Sicular, 79 OCB 33 (BCB 2007)

[Decision No. B-33-2007] (IP) (Docket No. BCB-2584-06).

Summary of Decision*:* Petitioner alleged that the Union breached its duty of fair representation by failing to provide representation in the adverse employment actions taken against him, including but not limited to termination. The Union responded that its determination to take no action to challenge the discharge beyond evaluating the facts as presented by Petitioner was fair, reasonable, non-discriminatory, and in compliance with its duty of fair representation. The City asserted that the City's motive in terminating Petitioner's employment was solely his failure to pass his probationary service and not retaliatory for Petitioner's union activities. The City further contended that Petitioner's derivative claim of improper practice must fail. The Board found that Petitioner has failed to sustain the burden of proof as to the Union and the City. Accordingly, the petition is denied in its entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ROY SICULAR,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, LOCAL 371, and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

Pursuant to Section 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), Roy Sicular ("Petitioner") filed a verified improper practice petition on December 11, 2006, subsequently amended on December

26, 2006, against the City of New York (City) alleging that his probationary appointment was terminated due to union activity including representing fellow employees with grievances over working conditions. The petition also charges District Council 37, Local 371 ("Union") with breach of the duty of fair representation in connection with this adverse employment action. The Union seeks dismissal of the petition on the grounds that the Union evaluated Petitioner's employment termination, found no violation of law, and reasonably determined that no further action was warranted in his case. The City asserts that, as Petitioner has not alleged facts sufficient to find a breach of the Union's duty of fair representation, no derivative claim has been stated against the City nor has any independent claim been stated. This Board of Collective Bargaining ("Board") finds that Petitioner has failed to sustain the burden of proof as to the Union and the City. Accordingly, the petition is denied in its entirety.

BACKGROUND

Petitioner was hired on February 19, 2006, as a Fraud Investigator for the New York City Department of Homeless Services ("DHS"), subject to the satisfactory completion of a one-year probationary period pursuant to New York City Personnel Rule 5.2.1(a) which provides, in relevant part:

> Every appointment and promotion to a position in the competitive or labor class shall be for a probationary period of one year unless otherwise set forth in the terms and conditions of the certification for appointment or promotion as determined by the commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period.

On February 20, 2006, Petitioner signed a Competitive Probation Statement presented by

DHS which explained that his employment was subject to a one-year probationary period in which DHS could choose to termination his appointment or extend the probationary period. That same date, he was assigned to work in DHS's Prevention Assistance and Temporary Housing ("PATH") Office at 346 Powers Avenue, Bronx, NY.

In March 2006, Petitioner was elected as one of the twelve Union delegates at that location at which approximately 80 employees worked who were represented by the Union.

On April 26, 2006, Petitioner met with PATH Office Manager Maria Rodriguez and a leader of Petitioner's work team in Rodriguez' office to review Petitioner's completed field work. The City states that in that meeting Petitioner complained about the vehicle assigned to him, about the conduct of a team that preceded him into the field, and about the effectiveness of Rodriguez herself to resolve the issues. The City alleges that Rodriguez directed Petitioner to leave her office several times and that he did so only after Rodriguez threatened to summon a peace officer to remove him. Petitioner has not disputed the City's assertions.[1]

At a time not specified in any of the pleadings but prior to April 30, 2006, Petitioner copied an article from the April 21, 2006, edition of The Chief civil service newspaper and, during his lunch and break periods, distributed the copies to other employees at DHS whom he addressed as "brother and sister employees." He typed personal comments in the margin of the photocopied article. The comments stated in part:

> The article on the left which appeared in the Chief is an example of the arrogance of some of the managers and supervisors at DHS.
>
> * * *
>
> I have resolved conflicts as a shop steward and chapter leader at other agencies on a local level. I was shocked and dismayed at the attitude

[1] Petitioner did not file a Reply.

> of the supervisor that told me "this is DHS". Well guess what; DHS is part of the City of New York which is part of the United States of America which has laws that protect citizens and employees against arbitrary and capricious and illegal actions. DHS is not a law unto itself, no matter how many police they have on their premises.
>
> We don't live in a police state. The culture of this organization should be updated. The autocratic management style is not suited to a group of professional employees; most of whom hold university degrees. . . .

(Petition Exhibit 7.)

