Howe, 77 OCB 32 (BCB 2006)

[Decision No. B-32-2006] (IP) (Docket No. BCB-2523-05).

Summary of Decision: Petitioner alleged that ACS interfered with his statutory rights, discriminated and retaliated against him, and unilaterally changed working conditions. In addition, Petitioner alleged that the Union breached its duty of fair representation when it failed to file grievances on his behalf concerning these complaints about ACS. The City claimed that most of Petitioner's claims are untimely and that he: lacks standing to bring a claim for unilateral change in working conditions; failed to prove a *prima facie* claim of retaliation and/or discrimination; and has not demonstrated that the Union violated its duty of fair representation. The Union alleged that it acted within its discretion in handling Petitioner's allegations against ACS, that Petitioner failed to demonstrate that the Union acted in an arbitrary or discriminatory manner; and his claims are time barred by the statute of limitations. The Board found that many of the Petitioner's claims are untimely and the remaining claims do not establish any violation of the NYCCBL. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

ROYDEL HOWE,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, LOCAL 1407, THE CITY OF NEW YORK and THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

DECISION AND ORDER

On December 5, 2005, Roydel Howe, a member of District Council 37, AFSCME, Local

1407 ("Union"), filed a verified improper practice petition against the City of New York, the New York City Administration for Children's Services ("City" or "ACS"), and the Union. Petitioner alleges violations of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (3) and (5) against ACS and violations of § 12-306(b)(3) against the Union. Petitioner claims that ACS, *inter alia* interfered with his statutory rights by restraining his performance of his duties as a shop steward; harassed, discriminated and retaliated against him; and unilaterally changed Petitioner's working conditions. In addition, Petitioner alleges that the Union breached its duty of fair representation when it failed to file grievances on his behalf. Then, on February 1, 2006, Petitioner filed and amended petition that alleges retaliation and discrimination claims solely against ACS.

In response, ACS claims that most of Petitioner's claims are outside the four month statute of limitations; Petitioner lacks standing to bring forth a claim under NYCCBL § 12-306(a)(5); no *prima facie* claim of retaliation and/or discrimination has been pleaded; and Petitioner has not demonstrated that the Union violated its duty of fair representation. The Union alleges that it acted within its lawful discretion in handling Petitioner's allegations against ACS; Petitioner failed to demonstrate that the Union acted in an arbitrary or discriminatory manner; and Petitioner's claims are time barred by the statute of limitations.

As a preliminary matter, we find many of Petitioner's claims which predate the four month statute of limitations are untimely. We also find that Petitioner's remaining claims failed to demonstrate that ACS interfered with, harassed, retaliated and/or discriminated against Petitioner. We further find that Petitioner lacks standing to allege an improper practice based on unilateral changes in working conditions. In addition, we find that the Union did not act arbitrarily or

capriciously, and thus no violation of its duty of fair representation occurred. Accordingly, all of Petitioner's claims are dismissed in their entirety.

BACKGROUND

Petitioner began his public employment in 1981, when he was hired into the title Accountant by the Office of the Comptroller. In 1985, Petitioner voluntarily transferred to the Human Resources Administration ("HRA") and moved into the title of Associate Accountant. In 1995, Petitioner moved within HRA into the Technical Assistance Unit ("TAU"). A year later, ACS was formed and TAU was one of the divisions that was moved from HRA to ACS. Shortly thereafter, TAU became the Fiscal Support Unit ("FSU").

In October 2001, FSU moved to 66 John Street. As a result of the move, Petitioner was placed at a work station that was adjacent to another ACS employee's work station. According to Petitioner, this employee disrupted the work environment by playing music at his desk at a loud volume, singing, talking and laughing loudly at his desk, and by speaking on the phone regarding non-ACS matters. Petitioner further stated that this employee was extremely abusive to Petitioner and other ACS employees, would regularly scream at them, would insist that other employees not eat lunch at their desks, and would vandalize other employees' desks. Petitioner asserted that, as a result of this behavior, he and other ACS employees lodged a series of complaints with their supervisors against this allegedly disruptive employee.[1]

In January 2002, Petitioner was moved to a different work station. However, according to Petitioner, he was now only five feet away from this employee, who continued to be a nuisance.

[1] It is undisputed that Petitioner became a Shop Steward for the Union within ACS.

According to Petitioner, over the course of the next year and a half, his complaints, as well as those lodged by his fellow employees, were ignored by the supervisors. In June 2003, as a result of the supervisors' inaction, Petitioner began requesting assistance from the Union. In December 2003, in response to Petitioner's inquiries and correspondence, Barbara Terrelonge, a Council Representative to the Union, spoke with Bernard Gold, the Director of FSU, on behalf of Petitioner. According to the record, Council Representative Terrelonge requested that Director Gold investigate Petitioner's claims concerning the allegedly disruptive employee. (*See* Union Answer, Terrelonge Affidavit, Exhibit A.)

