful defense to the arbitrability challenge in Somma's case belies its claim here that the subject of equalization of overtime is solely a matter of management prerogative.

In the earlier case, the Union pursued a grievance on behalf of Somma, arguing that FDNY violated the executive order which required equalization of overtime by *forcing* Somma to perform overtime work when there were other employees available who were not offered the opportunity to work overtime. By contrast, in the instant case, Petitioner claims FDNY violated the executive order requiring equalization of overtime by failing to offer him opportunities to perform overtime. In Somma's case, the Union specifically argued that identical language in the executive order referred to opportunities to work overtime. When the City challenged the arbitrability of Somma's grievance, the Union argued that the interpretation and application of the language of the executive order was indeed appropriate for arbitral review, and this Board agreed. *Local 3, Int'l Brotherhood of Electrical Workers*, Decision No. B-59-90.[11] We find that the Union's refusal to process similar equalization of overtime claims by Petitioner, in the circumstances of this case, is persuasive evidence of the Union's disparate and discriminatory treatment of Petitioner.

The Union never took any action to advance Petitioner's grievance over his failure to be

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[11] The arbitrator did not resolve the question of interpreting the executive order but instead decided the case by finding that a conflict in FDNY's written rules precluded the Department from compelling Somma to work overtime. *Matter of Local 3, IBEW and City*, No. A-3435-90 (Philip Ross, Arbitrator, April 12, 1991).

considered for promotion. However, the record shows that the Union did inform Petitioner, within a month of his inquiring about the status of the promotion grievance, that the Union would not pursue it. The reasons given, that the civil service list for the position had expired, and that promotions are matters of management right which are not grievable, are not arbitrary or discriminatory, and there is no showing of bad faith as to this decision by the Union. Accordingly, we do not find that the Union breached its duty of fair representation as to the promotion grievance.

We find, therefore, that Petitioner has proved that the Union breached its duty of fair representation in the processing of his grievances concerning equalization of overtime, and that the Union also interfered with and coerced Petitioner in his pursuit of those overtime grievances.

B. Claims against the City

Pursuant to NYCCBL § 12-306(a)(1), it is an improper practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. . . ." As stated above, the protected § 12-305 rights include the filing of grievances. *Civil Service Bar Association*, Decision No. B-24-03 at 12; *Doctors Council*, Decision No. B-12-97. In addition, NYCCBL § 12-306(a)(3) provides that it is an improper practice for a public employer to "discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization . . . ."

When a petition asserts that a public employer has discriminated or retaliated against an employee for engaging in protected activity, this Board uses the standard enunciated in *City of Salamanca*, 18 PERB 3012 (1985), which we adopted in *Bowman*, Decision No. B-51-87. This

standard requires that a petitioner 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 attempt to refute petitioner's showing or to demonstrate legitimate business motives that would have caused the employer to take the action complained of even in the absence of the protected activity. *Rivers*, Decision No.. B-32-2000, at 9.

In *Fabbricante*, Interim Decision No. B-39-2002, we held that the testimony and evidence adduced by Petitioner, if not rebutted, established a *prima facie* showing of discrimination and retaliation by FDNY. We found that the evidence demonstrated that Petitioner's supervisors and other FDNY agents were annoyed by his grievance activity concerning overtime and promotion and that, consequently, they denigrated his work performance, belittled him and his grievances to other unit employees, denied him workplace opportunities with respect to work assignments and promotion, and docked his leave and pay banks to attend work-related meetings and hearings while excusing others members of the unit to attend the same proceedings. In addition, they threatened, cursed, and screamed at him and failed to prevent or to penalize such verbal abuse and threats by unit employees of which agents of FDNY were aware.

