Leiva, 9 OCB2d 11 (BCB 2016)

(IP) (Docket No. BCB-4128-15)

Summary of Decision*:** Petitioner argued that DOHMH retaliated against her for protected union activity in violation of NYCCBL § 12-306(a)(1) and (3) by disciplining her, denying her request for a transfer, and failing to honor her direct deposit request. The City argues that Petitioner has not established a *prima facie* case and that it has demonstrated legitimate business reasons for DOHMH's actions. The Board found that Petitioner has not established a *prima facie* case of retaliation. Accordingly, the improper practice petition was dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

MAXI-MILLIE LEIVA,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondents.

DECISION AND ORDER

On September 15, 2015, Maxi-Millie Leiva filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Health and Mental Hygiene ("DOHMH"). Petitioner argues that DOHMH violated of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by disciplining her, denying her transfer requests, and failing to honor her direct deposit request because she engaged in union activity. The City argues that Petitioner

has not established a *prima facie* case of retaliation because she was not engaged in protected union activity and because the disciplinary charges were initiated before Petitioner's complaint was received. The City also argues that it has established legitimate business reasons for DOHMH's actions. The Board finds that Petitioner has not established a *prima facie* case of retaliation. Accordingly, the improper practice petition is dismissed.

BACKGROUND

The Trial Examiner held three days of hearings and found that the totality of the record established the following relevant facts. Petitioner has been employed by the City since 1993 and by DOHMH since July 2005. Petitioner works in DOHMH's Bureau of Child Care ("BCC"), which is responsible for processing license applications by day care providers.

In August 2015, DOHMH issued disciplinary charges against Petitioner ("2015 Charges") and denied her request for a transfer. In January 2016, Petitioner's direct deposit was stopped and since then DOHMH has been issuing her paper checks. Petitioner testified that these acts were in retaliation for purported union activity, including complaints about, and efforts to transfer away from, her supervisor, Janet James. Petitioner testified that she had no problems at DOHMH until being assigned to work under James in November 2010.

Alleged Union Activity

2011 Request for Union Representation

Petitioner testified that shortly after she started working for James, James began harassing and defaming her, including falsely accusing her of time and leave violations in mid-

March 2011.[1] James had informed the Borough Manager that Petitioner had not followed proper procedures prior to taking time off on March 17 and 18, 2011. Thereafter, Petitioner met with the Borough Manager, her leave was retroactively approved, and no disciplinary action was taken. Petitioner testified that after that, "things started getting worse." (Tr. 19)

On March 30, 2011, Petitioner requested a meeting with James and the Borough Manager to address James' purported harassment of her, and a meeting was scheduled for April 4. Petitioner testified that on April 4, she contacted the president of her union, District Council 37, Local 2627 ("Union"), to ask him to attend the meeting, and that the Union president said she should notify DOHMH that he would be attending. Petitioner then informed the Borough Manager that she had invited the Union president. In response, the Borough Manager informed Petitioner that the meeting would be rescheduled. On April 7, 2011, James Morriss, BCC's Director of Field Operations and Regulatory Enforcement ("BCC Director"), emailed DOHMH's Human Resources Department, described the events in March regarding Petitioner's leave, and requested advice regarding Petitioner's request for union representation. The BCC Director testified that his understanding was that DOHMH did not have to allow union representation for a routine discussion between a supervisor and a staff member. On April 20, 2011, the Borough Manager denied Petitioner's request, stating that the "current Labor Management agreement authorizes [DOHMH] to conduct meetings between supervisors and employees without Union representation."[2] (Pet., Ex. B)

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[1] Petitioner testified that James micromanaged her, scrutinized her more than her co-workers, and gave her significantly shorter time frames than her co-workers to complete her work. Petitioner further testified that James would write her up when day care providers failed to supply the proper documentation and asked day care providers to complain about her.

[2] Petitioner testified that the Union president informed her that in 2011, he tried to meet with the Borough Manager on Petitioner's behalf but that the Borough Manager refused to meet with him.