Over the course of the next several months, Petitioner corresponded with the Union provided documentation in support of his complaints. Also according to the record, the Union communicated with ACS, provided the agency with supporting documents sent by Petitioner, and intermittently inquired about the status of the investigation into Petitioner's claims.

In September 2004, ACS determined that Petitioner's claims could not be substantiated, and communicated this fact to the Union, via a letter dated September 8, 2004. In turn, the Union, on September 13, 2004, sent Petitioner a copy of ACS's letter.

In March 2005, Petitioner began corresponding with his supervisors again, lodging a number of complaints concerning various topics, including but not limited to renewed complaints regarding the allegedly disruptive employee. Petitioner also complained about ACS's failure to properly prepare Petitioner for a training workshop he was to conduct, changes in the procedure of submitting timesheets, and Petitioner's inability to obtain information from other units within ACS that he felt he needed to complete his tasks.

On May 2, 2005, Director Gold, in response to Petitioner's complaints, sent Petitioner a

written communication stating that the information sought by Petitioner from other units in ACS was not necessary for the performance of Petitioner's job and that some employees in those other units have "expressed concern" regarding the manner in which Petitioner insists upon such information. (*See* Petition, Exhibit B-44.)

On May 20, 2005, Director Gold sent Petitioner an e-mail, this time addressing a number of topics, including his failure to submit Field Visit forms and weekly schedules, his failure to audit a list of programs, and his continued pursuit of information from other ACS units that is not needed to complete his tasks. In response, on May 25, 2005, Petitioner sent a memorandum to Director Gold, in order to address these accusations. Petitioner's memorandum stated that he in fact submitted the requisite weekly documents, that performance of the program audits was not possible due to the incompleteness of the program list, and that other employees performing similar tasks had access to the information sought by Petitioner.

On May 31, 2005, Director Gold responded to Petitioner's May 25, 2005 memorandum. Director Gold stated that Petitioner's explanation regarding his Field Visit forms and his program audits was inadequate and that Petitioner was required to perform his job duties without the information sought from the other ACS units. As such, Director Gold suggested a number of corrective actions for Petitioner to perform in order to improve his overall performance. Upon receipt of this directive, Petitioner sent a memorandum, dated June 8, 2005, to the President of the Union and stated that his supervisors continue to engage in "harassment, reprisal, [and] discrimination" against him and requested that the President speak with Director Gold and his superiors. (*See* Petition, Exhibit B-21.)

On June 17, 2005, Petitioner filed a complaint with the ACS Equal Employment Opportunity

office against Director Gold "on the grounds of unjust and illegal treatment towards me, including: Discrimination, Reprisal, Harassment, etc." (*See* Petition, Exhibit B-17.) On July 14, 2005, Director Gold sent Petitioner a work assignment concerning the closing of classrooms at the Lexington Children's Center. Petitioner was instructed to determine if any staff would be terminated, and if so, what would be the amounts of the accrued vacation time payments. Less than a week later, on July 19, 2005, Director Gold sent Petitioner another assignment concerning a work location in the North Bronx region. Petitioner was instructed to determine if proper calculation of salary and longevity payments were made to the location's staff, in accordance with its collective bargaining agreement. Both of these assignments were given "high importance" by Director Gold. (*See* Petition, Exhibit B-15 and B-16.) In response to these assignments, Petitioner, on July 28, 2005, informed Director Gold that he was working on the Lexington Children's Center program, but he had received the North Bronx assignment.

On August 16, 2005, Petitioner sent Director Gold and Associate Deputy Commissioner Jennifer Marino an e-mail stating that the same allegedly disruptive employee was playing music at his desk, which distracted Petitioner and prevented him from performing his duties satisfactorily. Petitioner further stated that Director Gold did not "enforce evenly" an ACS policy, which states that "employees may not use personal radios or televisions in work areas during work hours" because he never instructed this employee to stop playing music. (*See* Petition, Exhibit B-12 and B-14, respectively.) Petitioner, in another letter, dated August 25, 2005, indicated that this employee does use headphones, but plays his music at such volumes that even the use of headphones cannot sufficiently silence the sound. The next day, Larry Thomas, the Executive Director of FSU, replied and informed Petitioner that Director Gold, who was on vacation at the time, was instructed "to

review [the] complaint and take appropriate action to address it." (*See* Petition, Exhibit C-9.)

On September 1, 2005, Petitioner informed Council Representative Terrelonge and Grievance Representative Jed Matalon of the situation involving his supervisors. Terrelonge and Matalon then consulted with the Assistant Division Director for the Professional Division, Maynard Anderson, in order to determine how best to proceed with Petitioner's renewed complaints. Believing that it would not be in Petitioner's best interest to file a grievance immediately, the three Union representatives decided that a labor-management meeting should be the initial step. On September 15, 2005, Matalon contacted ACS Office of Labor Relations and requested a labor-management meeting to discuss specifically Petitioner's situation.