On April 30, 2006, Petitioner was summoned to a supervisory conference with his immediate supervisor, Raymond Ramos, Associate Fraud Investigator (Level I), who cautioned Petitioner about three incidents during the previous week in which Petitioner had allegedly arrived late to work. The incidents of lateness ranged from four to 42 minutes in duration. At the conference, Ramos also "reminded" Petitioner "that materials with personal messages are not to be distributed on agency time." (City Exhibit D.)

On May 1, 2006, Petitioner received a supervisory conference memo from Ramos memorializing their meeting the day before. The memo stated that "further similar conduct on your part may necessitate formal disciplinary action against you." (City Exhibit D.) Petitioner signed and acknowledged receipt of the conference memo on May 1, 2006. Petitioner would respond to the conference memo the following day, apologizing for his time infractions and vowing to do better in the future, and explaining that the distribution of the newspaper article was "not union related business but purely my own thoughts on a topic which I thought would be of interest to some of my fellow workers." (Petitioner Ex. 8.)

Also on May 1, Rodriguez spoke with members of Petitioner's team regarding the completion

of their field assignment activity reports. When she asked Petitioner about his progress, he told her that he was almost finished. She then approached other members of the team. The City asserts that, while Rodriguez was talking with the others on this same occasion, Petitioner approached her, clapping his hands at her and yelling at her. The City asserts that she asked Petitioner to return to his seat but that he refused her directives, continuing instead to yell at her. Petitioner has not replied in a pleading to the City's assertions with regard to this incident but, in a letter five months later to the Union's attorney, he described an undated incident in which "Rodriguez walked up to me in a room of at least fifteen other field investigators and began harassing me. She had engaged in several harassing actions against me and I had complained to E.E.O. about her. I think she was retaliatory." (Sicular letter to Kreisberg, October 26, 2006; Petition Ex. 10.)

For the incident with Rodriguez on May 1 as well as the incident on April 26 in which she had directed Petitioner to leave her office under threat of removal, Petitioner was summoned to a second supervisory conference memorialized in another conference memorandum on May 1, 2006. The memo characterized Petitioner's conduct towards Rodriguez as unprofessional and disrespectful.

On July 5, 2006, Supervisor Ramos held a third supervisory conference with Petitioner about additional, alleged time infractions. These subsequent incidents of lateness – on May 3, 7, 10, 28, and 30, and June 1, 14, 27, and 29, 2006 – ranged from two to 52 minutes in duration. Petitioner was warned that further similar conduct could result in formal disciplinary action against him.

The City asserts that, on July 12, 2006, the agency issued Petitioner and his agency partner a Nextel communications device and that upon their return to the office Petitioner stated that he did not have it and that he had possibly left it at a candy store and that an attempt to retrieve it had been unsuccessful. On July 17, Ramon Barreras, Associate Fraud Investigator (Level II), summoned

Petitioner to a fourth supervisory conference and cautioned Petitioner about his alleged failure to properly care for and safeguard equipment issued to him by DHS. (City Ex. G.) A memo memorializing the supervisory conference stated that formal disciplinary action was not necessarily warranted by Petitioner's alleged conduct at that time but he was warned to be more careful in the future with agency equipment. The memo stated that it would be placed in his personnel file.

On July 18, 2006, John Talbutt, whose position with the Union is not specified in the pleadings, represented the Union at a meeting of unit members at PATH. They discussed various issues of concern to the employees. The Union asserts that no members of management were present and that during the meeting Petitioner expressed his views in a vigorous manner on a number of subjects. By letter of July 20, 2006, to Talbutt, Petitioner defended his conduct at the meeting. Petitioner explained that his decision to copy portions of "the old contract" and distribute the copies to meeting attendees was "meant to be helpful and constructive," not to "undermine" Talbutt's "authority." (Petitioner Ex. 11.) Petitioner wrote that Talbutt's "arrogant and dictatorial" admonition to Petitioner to "be quiet or you would ask me to leave" the meeting humiliated Petitioner in front of his "peers" and Petitioner put Talbutt "on notice" that he would not hesitate to institute a defamation lawsuit against Talbutt "to protect my good name and reputation." (Petitioner Ex. 11.)

On July 24, 2006, DHS Commissioner Robert V. Hess visited the PATH offices. Petitioner introduced himself to the Commissioner as a Union delegate and spoke with the Commissioner about a lack of working copy machines. By letter dated July 27, 2006, to the Commissioner, Petitioner confirmed their meeting and their discussion about the copy machines. Petitioner also inquired about compensatory time which he stated was owed to fellow employees who were required to work in

non-air-conditioned offices during a heat wave at the time. Further, Petitioner praised "line people" with whom he worked as well as "many fine management people," but he added that "it is not fair when only 'line people' are written up and the bosses are not." (Petitioner Ex. 2.)