EEO Complaints

Petitioner described working for James as "a pretty hostile environment." (Tr. 39) On two occasions, Petitioner complained to DOHMH's Equal Employment Opportunity ("EEO") Office. In January 2013, Petitioner filed a charge alleging that James discriminated against her based on her national origin/race. On March 6, 2013, the EEO Office closed the matter with a finding of no discrimination. On September 29, 2014, Petitioner emailed DOHMH's EEO Office, complaining about harassment from James and co-workers, alleging that she had been "bullied" since she first came to BCC seven years ago, and that James has told her co-workers that she is a "kleptomaniac."[3] (Pet., Ex. H)

Transfer Requests

Petitioner's unrebutted testimony is that she requested a transfer every year since 2011. The record contains three emails Petitioner sent which contained an explicit request to transfer. On January 27, 2014, Petitioner sent an email to the BCC Assistant Commissioner referencing the disciplinary charges she was challenging and stating that she did not "feel safe in my current office." (Pet., Ex. G) In Petitioner's September 29, 2014 email to the EEO Office, discussed above, she again requested a transfer. On January 17, 2015, Petitioner sent an email to the DOHMH Commissioner advising her that she had been subject to daily "bullying," that she had repeatedly been falsely accused of stealing, and that she feared that if she "continue[d] to work in my current office, the stress will cause me a heart attack." (Pet., Ex. I) While Petitioner testified that she discussed seeking a transfer with her Union, the Union was not mentioned in, nor copied

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[3] Petitioner did not file a complaint. Petitioner testified that when she went to the EEO Office, she was informed that she could not file a complaint at that time. Petitioner further claims that the EEO Office notified James that she was trying to file a complaint against James.

on, any of Petitioner's emails. In her emails, Petitioner did not claim a contractual right to a transfer, and the collective bargaining agreement was not mentioned.

In addition, on August 6, 2015, counsel retained by Petitioner sent a letter ("August 2015 Letter") to DOHMH's Associate Commissioner for Food Safety and Community Sanitation requesting a transfer. Petitioner's counsel asserted that Petitioner has suffered "ongoing harassment and defamation" and that the "stress of these false allegations are aggravating [Petitioner's] health conditions and causing her to have to seek ongoing medical treatment."[4] (Pet. Ex. J.) Petitioner's counsel did not identify himself as a union representative, did not state that he was acting on the Union's behalf, and the letter was not copied to the Union.

Alleged Retaliatory Acts

DOHMH denied all of Petitioner's requests for a transfer. In its August 13, 2015 email response to the August 2015 Letter, DOHMH informed Petitioner's counsel that a "transfer is not appropriate at this time." (City Ex. 5) The BCC Director testified that transfers are not considered for employees with pending disciplinary charges. DOHMH's August 13, 2015 email informed Petitioner's counsel that DOHMH was going to serve disciplinary charges against Petitioner and asked Petitioner's counsel if Petitioner had retained him for all matters or if Petitioner's "union representative should be the contact . . . ." (City Ex. 5)

DOHMH issued two sets of disciplinary charges against Petitioner, the first on August 29, 2013 ("2013 Charges"), and the second on August 17, 2015 ("2015 Charges"). Both the 2013 and 2015 Charges were requested by the BCC Director. The decision to issue disciplinary charges is made by DOHMH's Employment Law Unit ("ELU"). Both the BCC Director and the ELU Director, Rose Tessler, testified that the 2013 and 2015 Charges were based upon

[4] The August 2015 Letter states that Petitioner had been falsely accused of stealing a cellphone, space heater, and money orders. No charges of theft have ever been levied against Petitioner.

information provided by James. The ELU Director testified that when she issued both the 2013 and the 2015 Charges, she was unaware of Petitioner's EEO complaints or her requests for a transfer. Similarly, the BCC Director testified that he was unaware of Petitioner's EEO complaints or her requests for a transfer when he requested that charges be brought against Petitioner.