On September 23, 2005, Petitioner wrote to Director Gold, Executive Director Thomas, and Associate Deputy Commissioner Marino. Petitioner again complained of this particular employee's behavior, stating that he "is now playing his music from the computer and reading the newspaper." (*See* Petition, Exhibit C-9.) Petitioner insisted "these actions have been in practice almost every day [and] . . . distract and disturb me, and hinder my work." (*See* Id.) Also, on this day, the Union informed Petitioner that Director Gold agreed to a labor-management meeting.

On October 7, 2005, Petitioner again sent an e-mail to Director Gold, Executive Director Thomas, and Associate Deputy Commissioner Marino. This time, Petitioner complained that Director Gold ordered the removal of a personal printer from his desk.[2] Petitioner requested that the printer be re-installed immediately because its removal prevented him from performing his duties with the utmost efficiency since he had to walk "about one-quarter mile to the nearest printer." (*See*

[2] According to Petitioner, in 2000, Director Gold also had a computer removed from Petitioner's desk, which he personally had fixed and installed.

Petition, Exhibit C-7.) In response, on October 11, 2005, Director Gold wrote that since all computer equipment belonged to the agency, and in order to maintain control over the computer network and keep it functioning properly, ACS was authorized to remove Petitioner's printer. Director Gold stated that if all employees were allowed to install such equipment on their own and without the approval and supervision of the agency's computer technicians, the effectiveness and security of the network would be compromised. Furthermore, Director Gold pointed out that no other employee in Petitioner's unit had their own printer, thus all employees in FSU had to use the same printer.

On October 12, 2005, Petitioner met with Grievance Representative Matalon to compile a list of specific issues that would be addressed at a possible labor-management meeting. Petitioner stated that he wanted the following issues to be discussed: Director Gold's critical performance evaluations of Petitioner, which Petitioner viewed as threats of discipline; Director Gold's insistence that Petitioner not seek information from other units in ACS which Petitioner viewed as vital to the performance of his duties; Director Gold's disparate treatment of Petitioner, by holding other employees to less stringent performance and disciplinary criteria; and the allegedly disruptive employee's job performance, duties, and disciplinary record. (*See* Union Answer, Matalon Affidavit, Exhibit B.)

On November 15, 2005, Matalon sent a written request for a labor-management meeting to the ACS Office of Labor Relations to discuss the issues raised by Petitioner. In response to this written request, on November 30, 2005, the Director of the ACS Office of Labor Relations, Clarence Jeffrey, asked Matalon to provide the specific issues that would be discussed. On December 2, 2005, in response to Director Jeffrey's inquiry, Matalon sent a letter enclosing the list that was compiled

by Petitioner and Matalon on October 12, 2005. On December 20, 2005, Director Jeffrey acknowledged receipt of Matalon's December 2, 2005 letter and stated "that an answer to the request would be forthcoming." (*See* Union Answer, Matalon Affidavit, Exhibit D.)

On December 5, 2005, Petitioner served the instant petition on the Office of Collective Bargaining. Petitioner alleged that ACS interfered with his statutory rights by restraining his performance of his duties as a shop steward; harassed, discriminated, and retaliated against him; and unilaterally changed Petitioner's working conditions. In addition, Petitioner alleged that the Union breached its duty of fair representation when it failed to file grievances on his behalf.

Shortly thereafter both the Union and the City requested extensions of time to submit their respective responsive pleadings, which were granted. In the interim, on Friday December 30, 2005, Petitioner missed work. According to the instant amended petition, Petitioner went to the doctor on December 30, 2005, and obtained a note from the doctor verifying Petitioner's visit. According to Petitioner's pleading, on Tuesday January 3, 2006, he submitted to Director Gold Form CS-000, entitled "Request for Unplanned Leave," which was the form he used in the past when he wanted to use leave time retroactively for an absence without prior approval. On the Form CS-000, Petitioner listed "Personal Business" as the "Reason For Request." (*See* Amended Petition, Exhibit D-3.) Petitioner wanted to use a day from his annual leave bank because he only had one day left in his sick leave bank. (*See* Amended Petition, Exhibit D-6.) That same day, Director Gold informed Petitioner that, not only had he submitted the wrong form to properly request usage of annual leave, requesting usage of annual leave must be made "in advance of the date of the leave," in accordance with ACS policy which Petitioner had been given. (*See* Amended Petition, Exhibit D-7.) Later that day, Petitioner submitted Form CS-344, entitled "Request for Leave," again listing

"Personal Business" as the "Reason Leave Requested." (*See* Amended Petition, Exhibit D-2.)