Also on July 27, 2006, Petitioner signed that he had received a copy of the Tasks and Standards issued by DHS for his title. Petitioner asserts that he was not given any training or instruction but instead was merely told to sign the document, which he did. This document stated that he had read and understood the list of tasks and standards which represented most of the work that he performed and the standards by which his job performance would be judged. (Petitioner Ex. 6.)

The Union asserts that, on August 1, 2006, Petitioner was notified that he was being investigated about a complaint against him by a co-worker concerning a comment that he made about the employee's driving skills. The Union asserts that no disciplinary action was ultimately taken against Petitioner on this matter. (Union Ex. A.)

By letter dated August 8, 2006, DHS's Director of Labor Relations responded to Petitioner's July 27 letter to the Commissioner, informing Petitioner that the issues which Petitioner raised in his letter had been "forwarded to the appropriate people for review, comment, and decision," and inviting him to call labor relations directly on any similar issues in the future. (Petitioner Ex. 3.)

On August 9, 2006, unit members at PATH met and considered a resolution drafted by Petitioner which, he stated, contained concerns of employees in the unit. Those concerns included: health and safety issues relating to being compelled to ascend more than five flights of stairs to conduct field investigations; disciplinary threats by persons in the title of Community Associate; and seniority as the "determining" criterion in the distribution of overtime and approval of annual leave.

(Petition Ex. 4.) The Union asserts that no vote was taken on the resolution and that it was not presented to management. The Union also asserts that no representative of management was present. (Union Ex. A.)

By letter of August 11, 2006, DHS informed Petitioner that his services as a probationary Fraud Investigator assigned to the Family Services Division were terminated effective that date. (City Ex. H.) Petitioner asserts that he received the letter when he reported to work on August 12 for an overtime shift. DHS's Notice of Personnel Action states that the effective date was August 13, 2006, and that the personnel action was approved on August 16, 2006. The difference in dates is inconsequential for purposes of this improper practice proceeding. As the reason for termination, the Notice states "did not pass probation." (City Ex. I.)

The City asserts that the termination of Petitioner's probationary appointment was authorized by Rule § 5.2.7(1) of the Personnel Rules and Regulations of the Department of Citywide Administrative Services ("DCAS"), which provides, in pertinent part, as follows:

> the agency head may terminate the employment of any probationer whose conduct and performance is not satisfactory after the completion of a minimum period of probationary service and before the completion of the maximum period of probationary service by notice to the said probationer and to the commissioner of citywide administrative services. . . .

(City Ex. K.)

The Union asserts that by letter dated August 14, 2006, Petitioner wrote to Commissioner Hess regarding the termination and no response was received. By letter dated September 28, 2006, Jeffrey L. Kreisberg, Counsel to the Union Local, informed Faye Moore, the Union Local's Vice President for Grievances and Legal Services, that he had met with Petitioner regarding the discharge.

It is undisputed that the date of the meeting was August 28, 2006. The letter stated that Kreisberg had determined that, on the basis of the facts and documents provided by Petitioner, there was insufficient legal basis to prove that Petitioner was discharged for an unlawful purpose, particularly, retaliation for any union activity in which he might have been engaged during his probationary period of employment. Counsel recommended that the Union take no further legal action on it. Kreisberg forwarded a copy of the letter to Petitioner. (Union Ex. A.)

By letter dated October 26, 2006, Petitioner responded to Counsel's letter to Moore by reiterating his active participation in Union matters and by urging that circumstantial evidence was sufficient to support a claim of improper practice under the New York City Collective Bargaining Law ("NYCCBL"). In the letter, Petitioner stated that other probationary employees with assertedly "worse time and leave issues" had not been discharged, contending that "[t]hey are not of my race, religion or age group," and urging that "[t]his could be a 14th amendment [Constitutional] issue." In the letter, Petitioner alleged that Supervisor Ramos had told him, at an unspecified time and occasion, that "it was not a very good idea to be so active" in the Union. Petitioner asserted that "[t]his fight is not just about me, it is about the union and the role of the union and the strength of the union." (Union Ex. B.)