The 2013 Charges were heard by an administrative law judge ("ALJ") from the Office of Administrative Trials and Hearings ("OATH"). The ALJ found that Petitioner was discourteous to a colleague on one occasion, discourteous to a home day care provider on one occasion, and failed to perform work as assigned on two occasions.[5] The ALJ recommended, and the Civil Service Commission affirmed, a 12-day suspension, which Petitioner served in April 2015.

Regarding the 2015 Charges, the record reflects that James drafted a memorandum, dated November 19, 2014 ("November 2014 Memorandum"), "to document the negative impact [Petitioner's] behavior has on the smooth operation of [James'] job responsibilities."[6] (City Ex. 4) James wrote that Petitioner's "passive aggressive attitude and refusal to communicate and/or respon[d] to directive[s] is a distraction and can be challenging each and every day. Within the past few weeks this behavior has intensified and is now a hindrance to me; both emotionally and mentally." (*Id.*) James further stated that the "constant disrespect and insubordination from [Petitioner] has really been an emotional turmoil for me." (*Id.*) James then "request[ed] Management assistance with disciplinary actions" against Petitioner. (*Id.*)

[5] A Civil Service Law § 75 hearing on the 2013 Charges was held at OATH on January 14, 2014, and the OATH determination was issued on March 14, 2014.

[6] The BCC Director testified that James had informed him prior to drafting the November 2014 Memorandum that her problems with Petitioner continued after the OATH hearing on the 2013 Charges. The ELU Director corroborated the BCC Director's testimony on this point.

The BCC Director immediately forwarded the November 2014 Memorandum to ELU but, due to a case back-log, ELU's investigation did not begin until February 2015.[7] In March 2015, an ELU attorney met with managers, reviewed the documentation, and began drafting charges. The ELU Director testified that she had reviewed first draft of the 2015 Charges by the end of April 2015, and approved the 2015 Charges on July 29, 2015.[8] The ELU Director further testified that the 2015 Charges were not scheduled to be issued to Petitioner until after August 17, 2015, because the ELU Director was out of the country from August 6 through August 17.

On August 19, 2015, the 2015 Charges were served on Petitioner. They alleged seven instances in which Petitioner had not followed an instruction or DOHMH policy, two instances when Petitioner was discourteous to a day care provider or to a co-worker, one instance in which Petitioner failed to pay attention at a training staff meeting, and four instances when Petitioner was absent without authorization. An informal conference for the 2015 Charges was held at DOHMH on September 16, 2015. At the conference, the matter was adjourned by mutual agreement of the parties. No further action has been taken on the 2015 Charges.

Petitioner was out on medical leave from October 19, 2015, to January 19, 2016, during which time the direct deposit of her pay ceased. Respondents acknowledge that Petitioner has been paid by paper checks instead of direct deposit since her return from medical leave in January 2016. Respondents state that cessation of direct deposit is standard procedure when an employee is inactive for all or part of a pay period, such as Petitioner's medical leave, and that

[7] The ELU Director explained that the back-log of cases was caused by a variety of factors, including a major investigation in the Medical Examiners' Office and her being on leave for part of the summer 2014 and November 2014. (*See* Tr. 162; 182)

[8] A series of emails corroborate the ELU Director's testimony that the drafting process was underway by March 2015 and was still in progress as of July 21, 2015. (*See* City Exs. 6 to 11)

Petitioner was informed of what she needs to do to re-activate her direct deposit, but she has not done so.[9]

POSITIONS OF THE PARTIES

Petitioner's Position

On September 15, 2015, Petitioner filed the instant improper practice petition. Petitioner argues that DOHMH retaliated against her, in violation of NYCCBL § 12-306(a)(1) and (3), by its issuing disciplinary charges, denying her requests for a transfer, and ceasing her direct deposit.[10] (Pet. Br at 1) According to Petitioner, James was the source of all her conflicts. Petitioner alleges that "James's actions have been and continue to be designed solely to destroy [her] career" and that James has sought to make her workplace "intolerable" with the "longer-term strategy" of effecting Petitioner's "termination via the filing of false disciplinary charges."

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[9] Petitioner claims that she has had payroll problems in the past, and Respondents acknowledge two incidents in 2015 when Petitioner was not paid by direct deposit. The first was when Petitioner was serving her suspension in April 2015; the second was when she was on jury duty.