On January 6, 2006, Petitioner retrieved his timesheet and discovered that his leave request and his attendance record for the previous work week had been disapproved by Director Gold because Petitioner had not made the December 30, 2005 leave request "in advance." (*See* Amended Petition, Exhibit D-4.) Immediately, Petitioner sent an e-mail to Associate Deputy Commissioner Marino stating that Director Gold had no reason to disapprove his leave request and timesheet because Petitioner followed the same procedures he "had been using for many years." (*See* Amended Petition, Exhibit D-5.) Petitioner further stated that if there was a change in the process for requesting such leave, Director Gold failed to explain such changes.

On Friday January 13, 2006, Petitioner discovered that he had been paid for only 63 hours of work, and had been docked seven hours pay. On January 17, 2006, Petitioner sent an e-mail to the Deputy Commissioner of ACS, Associate Deputy Commissioner Marino, Director of the ACS Office of Labor Relations Jeffrey, Executive Director Thomas and Director Gold. Petitioner claimed that Director Gold's seven hour deduction of Petitioner's wages was "Arbitrary, Capricious, and Discriminatory." (*See* Amended Petition, Exhibit D-8.) Petitioner claimed that Director Gold's action violated the time and leave regulations of ACS and had allowed an unauthorized employee of ACS handle Petitioner's timesheets.

That same day, Petitioner informed the Union that his wages had been docked seven hours pay. According to Grievance Representative Matalon, he "took steps to file a grievance on Mr. Howe's behalf." (*See* Union Answer, Matalon Affidavit ¶15.) According to the Union's responsive pleading, on January 31, 2006, Director of the ACS Office of Labor Relations Jeffrey, informed Matalon that ACS would not meet with the Union and Petitioner on the issues raised in the Union's

December 2, 2005 letter because of the improper practice petition filed on December 5, 2005.

On February 1, 2006, Petitioner filed an amended petition, containing allegations that only addressed the refusal of Petitioner's leave request and the loss of seven hours' pay. According to the record, it is unclear as to the remedy sought by Petitioner in the amended petition because there is no specification of relief requested contained therein.

On February 7, 2006, the Union filed a grievance on Petitioner's behalf alleging that "seven hours of salary was wrongfully deducted from his pay check." (*See* Union Answer, Matalon Affidavit, Exhibit F.)

On February 9, 2006, the Union filed another grievance on Petitioner's behalf because ACS refused to schedule a labor-management meeting. The Union identified the issues that were to be discussed at that meeting as the subject of this grievance. (*See* Union Answer, Terrelonge Affidavit, Exhibit F.)

On April 5, 2006, ACS issued a Step II determination involving the alleged improper deduction of Petitioner's wages and found that, since Petitioner provided proper documentation, "seven hours of pay . . . [should be] restored to grievant." (*See* Petitioner's Reply to Union, Exhibit E-1.)

POSITION OF THE PARTIES

Petitioner's Position

Petitioner contends that the Union violated its duty of fair representation when it failed to file grievances on his behalf for complaints against ACS. The Union has been aware of ACS's mistreatment of Petitioner since June 2003. However, the Union did not file a grievance against

ACS until February 1, 2006, two months after the instant petitioner had been filed.

Petitioner further asserts a litany of violations against ACS dating back to October 2001. Petitioner argues that ACS interfered with this statutorily protected rights set forth in NYCCBL § 12-305 when it restrained his performance of his duties as a designated shop steward for the Union. Petitioner was prevented by Director Gold from communicating with other units within ACS and was forced to work in isolation. As such, ACS restrained Petitioner's ability to perform his job effectively and interact with ACS employees whom he represented as a Union shop steward.

Petitioner further contends that ACS discriminated, harassed, and retaliated against Petitioner. Director Gold and other members of ACS management subjected Petitioner to more stringent work rules than other ACS employees, subjected him to threats of discipline, and gave him unfavorable performance evaluations as a result of Petitioner's complaints lodged against ACS. Also, Petitioner had to submit Field Visit forms and weekly schedules. Director Gold also denied Petitioner's leave request, forced him to file a new form to request such leave, and was never apprised of changes to existing ACS policies regarding the request of such leave. In addition, Petitioner was continually subjected to the abusive and disruptive behavior of an ACS employee, despite Petitioner's continuous complaints. Thus, due to ACS's continuous disregard for Petitioner's complaints, his subjection to more rigid work rules and mistreatment by Director Gold, ACS violated NYCCBL § 12-306(a)(1) and (3).[3]

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[3] 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
(continued...)