In response to this evidence, the City, admitting that antipathy between members of the Department and Petitioner existed, argues, however, that such antipathy between a superior and a subordinate, alone, does not constitute a violation of the NYCCBL. We find that the case on which the City relies, *Echevarria*, Decision No. B-28-89 is factually inapposite. In *Echevarria* the petitioner and his supervisor were employees involved in an inter-union dispute regarding

representation of a bargaining unit. The record showed that the employer attempted to maintain a neutral position in that dispute. In the circumstances of that case, the evidence did not support a finding that the acts of the supervisor were chargeable to the employer. *Id.* at 12. Such is not the case in the instant matter. Here, the uncontroverted evidence shows that Division Directors Katz and Mastropietro, agents of FDNY, engaged in retaliatory and discriminatory conduct themselves and were aware of and failed to take action to stop the improperly motivated conduct of Petitioner's immediate supervisors. We find, therefore, that the City's argument on this point is unavailing.

There is no dispute that Petitioner engaged in extensive grievance and improper practice filing and that supervisors and division directors knew about this activity. Thus, Petitioner has established the first element of the *Salamanca* standard. Accordingly, our analysis focuses on the second element of that test, the issue of improperly motivated conduct.

The City addresses Petitioner's claims of retaliation and discrimination by referring to the overtime hours that he worked and the nature of the work that he performed. This pertains to the merits of Petitioner's grievances and is not properly before us. The ultimate merit of the grievances, or lack thereof, is irrelevant to the question of whether there was retaliatory or discriminatory conduct by the Department's agents that was motivated by Petitioner's pursuit of the grievances.

The City contends that Petitioner's grievance activity had no effect on the conduct of its supervisors. The City's sole direct witness,[12] Director Joseph Mastropietro, testified that his

[12] The City had intended to also call Roy Katz as a witness. Katz had testified as a hostile witness for Petitioner and was subject to cross-examination by the City, but was not available for the City's direct case due to his untimely death.

knowledge of Petitioner's grievances did not affect the assignment of overtime to Petitioner. Nevertheless, the record demonstrates that Department agents had knowledge of on-going retaliation by both supervisors and co-workers because of Petitioner's overtime complaints. When Petitioner declined an overtime assignment on May 24, 1995, FDNY was on notice that he did so because he would be working directly with electricians who had openly derided him over his grievances and threatened him with physical injury if he continued to pursue those grievances. Petitioner's letter of May 24, 1995, to Katz and the Chief of the Department, describing retaliatory derision by other members of the shop due to his grievance activity, is a matter of record. This is the same letter that Katz admitted sending to Supervisor Bianchino, who circulated copies to unit members working in the same shop.

The City also points to testimony by Katz that he "always found" Petitioner's complaints to be unsubstantiated. (Tr. 948.) We find that Katz's own testimony is internally inconsistent. At other points in his testimony, Katz stated that he did not consider Petitioner's complaints about equalization of overtime and threats by other employees as trivial, and that he believed Petitioner's complaint about the assignment of personnel "had some validity." (Tr. 946, 952.)

The record further shows that Katz's and Mastropietro's responses to Petitioner's complaints about his mistreatment by other members of the shop, including supervisors, were tepid and ineffectual. These managers failed to admonish those responsible or otherwise to prevent the continuation of the verbal and physical threats that Petitioner brought to their attention. Their inaction supports Petitioner's contention that the Department condoned the threats and treated him in a disparate and discriminatory manner.

We find it significant that when Petitioner wrote to Katz and Chief Devine to complain

about verbal attacks and threats of physical injury that caused him to decline a particular overtime assignment, Katz sent a copy of Petitioner's letter to Supervisor Bianchino, who then circulated the letter among Petitioner's fellow employees in the shop. Katz admitted that this happened, and that he was aware that the comments of employees in response to the letter which Bianchino circulated caused embarrassment to Petitioner. (Tr. 952-953.) We find this incident strikingly similar to one we considered in *Committee of Interns and Residents*, Decision No. B-26-93, *enforced sub nom*. *Committee of Interns and Residents v. Dinkins*, No. 127406 (Sup. Ct. N.Y. Co. Nov.29, 1993), in which a supervisor made copies of a grievance, distributed it to bargaining unit employees, and commented to the employees that the grievants were attempting to use the Union to cover up their deficiencies. We found that the distribution of the grievance sent a clear message to employees that filing grievances would have a deleterious effect on their standing in the agency and that it had "a predictably chilling effect" on employees' participation in protected union activity. *Id*. at 46-48. We held that this conduct was inherently destructive of important employee rights. *Id*. at 47. In the present case, given all of the evidence concerning the verbal abuse to which Petitioner was subjected, we find that Bianchino's circulation of Petitioner's letter similarly had a "predictably chilling effect" and could have been intended only to discourage Petitioner from pursuing his grievances.