[10] NYCCBL § 12-306(a)(1) and (3) provide, in pertinent part, that:

> 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 [§] 12-305 of this chapter;
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

NYCCBL § 12-305 provides, in pertinent part, that: "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."

(*Id.* at 5) Petitioner requests that the Board order DOHMH to withdraw the 2015 Charges and transfer her.

Petitioner argues that her effort to obtain union assistance in 2011 to address James's harassment constitutes protected activity.[11] Petitioner further argues that the union assistance she received in seeking a transfer, as well as her EEO complaints, constitute protected activity. According to Petitioner, there is temporal proximity between her protected activity and DOHMH's retaliatory acts. The 2013 Charges were issued shortly after Petitioner's EEO complaint against James; James sent the November 2014 memorandum shortly after Petitioner attempted to file a second EEO complaint against James; and the 2015 Charges were issued shortly after the August 2015 Letter seeking a transfer away from James. Further, Petitioner argues that DOHMH's hostility toward the Union is demonstrated by the timing of the 2015 Charges. According to Petitioner, DOHMH was content to do nothing for 10 months after the BCC Director's requested disciplinary action against Petitioner. Yet, within weeks of the August 2015 Letter, DOHMH issued the 2015 Charges. Petitioner also argues that DOHMH's animus is shown by its refusal to allow her to have union representation at the meeting in 2011.

James did not testify and, according to Petitioner, the record contains only hearsay testimony about Petitioner's work performance, as the City's witnesses all testified that their knowledge of Petitioner's alleged performance problems came solely from James. This testimony is, according to Petitioner, entirely unreliable hearsay and entitled to little or no weight. According to Petitioner, the BCC Director was biased, unreliable, and "little more than a mouthpiece for the smear of [Petitioner] by [James]." (Pet. Br. at 7) Petitioner argues that since James did not testify, the Board may draw the strongest inference that the opposing evidence

[11] Petitioner's counsel refers to a "union grievance" in his brief to the Board. (Pet. Br. at 1) We note that there is no union grievance in the record before the Board.

permits and find that DOHMH has failed to establish a legitimate business reason. Petitioner further argues that DOHMH has never explained why Petitioner could not be transferred or why it "played" with her payroll by stopping her direct deposit without notice. (*Id.*)

City's Position

The City argues that Petitioner cannot establish a *prima facie* case of retaliation in violation of NYCCBL § 12-306(a)(1) and (3).[12] According to the City, Petitioner was not engaged in protected activity within the meaning of the NYCCBL. Petitioner's actions were all personal in nature, relating exclusively to her own individual welfare, and thus are not union activity. The City argues that there is no direct evidence in the record to indicate that the Union took any action on Petitioner's behalf with respect to her request for a transfer. Further, her transfer requests were not made pursuant to a provision of the collective bargaining agreement and there is no contractual right to a transfer. Moreover, both the BCC Director who made the referral for the 2015 Charges and the ELU Director who issued them testified that they were not aware of Petitioner's transfer requests or her EEO complaints until after the 2015 Charges were issued, and Petitioner has offered no evidence to rebut this testimony.

Further, the City argues that even assuming that the Board finds that Petitioner engaged in union activity, she cannot establish the requisite causal connection between the August 2015 Letter and the alleged acts of retaliation. According to the City, there is no temporal proximity because the ELU Director's testimony establishes that the request, finalization, and decision to issue the 2015 Charges were all made prior to the agency's notice of August 2015 Letter. The City also argues that Petitioner has not put forth any direct evidence indicating that her alleged

[12] The City also argues that there is no independent NYCCBL § 12-306(a)(1) violation. Since Petitioner has not alleged an independent NYCCBL § 12-306(a)(1) violation, we do not address this argument.

union activity was a motivating factor in the decision to issue the 2015 Charges and that the timing of the 2015 Charges has been fully explained.