By letter dated November 8, 2006, to Petitioner, Kreisberg stated that he had reviewed Petitioner's contentions as reflected in Petitioner's October 26, 2006, letter, as well as the facts and documents supplied by Petitioner at their earlier meeting. Kreisberg wrote that upon consideration of all of the above, he adhered to his assessment that the case presented insufficient evidence of retaliation for union activity required to sustain Petitioner's burden of proof on a charge of improper practice against DHS. It is undisputed that Kreisberg informed Petitioner that Petitioner was

permitted to file such a charge individually and, further, informed him of the need for filing in a timely fashion. (Union Ex. C.)

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner asserts that his activism in the Union is well documented and known to supervisory and management personnel with DHS and that his termination resulted from that activism. Petitioner alleges that the Union failed to represent him in various adverse employment actions by DHS, including supervisory conference memos by his manager and two supervisors as well as the termination of his employment some six months after his appointment.[2] Petitioner notes that the Union represents supervisors as well as employees in Petitioner's title of Fraud Investigator whom the supervisors oversee, which constitutes a conflict of interest in Petitioner's view. He contends that this conflict may have caused Union Counsel to decline to pursue retaliation claims on his behalf against the supervisors. Petitioner also contends that Talbutt, Moore, and Wells of the Union bore personal hostility towards him which influenced the Union's decision not to pursue either his disciplinary case or the instant improper practice proceeding. Petitioner also asserts claims unrelated to the instant improper practice petition. He requests reinstatement to his position and back pay.

Union's Position

The Union asserts that the petition fails to allege facts which would demonstrate that it breached its duty of fair representation toward Petitioner. The Union contends that it evaluated the

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[2] NYCCBL § 12-306(b)(3) states, in pertinent part, as follows:
It shall be an improper practice for a public employee organization or its agents to breach its duty of fair representation to public employees under this chapter.

facts and circumstances regarding Petitioner's termination of employment as a probationary Fraud Investigator by DHS in a non-discriminatory and reasonable manner, and the Union's considered determination to take no further action to challenge the discharge was fair, reasonable, and non-discriminatory. Specifically, the Union points to Kreisberg's assessment that the facts as alleged by Petitioner were insufficient to prove that he was discharged because he was a Union delegate or because of any other Union activities. Kreisberg also found a lack of probative facts as to Petitioner's allegation that members of management had any knowledge of Petitioner's activities at Union meetings on July 18 and August 9, 2006. In the absence of such proof of knowledge, Kreisberg determined that Petitioner could not meet his burden of proof that he was discharged in retaliation for those activities. Further, Kreisberg determined that even if Petitioner were able to sustain his burden of proof on that point, DHS "would surely claim" that Petitioner was discharged because of any one or more of the alleged infractions which were the subject of memos from supervisors. Kreisberg concluded that he believed Petitioner's claims rested upon insufficient factual basis to prove that Petitioner was discharged for an unlawful reason. On that basis, Kreisberg recommended that the Union take no further legal action in this matter.

City's Position

The City acknowledges that Petitioner often sought to address work-related issues of fellow employees as a Union representative but contends that Petitioner has failed to prove a causal connection between any allegedly improper actions by DHS and his Union activities. The City asserts that DHS's sole reason for terminating Petitioner's employment was his unsatisfactory service as a probationary employee. It points to the supervisory conference memos which he received starting two months after his appointment for time infractions, insubordinate conduct,

failure to safeguard agency equipment issued to him, and distribution of literature on agency time. The City further asserts that DHS was not required to provide him with an explanation for its termination of his probationary employment. Although Petitioner's union activity occurred concurrently with the various adverse employment actions, coincidence in time alone is insufficient to support any conclusion that DHS was improperly motivated. Not only has Petitioner failed to sustain his burden of alleged retaliation by DHS personnel, but he has also failed to demonstrate any pretextual action on DHS's part to counter DHS's legitimate business reason for terminating his employment. As Petitioner has failed to demonstrate that the Union has failed to breach its duty of fair representation, no derivative claim against the City has been stated.