Other testimony presented at the hearing also belies the City's argument that supervisors and managers responded in an appropriate and non-discriminatory manner to each of Petitioner's complaints. Though Petitioner was threatened with disciplinary action on several occasions, the City offered no evidence that individuals who harassed and threatened him were reprimanded or disciplined in any way.

For example, starting in 1994 and continuing thereafter, Supervisor Bianchino repeatedly told members of the shop that Petitioner was to blame for the loss of overtime work when FDNY's OLR curtailed the "heat work." Bianchino also spread rumors through the shop that Petitioner was acting as an agent of departmental investigators concerning allegedly improper overtime assignments. The City offered no evidence that FDNY ever acted to stop Bianchino from making these remarks which, the record shows, were responsible for inciting other members of the shop to act out specifically against Petitioner.

Since 1995, Supervisor Gelman openly blamed Petitioner for the loss of overtime "heat work." The record is replete with references to Gelman's negative comments about Petitioner's pursuit of overtime-related grievances. The City offered no evidence that FDNY sought to stop Gelman from making such remarks, which, the record shows, also incited members of the shop to harass Petitioner.

In 1995 electrician Ray DelGaudio told Petitioner that he and other tradesmen were taking bets on when Petitioner would die, and he and others made derogatory remarks derived from their knowledge of Petitioner's May 24, 1995, letter to Katz and Devine. The City acknowledged investigating this incident but offered no testimony or other evidence that supervisors and managers disciplined anyone. The City also offered no testimony to dispute Petitioner's contention that Supervisor Scupelitti, the very person FDNY assigned to investigate the incident, told other electricians during a discussion about Petitioner that, in the neighborhood from which he comes, disfavored people are thrown from rooftops.

In 1998 Petitioner found a hangman's noose and a threatening sign in his work location. He also repeatedly found parking lot lights extinguished and his parking space blocked when

returning his work vehicle. Other electricians did not experience those pranks. The City was informed of these problems but offered no evidence that FDNY addressed this conduct.

The record also belies the City's argument that Petitioner's complaints about retaliation and discrimination were merely the result of "interpersonal" problems that Petitioner had with his colleagues. Even though there may have been personal animosity between the workers, the testimony establishes that the City's failure to act on Petitioner's claims about equalization of overtime violated the NYCCBL's prohibition against retaliation for protected activity.

In a letter dated March 29, 1996, to the Fire Commissioner, Katz complained that Petitioner was "paranoid" and "disturbed" and that he complained constantly about "trivial" issues, all of which Katz later testified he found to be unsubstantiated. The letter was written on official FDNY letterhead in Katz's capacity as a member of management. We cannot agree with the City's contention that this represented Katz's unofficial, personal opinion about Petitioner. The City also does not explain the inconsistency between that letter and Katz's testimony that some of Petitioner's complaints, in fact, had merit or validity. (Tr. 946, 951-54.)

The City's attempt to counter Petitioner's claim that he was not seriously considered for a supervisory position due to retaliation for his grievance activity is unavailing. Director Mastropietro testified that while his own supervisor, Katz, told him he considered Petitioner a "rabble rouser," "irrational," and unfit for a supervisory position, Mastropietro himself would "not have a problem" with recommending Petitioner for a supervisory position if he were otherwise qualified for the job. But Mastropietro's claim that he bore no animosity toward Petitioner is not convincing. When Mastropietro interviewed Petitioner, a licensed master electrician with a "very good" performance evaluation, for a supervisory position in February

1998, he found Petitioner unqualified, but he failed to offer any objective basis for this conclusion. In contrast, electrician Campbell, whom Mastropietro selected, did not have the requisite licenses, had not passed the requisite examinations, and was known to have threatened Petitioner. Although there is no evidence whether certification as a master electrician was a relevant qualification for a supervisory position in the Department, the selection of Campbell over Petitioner, without further explanation, casts doubt on Mastropietro's motive for selection.