Additionally, the City argues that it has established legitimate business reasons for DOHMH's actions. According to the City, the record demonstrates the BCC Director's concerns regarding Petitioner's ongoing misconduct, particularly in light of Petitioner's previous disciplinary penalty for essentially the same conduct. The City further argues that ELU thoroughly investigated and issued the 2015 Charges under its usual and customary practices. Regarding the transfer requests, the City argues that denying them was a proper exercise of managerial authority to direct its operations under NYCCBL § 12-307(b).[13] Regarding the direct deposit allegations, the City argues that the record shows that the interruptions of Petitioner's direct deposit were unrelated to any union activity but a result of Petitioner being inactive during certain pay periods.

DISCUSSION

Petitioner claims that DOHMH retaliated against her because of union activity in violation of NYCCBL § 12-306(a)(1) and (3). The Board finds that Petitioner has not established a *prima facie* case of retaliation, and thus dismisses the petition.

Timeliness

As Petitioner's allegations concern acts that go back several years, we must first address which claims are timely. *See Nardiello*, 2 OCB2d 5, at 27-28 (BCB 2009) (timeliness is a threshold question). NYCCBL § 12-306(e) sets the statute of limitations for an improper

[13] NYCCBL § 12-307(b) provides, in pertinent part, that: "It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . determine the methods, means and personnel by which government operations are to be conducted . . . and exercise complete control and discretion over its organization and the technology of performing its work."

practice claim and requires that an improper practice petition "must be filed within four months" from the time the disputed action occurred or from the time the petitioner knew or should have known of the disputed action. *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (Beeler, J.); *Accord* Section 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").[14] The date a petition is filed is used to calculate the statute of limitations. *Sims*, 8 OCB2d 23, at 14 (BCB 2015). As the instant petition was filed on September 15, 2015, only claims arising after May 15, 2015, are timely. Accordingly, we find timely Petitioner's claims regarding the 2015 Charges, the denial of her August 2015 request for a transfer, and the 2016 cessation of her direct deposit. Petitioner's claims regarding DOHMH's actions that pre-date May 15, 2015, such as its 2011 rejection of her request for union representation, the 2013 Charges, its rejection of her pre-May 2015 transfer requests, and any pre-May interruption in her direct deposit, are not timely and are not themselves remediable. They are, however, "admissible as background information." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007); *see also Nealy*, 8 OCB2d 2, at 15 (BCB 2015).

Retaliation Claims

To establish a *prima facie* case of retaliation in violation of NYCCBL § 12-306(a)(1) and

[14] NYCCBL § 12-306(e) provides, in relevant part: "A petition alleging that a public employer 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 or of the date the petitioner knew or should have known of said occurrence."

OCB Rule § 1-07(b)(4) provides, in relevant part: "public employees . . . may file a petition alleging that a public employer or its agents . . . has engaged in or is engaging in an improper practice in violation of [NYCCBL] § 12-306 . . . . The petition must be filed within four months of the alleged violation . . . ."

(3), the Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), requiring that 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.

Bowman, 39 OCB 51, at 18-19; *see also CSTG, L. 375*, 7 OCB2d 16, at 19 (BCB 2014), *affd., Matter of Donas v. City of New York and & NYC Off. of Collective Bargaining*, Index No. 101265/14 (Sup. Ct. N.Y. Co. Oct. 23, 2015) (Wooten, J.). If a *prima facie* case of retaliation is established, "the employer may attempt to rebut petitioner's showing on one or both elements, or may attempt to rebut this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *CSTG, L. 375*, 7 OCB2d 16, at 20 (citations and quotation marks omitted); *see also SSEU*, 77 OCB 35, at 18 (BCB 2006).