Finally, Petitioner contends that ACS unilaterally changed working conditions with regard to him, and as such, violated NYCCBL § 12-306(a)(5). He was forced to file documents that he had never before had to file, forced to submit timesheets in a different manner than other employees, and he was required to perform his job duties in a different manner than before. Due to these changes, and ACS's failure to apprise Petitioner of such changes ACS violated the NYCCBL.

Union's Position

The Union contends that it satisfied its duty of fair representation. The Union maintained communication with Petitioner; both Council Representative Terrelonge and Grievance Representative Matalon spoke with Petitioner on multiple occasions regarding his complaints about ACS. Furthermore, the Union kept Petitioner informed and up to date with developments regarding his complaints. In order to address Petitioner's complaints, the Union attempted to schedule a labor-management meeting and, eventually, filed two grievances on his behalf. In fact, the Union had restored seven hours of pay that had been deducted from his wages.

Moreover, the Union contends that Petitioner failed to allege a *prima facie* claim that it violated its duty of fair representation because Petitioner did not demonstrate that the Union's actions were arbitrary, capricious, or performed in bad faith. The Union enjoys a level of discretion

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[3](...continued)
membership in, or participation in the activities of, any public employee organization;

* * *

(5) to unilaterally make any change as to a mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization . . . .

NYCCBL § 12-305 provides, in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

as to which complaints it chooses to pursue and the manner in which it chooses to pursue them. As long as the reasons behind these actions are not arbitrary, capricious, or in bad faith, the Union has satisfied its duty of fair representation.

In addition, the Union argues that many of Petitioner's allegations are untimely. NYCCBL § 12-306(e) provides that a petition alleging an improper practice shall be filed "within four months of the occurrence of the acts alleged to constitute the improper practice."[4] Thus, many of the actions alleged by Petitioner to constitute a violation of the duty of fair representation fall outside the statute of limitations. Based on the filing date of the instant petition, any acts alleged that pre-date August 5, 2005 are untimely.

Finally, the Union avers that the timely acts complained of by Petitioner that constitute a violation of the Union's duty of fair representation are moot because the Union, by filing the February 7 and 9, 20006 grievances, fulfilled its obligations owed to Petitioner.

City's Position

The City contends that most of the alleged improper practices performed by ACS in the instant matter are untimely. Since Petitioner filed the instant petition on December 5, 2005, any acts allegedly engaged in by ACS that pre-date August 5, 2005 are untimely because the statute of limitations for filing a timely improper practice petition is four months.

The City also contends that Petitioner lacks standing to assert a violation of NYCCBL § 12-306(a)(5). Since the duty to refrain from making unilateral changes to terms and conditions of

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[4] NYCCBL § 12-306(e) provides, in pertinent part:
A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice . . . .

employment that are mandatory subjects of bargaining runs between the employer and the union, an individual employee cannot allege violations of this particular statutory provision. Moreover, Petitioner, in his pleadings, failed to set forth a claim that ACS made unilateral changes to mandatory subjects of bargaining that effect terms and conditions of employment.

With regard to the alleged violations of NYCCBL § 12-306(a)(1) and (3), the City argues that Petitioner failed to set forth a *prima facie* claim against ACS for interference with Petitioner's rights protected by NYCCBL § 12-305, or for discrimination and retaliation for union activity. Petitioner, in his pleadings, failed to allege that he was engaged in activity protected by the NYCCBL and that ACS's actions toward Petitioner were motivated by anti-union animus.

Assuming *arguendo*, that Petitioner set forth a *prima facie* claim against ACS for interference, discrimination and/or retaliation, ACS had a legitimate business reason for acting in such a fashion, and, as such, is protected by NYCCBL § 12-307(b).[5]

Finally, the City avers that Petitioner failed to set forth a *prima facie* claim against the Union for violating its duty of fair representation. As argued above by the Union, an employee's bargaining representative is awarded wide latitude in deciding which complaints it wishes to pursue and in what manner it chooses to pursue them. In order to establish a violation of the duty of fair representation, one must demonstrate that the bargaining representative acted in an arbitrary, capricious, or bad faith manner in order to substantiate a claim that a breach of the duty of fair representation occurred.

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[5] 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 maintain the efficiency of governmental operations, . . . and exercise complete control and discretion over its organization . . . .

DISCUSSION

As an initial matter, the Board finds that many of Petitioner's allegations contained in the instant petition are untimely. As set forth by NYCCBL § 12-306(e), the statute of limitations for filing an improper practice petition is four months from the accrual of the claim. Failure to file a petition within this time period renders the claims untimely, and this Board will not consider the substantive merits of those claims. *See Castro*, Decision No. B-44-99 at 6. Nevertheless, untimely claims may be admissible as background information, *see Patrolmen's Benevolent Ass'n*, Decision No. B-10-2006 at 13.[6]

Petitioner's first substantive claim in the instant matter alleges that the Union violated NYCCBL § 12-306(b)(3), when it breached its duty of fair representation to Petitioner. In defining the duty of fair representation, the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), held that:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Incorporating this definition into the NYCCBL, this Board has held that 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. *See Del Rio*, Decision No. B-6-2005; *Brown*, Decision No. 30-2005; *Whaley*, Decision No. B-41-97. Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion constitutes a violation of

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[6] Petitioner's factual allegations that occurred prior to August 5, 2005 are considered by this Board for background material, but not as remediable allegations of violations of the NYCCBL, as these factual allegations occurred outside the four month statute of limitations.

the duty of fair representation. *Watkins*, Decision No. B-23-2005 at 12; *Hassay*, Decision No. B-2-2003 at 10-11.

However, a union enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty. *See Wooten*, Decision No. B-23-94 at 15; *Page*, Decision No. B-31-94 at 11. A union has the implied authority, as representative, to make a fair and reasonable judgment about whether a particular complaint is meritorious, and to evaluate the degree of prosecution to which it is entitled. *Hug*, Decision No. B-51-90 at 16. Thus, the union is entitled to broad discretion in determining whether to pursue an employee's complaint through a labor management meeting, a grievance, or some other method of resolution. *Richardson*, Decision No. B-24-94 at 10-11. In addition, a union does not breach its fair representation duty merely because the outcome of a union's good faith efforts to resolve a member's complaint does not satisfy the member. *See Del Rio*, Decision No. B-6-2005 at 13; *Hassay*, Decision No. B-2-2003 at 11. Furthermore, the Board will not substitute its judgment for that of a union or evaluate its strategic determinations. *See Grace*, Decision No. B-18-95 at 8.

The Union has clearly satisfied its duty of fair representation because the Union advocated on Petitioner's behalf with some success against ACS and exercised its discretion within the confines of the law. After Petitioner complained to Council Representative Terrelonge and Grievance Representative Matalon about his supervisors, these two Union agents met with Assistant Division Director Anderson. Matalon then requested a labor-management meeting from ACS and met with Petitioner in preparation for such a meeting. Even after Petitioner filed the instant petition on December 5, 2005, the Union grieved ACS's deduction of seven hours of pay from Petitioner's wages and ACS's refusal to engage in a labor-management meeting. In fact, the Union was able to

restore seven hours of pay to Petitioner through a Step II determination. Based upon these actions, we find that Petitioner has failed to establish that the Union acted in any manner proscribed by the duty of fair representation, or that it failed to exercise its discretion in good faith and with honesty.

Moreover, we find Petitioner's factual allegations that the Union's conduct was arbitrary, discriminatory, or founded in bad faith are speculative and without merit. Petitioner alleges that the Union failed to fairly represent Petitioner because, despite his numerous complaints to the Union about his supervisors, his working conditions, and the allegedly disruptive employee, the Union did not file a grievance on his behalf until February 7, 2006, after the filing of the petition and amended petition. Although the Union did not file a grievance on Petitioner's behalf until 2006, the record demonstrates that the Union advocated for Petitioner through communication with ACS and attempted to schedule a labor-management meeting. Therefore, the lapse of time and Petitioner's mere dissatisfaction with the tactics chosen by the Union does not demonstrate that a violation of the Union's duty of fair representation occurred. *See Samuels*, Decision No. B-17-2006 at 15; *Burtner*, Decision B-1-2005 at 14. Accordingly, we find that the Union satisfied its duty of fair representation with regards to Petitioner.

Any potential derivative claim against ACS, pursuant to NYCCBL § 12-306(d), must also fail because we dismiss the petition against the Union. *See Raby*, Decision No. B-14-2003 at 13, *aff'd*, *Raby v. Office of Collective Bargaining*, No. 109482/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003).

Petitioner also alleged that ACS violated NYCCBL § 12-306(a)(1) by interfering with and restraining his ability to exercise his statutory rights under NYCCBL §12-305. According to Petitioner, ACS management prevented Petitioner from interacting with ACS employees in other units and forced Petitioner to work in isolation, thereby inhibiting Petitioner's ability to represent

these employees as their designated shop steward.

When an employer denies its employees access to a union representative's services in assisting with issues such as seeking counsel and representation, or the filing grievances and other similar complaints, an employer may be violating these employees' rights under NYCCBL § 12-305. *See Patrolmen's Benevolent Ass'n*, Decision No. B-13-2004 at 10-11; *District Council 37, AFSCME, Local 376*, Decision No. B-6-2004 at 10-11; *Lehman*, Decision No. B-23-82 at 10-11. We have held that the denial of a union representative access to his constituency to discuss matters related to collective bargaining has been viewed as an "inherently destructive" act and "may constitute unlawful interference even in the absence of proof of improper motive." *Communications Workers of America, Local 1180*, Decision No. B-20-2006 at 10; *see also District Council 37, AFSCME, Local 376*, Decision No. B-6-2004 at 10-11.

For example, in *Patrolmen's Benevolent Ass'n*, Decision No. B-13-2004 at 2-4, the union demonstrated that certain union representatives were denied access to a particular precinct in order to apprise their members of an ongoing retaliation claim involving a police office at that precinct and that certain management officials refused to discuss union matters with these union representatives. In *Lehman*, Decision No. B-23-82 at 2, the union demonstrated that the employer subjected a union representative to a more rigid admission standard to a work location than other union representatives and denied that union representative access to that location for the purpose of handling employees' grievances. In *District Council 37, AFSCME, Local 376*, Decision No. B-6-2004 at 2-6, the union proved that the employer admonished a particular union official's behavior and techniques when representing the membership and avoided dealing with the official.

Unlike the above-cited cases, Petitioner here failed to allege and demonstrate that ACS

prohibited Petitioner from speaking with employees in other ACS units in an attempt to restrain Union activity. Instead, the record demonstrates that Petitioner wanted to speak with employees in other units in order to obtain information from them because he believed this would enable him to better perform his job. In instructing Petitioner to cease contacting other units for information Petitioner deemed necessary for the performance of his job duties, Director Gold stated that Petitioner did not need such information to perform his tasks effectively. Whether or not Director Gold was correct in his rationale, Petitioner failed to articulate how and why these visits to the other units were related to his duties as a shop steward.

Moreover, Petitioner failed to demonstrate that the employees in the other ACS units were prevented from contacting him to discuss union business. Rather, according to Director Gold, employees "expressed concern about the means by which you [Petitioner] request information from them." (*See* Petition, Exhibit B-44.) Based on Petitioner's failure to plead and/or demonstrate a *prima facie* claim of interference, we find no merit to this claim and it is dismissed.

This Board must also consider whether ACS harassed, discriminated and retaliated against Petitioner because he was a shop steward and he complained about the conditions of his work place. To determine if an action 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. Petitioners 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 a petitioner alleges sufficient facts concerning these two elements to make out a *prima*

facie case, the employer may attempt to refute the 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 Local 237, City Employees Union,* Decision No. B-24-2006.

Regarding the first prong of the *Salamanca* test, Petitioner contends that he was engaged in protected activity because he was a shop steward. However, as mentioned above, there is no evidence on the record that indicates that Petitioner, at any point, drew the ire of his supervisors based upon his activity in his capacity as shop steward. Therefore, we cannot hold that Petitioner's status as a shop steward played any role in the complaints contained in his pleadings.

Petitioner also contends that he was engaged in protected activity when he voiced concerns shared by other employees within FSU about their treatment by supervisors and the allegedly disruptive employee. For example, ACS knew of Petitioner's protected activity because he voiced his complaints several times to Director Gold, Executive Director Thomas, and Associate Deputy Commissioner Marino concerning the improper use of a radio by the allegedly disruptive employee at his desk, in contravention of ACS regulations. When an individual employee files a grievance or complains about terms and conditions of employment that are covered in the parties' collective bargaining agreement, then such acts are deemed to be protected. *See e.g. Lamberti*, Decision No. B-21-2006 at 15-16; *Sergeant's Benevolent Ass'n*, Decision No. B-22-2005 at 22 (finding that employee's advocation of other employees' complaints constituted protected activity). Therefore, with respect to Petitioner's allegations that his complaints were common to other employees within FSU and that ACS had knowledge of such protected activity, we find that Petitioner has properly pleaded grounds that, if proven, would satisfy the first prong of the *Salamanca* test.

Typically, the second element of the *Salamanca* test is proven through the use of circumstantial evidence, absent an outright admission. *Burton*, Decision No. B-15-2006. The mere assertion of retaliation is not sufficient to prove that management committed an improper practice, *Local 983, District Council 37*, Decision No. B-15-2001 at 6, and allegations of improper motivation must be based on specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion. *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. Furthermore, that a petitioner challenged an employer's action, by itself, is not a sufficient basis for a finding that an employer has acted with improper motive. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 13; *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 7.

With regards to the second prong of the *Salamanca* test, Petitioner's allegations do not establish that Director Gold and the other management personnel in ACS harassed, discriminated and retaliated against Petitioner because of his protected activity. Petitioner claimed that ACS's refusal to apply its regulations concerning radios at an employee's desk uniformly indicated that ACS intended to discriminate against Petitioner. However, there is no indication that ACS's failure to enforce this regulation was a result of Petitioner's protected activity; or that the regulation was disparately enforced, preventing other employees from using radios on their respective desks. *See Sergeants' Benevolent Ass'n*, Decision No B-22-05 at 23 (finding a causal connection between a shop steward's transfer and denial of training and his supervisor's disparate treatment of the shop steward in relation to other sergeants under his command).

Petitioner further contends that ACS discriminated and harassed him when Director Gold ordered the removal of Petitioner's printer, which he installed himself, from his desk. There is no indication that Petitioner's protected activity was the impetus for the removal of the printer. In

addition, removal of the printer does not constitute an adverse employment action, as it is not a material change. Moreover, the legitimate business reason offered by Director Gold, which was to prevent corruption of the ACS computer network, has not been contravened. Accordingly, we find that the removal of Petitioner's printer was not retaliatory, thus no violation occurred.

Petitioner also argues that ACS discriminated against him by requiring him to satisfy more stringent work rules and performance criteria. Specifically, Petitioner alleges that he was required to submit weekly schedules and Field Visit forms, whereas other employees did not have to submit such documentation, and that he was the only employee in FSU to be subjected to this additional burden. However, Petitioner's contention fails to establish a *prima facie* claim of harassment and retaliation under the NYCCBL. First, Petitioner's contention that he was the only FSU employee required to submit both weekly schedules and Field Visit forms is contradicted by the evidence. The documentary evidence submitted by the City, which was a written communication addressed to Petitioner and to two other employees, states that all employees were required to file these documents. Thus, the evidence does not support a finding that Petitioner was being singled out for his complaints against his supervisors. Accordingly, this claim of harassment is not born out by the record.

In addition, Petitioner avers that his overall work was evaluated in a hyper-critical manner by Director Gold because Petitioner complained about the manner in which Director Gold managed FSU. The record is replete with letters, written communications, and memoranda from Petitioner to Director Gold and other ACS supervisors that allege misconduct that is either being overlooked, condoned, or directed by ACS. The record further shows that, on a few occasions, Director Gold had to inform Petitioner that he was not performing his job duties in a satisfactory manner.

However, the record does not demonstrate that Director Gold and ACS issued critical evaluations because of Petitioner's protected activity. The record further does not establish that other FSU employees were not subjected to the same evaluation criteria, or that Petitioner received these evaluations unfairly and unjustly . Rather, the record shows that Director Gold acted in a supervisory capacity when he attempted to raise awareness of and correct the missteps of an employee under his charge. Moreover, the record, though expansive, contains no actual performance evaluations or any probative facts linking Petitioner's negative evaluations and his issuance of complaints against ACS. Thus, we find Petitioner's allegations concerning the negative evaluations are conclusory and based upon surmise.

Furthermore, Petitioner contends that his request for annual leave was denied, and he was subsequently docked 7 hours of pay from his wages because of his numerous protected acts, including the filing of the instant petition. Petitioner highlights that, on previous occasions he had requested for leave after the fact, that he had used the same form he submitted initially and that he had never had such requests denied. However, we find that Petitioner has not pleaded facts sufficient, even if taken as true, to establish that the denial of leave request and deduction of pay stemmed from anti-union animus.

Petitioner has demonstrated that there is proximity in timing between the filing of the grievance and the denial of Petitioner's request for annual leave. However, we must also examine the other relevant facts in this case. *See Communication Workers of America, Local 1180*, Decision No. B-20-2006 at 14 ("The petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence"); *Civil Serv. Bar Ass'n*, Decision No. B-17-2004 at 18. With regards to Director Gold's

denial of Petitioner's leave request, we find that this supervisor acted consistent with the regulation that specifies the manner in which an employee is to request use of annual leave. By Petitioner's own admission, he indicated that he wanted to Director Gold to approve an annual leave request for time off, even though Petitioner had in fact used this time off to visit the doctor, because he did not want to use his last day of sick leave. Accordingly, Petitioner's accusations that ACS violated NYCCBL §12-306(a)(1) and (3) are dismissed in their entirety.

Finally, Petitioner alleged that ACS violated NYCCBL § 12-306(a)(5), which makes it an improper practice if a public employer "unilaterally make[s] any change to any . . . term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization." This Board has held that, while an individual public employee may generally commence an improper practice proceeding, the duty to refrain from making unilateral changes to established terms and conditions of employment exists only between a labor organization and a public employer. *See McAllan*, Decision No. B-15-83 at 15; *Robinson*, Decision No. B-43-2002 at 6; *see also Cheatum*, Decision No. B-13-1981 at 10.

Since the duty to maintain the status quo and not unilaterally change working conditions rests with ACS and the Union, and Petitioner is an individual employee and not a public employee organization, this Board finds that Petitioner lacks standing to file a claim for the violation of NYCCBL §12-306(a)(5). Accordingly, this claim is also dismissed.

ORDER

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

ORDERED, that the improper practice petition filed by Roydel Howe docketed as BCB-2523-05 be, and the same hereby is dismissed in its entirety.

Dated: October 25, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

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MEMBER

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