We find that the City has not succeeded in rebutting Petitioner's evidence of discrimination and retaliation. We need not reach the question whether the City was motivated by an independent legitimate business reason, as none has been asserted. Therefore, we hold that Petitioner has sustained his claims that agents of the FDNY retaliated and discriminated against him because of his grievances concerning equalization of overtime and improper practice petitions.

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 petitions, BCB-1708-94, BCB-1774-95, BCB-1781-95, BCB-1913-97, and BCB-1964-98, filed by John J. Fabbricante, be, and the same hereby are, granted, to the extent set forth in this decision; and it is further

ORDERED, that the Union and its agents shall cease and desist from retaliation and discrimination against Petitioner with respect to his pursuit of contractual grievances concerning equalization of overtime and with respect to his filing improper practice petitions; and it is further

ORDERED, that the Union shall process, through the contractually provided grievance procedure, Petitioner's grievances with respect to equalization of overtime predicated on Executive Order No. 7, and any subsequent Executive Order or Mayoral Directive pertaining thereto; and it is further

ORDERED, that the Union shall, at Petitioner's discretion, either represent Petitioner in the presentation of said contractual grievance with respect to equalization of overtime, or pay the reasonable and necessary cost of legal representation for Petitioner, throughout the grievance steps and arbitration of said grievance; and it is further

ORDERED, that the Department shall consent to the processing through arbitration of the overtime contractual grievances which are the underlying subject of these instant improper practice petitions and over which we retain jurisdiction in the event that an apportionment of damages is necessary; and it is further

ORDERED, that the Department and its agents shall cease and desist from retaliation and discrimination against Petitioner with respect to his pursuit of contractual grievances concerning equalization of overtime and with respect to his filing improper practice petitions; and it is further

ORDERED, that the Department shall, without retaliation or discrimination, consider Petitioner for promotion to any supervisory positions for which he is qualified as they become available; and it is further

ORDERED, that the Union and the Department shall post the attached notice for no less than thirty days, at all locations used by the Union and by the Department for written communication with unit employees.

Dated: October 30, 2003
New York, New York

GEORGE NICOLAU
MEMBER

CAROL WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

VINCENT BOLLON
MEMBER

ERNEST F. HART
MEMBER

M. DAVID ZURNDORFER
MEMBER

NOTICE

TO

ALL EMPLOYEES

PURSUANT TO THE DECISION AND ORDER OF THE

BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK

and in order to effectuate the policies of the

NEW YORK CITYCOLLECTIVE BARGAINING LAW

We hereby notify:

All employees that Local 3, International Brotherhood of Electrical Workers, and the New York City Fire Department committed improper practices in the cases of Fabbricante v. Local 3, IBEW, & FDNY, BCB-1708-94, BCB-1774-95, BCB-1781-95, BCB-1913-97, and BCB-1964-98.

It is hereby:

ORDERED, that the Union and its agents shall cease and desist from retaliation and discrimination against Petitioner with respect to his pursuit of contractual grievances concerning equalization of overtime and with respect to his filing improper practice petitions; and it is further

ORDERED, that the Union shall process, through the contractually provided grievance procedure, Petitioner's grievances with respect to equalization of overtime predicated on Executive Order No. 7, and any subsequent Executive Order or Mayoral Directive pertaining thereto; and it is further

ORDERED, that the Union shall, at Petitioner's discretion, either represent Petitioner in the presentation of said contractual grievance with respect to equalization of overtime, or pay the reasonable and necessary cost of legal representation for Petitioner, throughout the grievance steps and arbitration of said grievance; and it is further

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Dated: October 30, 2003

Local 3, International Brotherhood of Electrical Workers
(Union)

Posted by: _____
(Title)

Fire Department of the City of New York
(Employer)

Posted by: _____

(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.