The first prong of the *prima facie* case is satisfied where "the employer is shown to have knowledge of the protected union activity." *CSTG, L. 375*, 7 OCB2d 16, at 20 (citing *Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011); *Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004)). Among the employee actions this Board has found to be protected under NYCCBL § 12-305 are "holding a union position, acting at the union's request, filing a grievance, or advocacy on behalf of other union members." *CWA, L. 1182*, 8 OCB2d 18, at 11-12 (BCB 2015) (citing *Local 375, DC 37*, 5 OCB2d 27, at 14 (BCB 2012) (email to colleagues regarding employer's alleged misapplication of the collective bargaining agreement protected); *Local 376, DC 37*, 5 OCB2d 31, at 18 (BCB 2012) (seeking union's assistance in appealing disciplinary charges protected); *SSEU, L. 371*, 79 OCB 34 at 9-10 (BCB 2007) (testifying at co-worker's disciplinary hearing at

union's request protected); *Washington*, 71 OCB 1, at 13 (BCB 2003) (individual's filing of out-of-title grievance protected); *County of Tioga*, 44 PERB ¶ 3016, at 3061 (2011) ("statements and actions that are organized, prompted or encouraged by an employee organization will, in general, be found to be protected concerted activity for purposes of the [Taylor] Act . . . .")).

However, "[a]ctions that appear to have only an individual purpose and are not union-sponsored or do not promote the collective welfare of the bargaining unit may not be protected." *CWA, L. 1182*, 8 OCB2d 18, at 12 (citing *Archibald*, 57 OCB 38, at 19-20 (BCB 1996) (letter to Mayor threatening legal action if a supervisor did not apologize to a co-worker who was allegedly mistreated was not protected)); *see also CIR*, 67 OCB 45, at 5-6 (BCB 2001) (union advocacy of its members tenancy rights not protected); *Local 1549, DC 37*, 63 OCB 30, at 15 (BCB 1999) (not all actions taken by a union or its members are protected under the NYCCBL); *Nelson*, 49 OCB 16, at 10 (BCB 1992) (finding a letter from a former shop steward alleging abusive treatment by a supervisor was not union activity where it was not clear that the letter was intended to be a grievance).

Here, Petitioner alleges that she engaged in three types of union activity: her 2011 request for union representation at a meeting, that she sought union assistance in seeking a transfer (including the August 2015 Letter), and that she sought union assistance in her EEO complaints. On the record before us, only Petitioner's 2011 request for union representation can satisfy the first prong of the *prima facie* case, as a request for union representation at a meeting falls within the scope of what the Board has held to be protected union activity. *See SSEU, L. 371*, 8 OCB2d 35, at 12 (BCB 2015) (citing *Kaplin*, 3 OCB2d 28, at 14 (BCB 2010); *DC 37, L. 376*, 77 OCB 12, at 14-15 (BCB 2006)). It is also undisputed that the BCC Director was aware of Petitioner's request for union representation in 2011 since he requested advice from

DOHMH's Human Resources Department regarding whether to grant the request. Accordingly, we find Petitioner's request for union representation in 2011 constitutes protected union activity.

Regarding Petitioner's transfer requests, the record does not establish that Petitioner involved the Union in them. While she testified that she consulted with the Union about transferring, the Union was not mentioned or copied on any of Petitioner's written transfer requests. Thus, the transfer requests "could not be identified in form or in content as having been sanctioned by the [U]nion." *UFA*, 1 OCB2d 10, at 21 (BCB 2008) (explaining *Archibald*, 57 OCB 38, at 19-20); *see also Nelson*, 49 OCB 16, at 10. Further, Petitioner does not allege a contractual right to a transfer or mention the collective bargaining agreement in any of her written transfer requests.[15] *See UFA*, 8 OCB2d 3, at 31 (BCB 2015). Accordingly, on the record before us, we cannot construe Petitioner's transfer requests as union activity.

For similar reasons, Petitioner's EEO complaints do not constitute protected union activity under the NYCCBL. There is nothing in the record establishing union involvement in Petitioner's EEO complaints, nor is the Union mentioned in or copied on Petitioner's emails to the EEO Office. Petitioner, in filing her EEO complaints, was not seeking to address rights provided for in the collective bargaining agreement but instead sought to address rights provided by a statute other than the NYCCBL. *See Gonzalez*, 8 OCB2d 10, at 9 (BCB 2015) (allegations of retaliation based upon the filing of an EEO complaint did not raise a claim under the NYCCBL); *Colella*, 79 OCB 27, at 52 (BCB 2007) (Board declined to address claim of alleged retaliation for filing an EEO complaint as the claim arises under a statutory scheme other than the NYCCBL). Accordingly, on the record before us, the EEO complaints do not constitute union activity necessary to satisfy the first prong of the *prima facie* case.