DISCUSSION

Petitioner's first claim in the instant matter alleges that the Union breached its duty of fair representation towards him in violation of NYCCBL § 12-306(b)(3), when it declined to take any action on his behalf with respect to the supervisory conference memos that he received during his probationary service and when it declined to file the instant improper practice petition for him. This Board, "in interpreting NYCCBL § 12-306(b)(3), has long held that the duty of fair representation requires the union to refrain from arbitrary, discriminatory, and bad faith conduct in negotiating, administering, and enforcing collective bargaining agreements." *Okorie-Ama*, Decision No. B-05-2007 at 13-14; *citing James-Reid*, Interim Decision No. B-29-2006 at 16-17; *Samuels,* Decision No. B-17-2006 at 12*; Del Rio,* Decision No. B-6-2005 at 12; *Whaley,* Decision No. B-41-97 at 12; *see also Transport Workers Union, Local 100 (Brockington),* 37 PERB ¶ 3002 (2004) (similar standard employed by the Public Employment Relations Board); *see generally Vaca v. Sipes,* 386 U.S. 171,

177 (1967) (same standard under federal National Labor Relations Act). Arbitrarily ignoring a meritorious grievance or processing such a grievance in a perfunctory fashion constitutes a violation of the duty of fair representation. *Watkins*, Decision No. B-23-2005 at 12; *Hassay*, Decision No. B-2-2003 at 10-11.

A union "enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty." *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, a union is entitled to broad discretion in determining whether to pursue an employee's complaint through a grievance, a labor management meeting, or some other method of resolution. *Richardson*, Decision No. B-24-94 at 10-11. In addition, a union does not breach the 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 Howe*, Decision No. B-32-2006 at 17; *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 in the instant case has clearly satisfied the duty of fair representation towards Petitioner. The Union referred the matter to its legal counsel who investigated and made a determination that the grievance lacked merit and should not be pursued. Its failure to act on Petitioner's grievance and its acquiescence in its counsel's letter to Petitioner of which it had notice make it clear that the Union adopted its counsel's view of the matter. This Board "has held that the representation provided to a member by a designee of a union may be the predicate of a claim that

the duty of fair representation has been breached, on the theory that the union, having appointed an agent to fulfill its duty, is properly held responsible for any resultant breach of that duty." *James-Reid*, Decision B-29-2006 at 15, *citing Del Rio*, Decision No. B-6-2005 at13-14*; Hassay*, Decision No. B-2-2003 (union delegate as agent); *Grace*, Decision B-18-95 at 7-8. Such a claim properly evaluates the attorney's behavior under the same standard as would apply to any other claimed breach of the duty of fair representation. *James-Reid*, Decision B-29-2006 at 15-17; *see also*, *Gertskis*, Decision No. B-11-2006 at 10-12; *Green*, Decision No. B-34-2000 at 9; *Matter of Grassel v. Public Employees Relations Board*, 34 PERB ¶7021 (Sup. Ct. Kings Co. 2001), *aff'd*, 301 A.D.2d 522 (1st Dep't 2001) (applying standard duty of fair representation analysis to claimed inadequate representation where union-employed attorney provided representation to a member of second union pursuant to an agreement between the two unions).

This case presents a question as to whether or not a claim of the duty of fair representation has been sufficiently alleged. Ultimately, the question is whether the Union's actions – through the determination of its counsel that the Petitioner's grievance lacked merit – was arbitrary or perfunctory or whether the Union and its agents did more for others than for Petitioner. *James-Reid*, *supra*, at 17, *citing Gertskis, supra,* at 11. Counsel's determination with respect to the merits of Petitioner's claims need not have been correct, but rather only concluded in good faith. No dispute exists over the fact that counsel met with Petitioner and discussed the matter with him, reviewed the facts and documents that Petitioner presented to him, and when Petitioner sought reconsideration of the Union's decision not to pursue the matter, counsel conducted a second review, described in his letter of November 8, 2006, to Petitioner, confirming the prior determination that legal deficiencies in the evidence would not support a successful outcome. Each of these reviews resulted in a written

response, providing grounds for the decision; the initial response in particular provides a detailed written legal analysis of the inapplicability of any grievance, Civil Service Law, or improper practice remedy under the NYCCBL. (SSEU Answer, Ex. A; SSEU Answer, Ex. C).

Further, the Union's decision not to pursue Petitioner's claims can not, in these circumstances, be deemed to be arbitrary or in bad faith, as no error, let alone one of the magnitude necessary to establish a breach of the duty of fair representation, has been demonstrated by Petitioner. In the instant case, as was the case in *Amaker*, Decision No. B-32-1998, Petitioner is a probationary employee unable to establish any entitlement to grievance or other appeal rights from the termination of his employment. *Id*., at 8. Clearly, Union counsel's determination to this effect, carefully explained to Petitioner in detail, cannot be found to be"perfunctory." *See D'Onofrio*, Decision No. B-03-2007 at 22; *Gertskis*, *supra*, at 11. A reasoned refusal to take a legal position on the basis that the position is without merit cannot, as a matter of law, constitute a basis for claiming that the decision breached the duty of fair representation. *See, e.g., James-Reid*, Decision B-29-2006 at 17-18.; *Gibson*, Decision No. B-13-1982 at 4 (union's reasoned decision that proceeding with a grievance would be fruitless could not constitute a breach of the duty of fair representation). Nor has Petitioner pleaded factual allegations which, if credited, would establish that the Union had filed grievances or otherwise appealed from a termination decision on behalf of other probationary employees in similar circumstances. Thus, Petitioner has not established that the Union's decision not to pursue a remedy under the collective bargaining agreement or Civil Service Law § 75 constituted a breach of the duty of fair representation.

Moreover, Petitioner has not established that the Union's decision not to pursue an improper practice charge arising out of the decision to terminate him breached the duty of fair representation.

Union counsel properly considered the proof required to establish Petitioner's claim that his termination was causally linked to his protected union activity, and under that theory would constitute an improper practice. Counsel noted that proof of the motivation underlying the termination decision would be difficult in view of the lack of any negative response to such activities on the part of any manager involved in his termination. Additionally, counsel explained in writing that the three disciplinary memoranda Petitioner had received provided a legitimate business reason for his termination. Here, as in *Gertskis*, "[e]ven if the Union's legal assessment was erroneous, the pleadings do not show that this exercise of its legal and strategic judgment violated its duty of fair representation." Decision B-11-2006 at 12; 12-13. In addition, because petitioner was informed of this reasoned determination, and thus had the opportunity to bring the claim on his own, the decision not to bring an improper practice claim did not constitute a breach of the duty of fair representation. *D'Onofrio*, Decision B-03-2007 at 20, *citing Minervini*, Decision No. B-29-2003 at 15; *Keitt*, Decision No. B-16-79 at 8.

Inasmuch as we deny the claim against the Union, any potential derivative claim against DHS also fails, pursuant to NYCCBL § 12-306(d). *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). Because Petitioner has not alleged facts which, if credited, would establish his claim that he was terminated in retaliation for his protected union activity, we also dismiss that claim.

To determine if an employer's 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.

Bowman at 15; *Howe*, Decision No. B-32-2006 at 22.

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. *Id.; see also Local 237, City Employees Union,* Decision No. B-24-2006 at 19. This test applies equally to employees who have not passed their probationary period of employment as well as to those who have. *District Council 37* , Decision No. B-12-2006 at 14. Wrongfully motivated conduct by a public employer is unlawful equally towards a probationer as it is towards a permanent employee. *Assistant Deputy Wardens/Deputy Wardens Ass'n*, Decision No. B-9-2003.

With respect to the first prong of the *Salamanca-Bowman* test, Petitioner contends, and the City admits, that he was engaged in protected activity in his capacity as a delegate and/or shop steward. The City does not dispute that Petitioner was involved with the Union. Therefore, with respect to Petitioner's allegations that DHS had knowledge of his protected activity, we find that Petitioner has properly established the first prong of the test. *See Howe,* Decision No. 32-2006 at 21.

Typically, the second element, requiring proof of a causal relationship between protected activity and the complained of action, is proven through the use of circumstantial evidence, absent an outright admission. *Howe*, Decision No. B-32-2006 at 22; *Burton*, Decision No. B-15-2006. As we have previously explained, "[t]his willingness to accept indirect evidence of wrongful intent does

not, however, permit to carry its burden of proof through mere assertion." *Social Services Employees Union*, Decision No. B-35-2006 at 15; *citing Local 983, District Council 37*, Decision No. B-15-2001 at 6. Rather, "allegations of improper motivation must be based on specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion." *Id.*; *citing Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. Only "where the first prong is satisfied and petitioner further is able to establish a causal link between the protected act at issue" is a *prima facie* case of a violation of the NYCCBL made out. *Social Services Employees Union*, Decision No. B-35-2006 at 15-16; *citing District Council 37*, Decision B-15-1999 at 16-17.

Petitioner alleges that DHS management subjected him to supervisory conferences and subsequently terminated his employment, which he claims resulted from his Union activism. Petitioner's conclusory allegations of anti-union animus are not, however, borne out by the undisputed facts. Petitioner was the subject of four separate supervisory conferences, memorialized in three memoranda, each of them specifying misconduct including multiple instances of unexcused lateness, improperly distributing written materials to co-workers on agency time, negligence with agency equipment, and, most seriously, two incidents of insubordinate, disrespectful and "threatening" behavior to superiors. (City Answer, Exhibits D, E, F, G).

The first such conference related to an incident, on April 26, 2006, occurred scarcely two months after Petitioner began work, in which Rodriguez reported that Petitioner addressed her in a threatening manner, refused her repeated requests to leave her office, yelled at her, and only left when she stated that she would call the security guards. Petitioner has not denied these allegations, although afforded the opportunity to reply.

The second incident in which Petitioner is accused of having behaved in an insubordinate

manner toward Rodriguez is likewise unaddressed by Petitioner in any pleading. This Board notes that Petitioner's letter to the Union attorney, annexed as an exhibit to the petition, references an incident of a similar nature, and although it presents a somewhat different account, Petitioner does not deny the specific facts stated in the supervisory memorandum. Further, Petitioner's own exhibits contain admissions of his repeated latenesses. With respect to the distribution of materials on agency time, Petitioner himself states that the article from The Chief with Petitioner's derogatory comments towards management "was not union related business but purely my own thoughts on a topic which I thought would be of interest to some of my fellow workers." Finally, Petitioner has not denied the loss of the cell phone, or the subsequent latenesses, after receiving a written warning.

Against this backdrop, Petitioner nonetheless asserts that the proximity in time between his assuming duties as a Union representative and the adverse employment actions against him establish the requisite causal connection. However, although a "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," proximity alone does not establish a causal connection. *See Communication Workers of America, Local 1180*, Decision No. B-20-2006 at 14; *Civil Serv. Bar Ass'n*, Decision No. B-17-2004 at 18; *compare Social Services Employees Union*, Decision B-35-2006 at 15-16. In this case, Petitioner has not pleaded that any specific actions undertaken in his Union capacity preceded these initial supervisory conferences and memoranda. Such allegations as he does make of protected activity are not connected by him in any way to the managers who complained about these uncontested instances of misbehavior, or indeed to any supervisor. Moreover, no other Union member has been alleged to be subject to discipline solely for agreeing to serve as a Union delegate–the only act situated by petitioner prior to his first supervisory

conferences. In this regard, the record shows that Petitioner was elected one of twelve Union delegates at his work location. The petition does not allege that any other delegate was subjected to adverse action because of their Union activity.

Likewise, Petitioner has provided no factual allegations which would, if credited, link the later, more public acts allegedly in his Union capacity with the decisions to discipline, and, ultimately, terminate, petitioner. Rather, Petitioner's own documents establish his repeated incidents of lateness and the uncontested allegations of the City further buttress the existence of legitimate, non-discriminatory grounds for termination. No factual allegations have been made tending to suggest that other similarly situated employees' misconduct went unremarked, and no reason has been provided tending to suggest that such misconduct is not an appropriate ground for terminating a probationary employee, who is, in the absence of bad faith or other impermissible motivation, "subject to termination for any reason or no reason." *Matter of Nieves-Diaz v. City of New York*, 27 A.D.3d 356, 356-357 (1st Dep't 2007); *Soto v. Koehler*, 171 A.D.2d 567 (1st Dep't 1991) ("the burden of raising and proving such 'bad faith' is on the employee and the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden"; repeated latenesses alone a legitimate ground for discharge); *see also Witherspoon v. Horn*, 19 A.D.3d 250 (1st Dep't 2005)(same). In the instant case, Petitioner has failed to plead any facts sufficient to establish a causal connection between his protected activity and the decision to terminate him, in view of his own admitted latenesses, and the undisputed records of disputes between Petitioner and his supervisors, as well as his loss of agency equipment. Such conclusory allegations as petitioner has made fail to substantiate his conclusory allegations that the decision to terminate him was motivated by anti-union animus. Thus, Petitioner has failed to plead a *prima*

facie case of retaliatory discharge under the NYCCBL.

Accordingly, the instant petition is dismissed in its entirety.

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 Roy Sicular docketed as BCB-2584-06 be, and the same hereby is dismissed in its entirety.

Dated: September 25, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER

PETER PEPPER
MEMBER