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[15] We take administrative notice that the pertinent collective bargaining agreement, the 2008-2010 Accounting/EDP Unit Agreement, does not grant a right to a transfer.

Turning to causation, the second prong of the *prima facie* case, "absent an 'outright admission of any wrongful motive, proof of the second element must necessarily be circumstantial.'" *CSTG, L. 375*, 7 OCB2d 16, at 20 (quoting *CWA, L. 1180*, 77 OCB 20, at 15 (BCB 2006)) (other citations omitted). "[P]roximity in time, without more, is insufficient to support an inference of improper motivation." *SSEU, L. 371*, 75 OCB 31, at 13 (BCB 2005), *affd., In re Soc. Serv. Empl. Union, L. 371 v. NYC Bd. of Collective Bargaining*, Index No. 116054/05 (Sup. Ct. N.Y. Co. May 30, 2006) (Stallman, J.), *affd.*, 47 A.D.3d 417 (1st Dept. 2008); *see also CSTG, L. 375*, 7 OCB2d 16, at 20. However, "timing may also be considered together with other relevant evidence." *Id.*

We find that Petitioner has not established causation. The alleged retaliatory acts did not occur in close proximity to Petitioner's union activity. Instead, the 2015 Charges were issued almost four years after Petitioner's request for union representation. *See Local 2627, DC 37*, 3 OCB2d 37, at 17 (BCB 2010) (finding a union failed to establish anti-union animus due to temporal proximity where alleged retaliatory act occurred nearly a year and half after union activity); *Local 371*, 1 OCB2d 25, at 18 (BCB 2008) (finding a gap of over a year between union activity and alleged retaliatory act lacked temporal proximity).

In addition, we also find no evidence that anti-union animus motivated the alleged retaliatory acts. Petitioner explicitly argues that all of the alleged acts of retaliation, including the disciplinary charges, stem directly from James' "harassment." (Pet. Br. at 5-6) Indeed, Petitioner testified that this alleged harassment began in 2010 and predated her earliest union activity, the 2011 request for union representation. Further, the 2011 request for union representation was made for a meeting that Petitioner initiated to address James' alleged

harassment.[16] Although we make no such finding, at best, Petitioner's allegations suggest retaliation based upon personal, rather than anti-union, animus. Employer actions motivated by personal animus do not establish a claim of retaliation under the NYCCBL. *See Nealy*, 8 OCB2d 2, at 19 (when an action is linked to personal animus, "a claim that an employer was motivated by antiunion animus necessarily must fail.") (quoting *Local 1087, DC 37*, 1 OCB2d 44, at 29 (BCB 2008)). *See also Warlick*, 29 OCB 1, at 3, 7 (BCB 1982) (finding that a personality conflict with a supervisor does not fall within the prohibited conduct contemplated by the NYCCBL). We find no other evidence in the record to support Petitioner's claim that the alleged retaliatory actions were motivated by anti-union animus or any alleged union activity. As such, there is insufficient evidence to establish any connection – temporal or otherwise – between Petitioner's 2011 request and the alleged retaliatory acts by DOHMH. Accordingly, Petitioner has not established a *prima facie* case and the petition is dismissed.

[16] We also note that Petitioner stated in her September 29, 2014 email to DOHMH's EEO Office that she had been "bullied" since she first came to BCC, which pre-dates the 2011 request for union representation. (Pet., Ex. H) *See Kassim*, 8 OCB2d 8, at 18 (BCB 2015); *DEA*, 79 OCB 40, at 22 (BCB 2007) (adverse actions that pre-date the protected activity "cannot be persuasively shown to have been retaliatory in nature").

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 verified improper practice petition filed by Maxi-Millie Leiva, docketed as BCB-4128-15, against the City of New York and the New York City Department of Health and Mental Hygiene hereby is dismissed in its entirety.

Dated: June 8, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER