Feder, 9 OCB2d 33 (BCB 2016)

(IP) (Docket No. BCB-4147-16)

Summary of Decision*:** Petitioner filed a *pro se* verified improper practice petition alleging that NYCHA violated § 12-306(a)(1) and (3) of the NYCCBL by unilaterally revoking his ability to perform a "split shift" schedule, in retaliation for his union activities. He also alleged that NYCHA's time and leave policies discriminated against and interfered with union activities. Petitioner further claimed that both Local 375 and DC 37 breached their duty of fair representation in violation of NYCCBL § 12-306(b)(3) by failing to adequately represent him regarding this dispute with NYCHA. NYCHA argued that its policies do not provide for a split shift and that its action was not motivated by a desire to discourage Petitioner's union activity. The Union argued that it properly represented Petitioner and that there was no evidence that he was discriminated against. The Board found that Petitioner did not establish a *prima facie* case of discrimination against NYCHA and that its time and leave policies did not interfere with union activities. The Board further found that the claims against Local 375 were untimely and that the evidence did not establish that DC 37 acted in an arbitrary, discriminatory, or bad faith manner. Therefore, the improper practice petition was denied in its entirety. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

MITCHELL FEDER,

Petitioner,

-and-

LOCAL 375, DISTRICT COUNCIL 37; DISTRICT COUNCIL 37; and THE NEW YORK CITY HOUSING AUTHORITY,

Respondents.

DECISION AND ORDER

On January 8, 2016, Mitchell Feder ("Petitioner") filed a *pro se* improper practice petition against the New York City Housing Authority ("NYCHA"), District Council 37 ("DC 37"), and

Local 375 of DC 37 (collectively, "Union"). Petitioner alleges that NYCHA violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it unilaterally revoked his ability to perform what he terms a "split shift" schedule, in retaliation for his union activities.[1] He also alleges that NYCHA's time and leave policies discriminated against and interfered with union activities. Petitioner further claimed that the Union breached its duty of fair representation, in violation of §12-306(b)(3), when it failed to adequately represent him regarding this dispute with NYCHA. In particular, Petitioner alleges that the Union's actions were undertaken in bad faith and that he was treated disparately when the Local 375 President denied him Union representation due to a political rivalry and personal animosity. NYCHA argues that its policies do not provide for a split shift and that its action was not motivated by a desire to frustrate Petitioner's Union activity. The Union argues that it represented Petitioner and that there was no evidence that he was discriminated against or treated with bad faith. The Board finds that Petitioner did not establish a *prima facie* case of discrimination against NYCHA and that its time and leave policies do not interfere with union activities. The Board further finds that the claims against Local 375 are untimely and that the evidence does not establish that DC 37 acted in an arbitrary, discriminatory, or bad faith manner. Therefore, the improper practice petition is denied in its entirety.

BACKGROUND

The Trial Examiner held two days of hearing and found that the totality of the record established the following relevant facts.

[1] Although Petitioner did not cite to NYCCBL § 12-306(a)(1) in the petition, we construe his arguments as alleging both a derivative and independent violation of this provision.

Petitioner is employed as an Associate Housing Development Specialist in the Real Estate Development division of NYCHA. Local 375 is an affiliated local of DC 37 and represents employees in various civil service titles at NYCHA, including Petitioner. Petitioner testified that he has been active in the Union since approximately 1997, and that he was first elected as Chapter President in 2001. Since then, he has held various positions within Local 375. At the time that the relevant events occurred, Petitioner served as Treasurer of Local 375 and President of its Chapter 25. In these capacities, sat on the Local 375 Executive Board.[2]

NYCHA's regular business hours are from 8:00 a.m. to 6:00 p.m. Petitioner's regular work schedule is from 9:00 a.m. to 5:00 p.m. with a one-hour lunch break, Monday through Friday. As a Union official, Petitioner frequently attends Union meetings or functions that occur during his normal working hours. Petitioner testified that for over a decade, up until July 2015, NYCHA had allowed him to attend these Union functions and utilize what he refers to as a "split shift." According to Petitioner, working a split shift means that he would come into the office in the morning and work for a few hours, then he would swipe out of the KRONOS system for however long it took him to attend the Union function, then swipe back in and finish the work day, sometimes staying up until NYCHA's closing time at 6:00 p.m.[3] This schedule allowed him to make up some of the hours he missed while attending the Union function. For example, when working a split shift, Petitioner might come into work early at 8:00 a.m. and work until 11:00 a.m., then swipe out and attend a Union meeting for approximately three hours, then swipe back in at 2:00 p.m. and work until 6:00 p.m. By working outside of his regularly-scheduled hours, in many

[2] Petitioner is no longer the Treasurer of Local 375, but has since been elected as Local 375's First Vice President.

[3] KRONOS is the system that NYCHA utilizes to record employees' time and leave.

instances he would be able to complete a seven-hour day. If the hours Petitioner worked in a day did not add up to seven hours, he would utilize annual leave to make up the difference.

In order to work a split shift, Petitioner would e-mail his supervisor in advance of the Union function and outline his proposed schedule for the day to secure permission. If it was necessary for Petitioner to take annual leave, he would later submit a leave of absence report ("LOA report") to his supervisor for approval.[4] Petitioner claims that "in the more than 10-years that I have been performing these split-shift work days, only once did a supervisor refuse to allow me to attend a Union function at a City Council hearing."[5] (Pet. ¶ 30)

On May 27, 2015, Petitioner e-mailed his supervisor as well as Nicole Ferreira, the Senior Director for Operations, regarding upcoming Union meetings on May 28 as well as June 2, 3, and 4, 2015. Ferreira replied and granted Petitioner's request to work the split shifts on those dates. Thereafter, on June 9, 2015, a Secretary forwarded Petitioner an e-mail chain that included a correspondence from Sheri Mattler, a KRONOS Liaison, to Ferreira, which stated the following:

> I spoke with Labor Relations today about Mitchell working a split schedule for Union issues. This is not allowed, all non-work related Union issues should be taken as personal time and should be pre-approved with an LOA being completed and approved.
>
> Moving forward we can't split Mitchell working shift anymore for

[4] A LOA report is a form on which an employee requests a certain number of hours or days off from work, and indicates whether the time will be taken "with pay," by utilizing annual leave; "without pay"; or as "excused" time. (Pet., Ex. 12) At the bottom of the form, the employee's supervisor signs and dates the form and indicates whether the request has been "approved" or "disapproved." (*Id*.)

[5] This incident was the subject of a 2008 improper practice petition and Board decision. *See Feder,* 1 OCB2d 23 (BCB 2008). In that decision, the Board noted that "[i]n addition to approving Petitioner's leaves of absence for Union business, NYCHA also has allowed him to work split shifts in order to accommodate the meetings that he schedules or events that he attends." *Id*. at 4. The Board went on to find that a "one-time delay" in NYCHA's approval of Petitioner's request to attend the meeting at issue did not constitute an improper practice. *Id*. at 16.

this reason.

(Union Ex. A) The Secretary then asked Petitioner to submit an LOA report to cover "missing time" on June 3 and June 4.[6] (*Id*.)

Petitioner responded to this instruction that same day with an e-mail addressed to a number of members of NYCHA management and copied to his Local 375 representative, Eduardo Rosario. In his response, Petitioner stated that on the days in question he had performed a split shift, as he had been doing "for more than 10 years" as a Chapter 25 NYCHA President. (*Id*.) He also stated, in pertinent part:

> [S]ince the Human Resources Manual allows for split shifts and I have approval from my department/ supervisor to take them . . . I do not see or understand why . . . [or w]ho exactly in Labor Relations stated that I cannot perform any more split-shift work days when it is referenced twice in the Human Resources Manual[.] I've been performing this action for over 10 years and it appears that I am now being singled out as a union official which would be disparate treatment[.]
>
> As for the LOA to perform union related personal business, this is filled out on an as needed basis when "personal" time is actually used- see attached LOA for May 28th. I usually give advance notice of the day (s) when a split-shift is needed, which is not too often as can be seen in the Subject block of this e-mail. This also has been approved by the department.
>
> I hereby respectfully request that [KRONOS] be corrected to reflect that actual time – 7 hours each day – I was in the office at my cubicle.

(*Id*.) Petitioner then copied and pasted various portions of NYCHA's Human Resources ("HR") Manual and the KRONOS Manual to refer to sections that he believed allowed for the use of split shifts. These included, in pertinent part:

[6] It is unclear why Petitioner was only instructed to submit an LOA report for these two days.

> Chapter I
>
> II. HOURS OF WORK – page 1:
>
> 4.
>
> ***
>
> When it is necessary to leave work on personal business during working hours, employees shall receive permission from their supervisors, punch/sign out at the time of leaving, note the reason, and punch/sign in at the time of returning.
>
> ***
>
> Chapter X
>
> IV. DAILY REPORTING OF TIME – p. 32:
>
> ***
>
> If it becomes necessary for an employee to leave work on personal business during working hours, other than for lunch period, the employee (after having received permission from the supervisor) shall punch the card and sign out and note the reason he/she must leave work. He/she shall punch in and sign again at the time of returning to work. The recorded time shall be considered final unless the Project Manager/Division Chief makes a change and indicates the reason on the time card.

(Union Ex. A)

Later that day, Petitioner was notified by his timekeeper that his hours were corrected in the KRONOS system to reflect that he had worked seven hours on each of the two days in question. Thereafter, Petitioner wrote additional e-mails to NYCHA management seeking to clarify that in the future he would be allowed to continue to work split shifts. In a June 10, 2015 e-mail, Petitioner cited Chapter X § 14 (c) of the HR Manual, which addresses "Time Off Without Pay" for *ad hoc* employee representatives, as an additional provision that he believed supported his claim. That section states, in pertinent part: "Subject to the approval of the Manager/Division Chief, employee representatives may be permitted during normal working hours, to have time off for the following types of activity, which time shall either be without pay, or chargeable to their annual leave

allowances." (Union Ex. A; Pet., Ex. 4)[7]

On July 7, 2015, Petitioner wrote an e-mail requesting a meeting with Mattler and Richard Bennardo, the Deputy Director for Employee and Labor Relations, to "discuss and review the change in policy . . . ." (Union Ex. A)

Petitioner's Request for Union Assistance

As noted above, Petitioner copied Rosario on all of his e-mails with NYCHA. On July 17, 2015, Rosario e-mailed Petitioner stating that he was available for the meeting and asking Petitioner to send him the details. However, shortly thereafter he e-mailed Petitioner again and stated "Hello Mitch: Please contact Alba Germosen if you want me to be there. I have to have clearance from the office."[8] (Pet., Ex. 17) Petitioner responded to Rosario on July 20, and stated: "You are my grievance rep and the chapter's re[p], what type of clearance do you need? Every time you go out you require clearance?" (Pet., Ex. 18) Rosario replied later that day, stating:

> Because this is a labor-management issue the local needs you to contact Alba in order to get it on Claude's calendar so it has the full weight and support of the local union. Being this is a global issue with ramifications chapter-wide, the matter needs to be raised through the president's office in context of a labor/management meeting. It is for this reason I cannot act on my own. As I have just learned Alba is out on vacation, so please contact Iris [Martinez] …."

(Pet., Ex. 27)

Petitioner then e-mailed Martinez, explaining his issue and stating that he believed that the Chapter 25 grievance representative should attend the meeting with him. The following day Rosario e-mailed Petitioner again, stating: "As a result of a discussion between Claude and

[7] The provision goes on to list a handful of union activities that are covered, such as attendance at union meetings or conventions, and organizing and recruitment of union membership. (*See id.)*

[8] Germosen is the Local President's Executive Assistant.

Michelle, it has been decided you keep your appointment with [HR] this Friday, July 24, but the local has found no reason to be in attendance." (Pet., Ex. 19) At that time, Claude Fort was the Local 375 President, and Michelle Keller was Local 375's First Vice President.

Rosario testified regarding Petitioner's request that he attend the meeting with him. He stated that after he had communicated with Petitioner that he would likely be able to attend the meeting, he "went over to touch base" with President Fort in his office since he had been instructed that he cannot go to labor-management meetings unilaterally. (Tr. at 232) Fort said that he wasn't aware of a labor-management meeting being set up and he asked Rosario what the meeting was about. When Rosario told him that the meeting was to address Petitioner's use of a split shift, Fort told him that a similar issue had come up with another Union official in the past. This official had requested a schedule arrangement similar to Petitioner's but NYCHA did not grant the request. Fort therefore told Rosario that he did not need to attend the meeting because the Union was already aware of NYCHA's position on this issue.

Uma Kutwal, a Grievance Coordinator for Local 375, supervises a number of grievance representatives, including Rosario. Kutwal testified that it is "fairly routine" for grievance representatives to deal with management directly to clarify issues that may involve an agency's rules, and he stated that he has never been directed by President Fort to seek permission before attending a labor-management meeting. (Tr. at 402) Kutwal recalled that sometime after Fort instructed Rosario not to attend the meeting with Petitioner and NYCHA, he spoke to Rosario. Kutwal stated that Rosario was very upset because it was rare for Fort to instruct him not to represent a member.

Petitioner testified that after he learned that Rosario would not represent him at the meeting, he did not attempt to contact Fort because it would have been "futile" and a "total waste of time" since Fort "want[s] me out." (Tr. at 200-01) Instead, on July 21, 2015, Petitioner sent an e-mail

to Henry Garrido, the Executive Director of DC 37. The e-mail states, in pertinent part:

> Sorry to have to bother you, but I believe the following is very important which can have an adverse impact on all the elected DC 37 local officials and all the represented employees/members here at the NYC Housing Authority.
>
> First, I have brought this to my grievance rep's attention (Eduardo Rosario), who in turn brought it to the Local's President's attention and just as I thought, has refused to allow me to be represented at a meeting this Friday at 90 Church St. (lower Manhattan) with the NYCHA H.R. Director (Ms. Kenya Salaudeen) and the Labor Relations Deputy Director (Mr. Richard Bennardo).

(Pet., Ex. 20) The e-mail then went on to describe the issue, and concluded by stating:

> Since this change in policy and practice will affect **all** DC 37 represented employees, members and elected local officials and since Local 375 has REFUSED to allow me to be represented by my grievance rep, I respectfully request that as DC 37 Executive Director, you appoint a DC 37 representative to accompany me to this meeting where we may be able to work something out without the necessity to file an improper labor practice or request a new Labor / Mgt meeting with a full DC 37 contingent present.
>
> Your input and assistance is respectfully requested.

(*Id*.) (emphasis in original)

Garrido responded on August 4, 2015 and informed Petitioner that Maynard Anderson, the Assistant Director of DC 37's Professional Division, would represent him at the meeting. He also stated that he had "reached out to the local asking that they also assign a representative but I am awaiting a response." (Pet., Ex. 21)

August 7, 2015 Meeting

On the day of the meeting, Anderson was there to represent Petitioner but no one from Local 375 appeared. Anderson testified that when he was asked by the Executive Director of DC 37 to attend the meeting, he did not understand it to be a labor-management meeting. Rather, he saw it as a meeting that Petitioner called because he wanted to discuss the issue of split shifts and

see "whether or not they will . . . grant him his request." (Tr. at 264) Anderson stated that prior to this meeting he had never heard of a split shift and he did not have very much information on the issue going into it. Also present at the meeting was Bennardo, NYCHA's HR Director Kenya Salaudeen, Deputy Director for HR Research & Information David Marcinek, and Assistant Director for HR Wendy Alexander.

At the meeting Anderson thanked everyone for coming and asked them to listen to what Petitioner had to say. Petitioner stated his position that the HR Manual allowed him to take split shifts, discussed his prior use of split shifts, and explained his time records. Petitioner testified that toward the end of the meeting, he posed a hypothetical, and asked what would happen if an employee left in the middle of the day and took two hours of annual leave to cover this time, but then stayed two hours beyond his 8-hour shift to complete work, with the supervisor's permission. According to Petitioner, Salaudeen responded that this scenario could be allowed, although she did not explain if overtime would result.[9]

At the end of the meeting Salaudeen told Petitioner that they would get back to him. There is some dispute, however, as to what happened as the parties were leaving the meeting. According to Petitioner, Salaudeen and Anderson "broke away and said a couple of words" to each other that he did not hear. (Tr. at 144) Petitioner asserts that he then asked Anderson to stay and "caucus" with him, at which time Anderson told him that NYCHA had agreed to go to mediation. (Tr. at 144) Salaudeen and Anderson both vehemently denied that they spoke with one another about mediation. Salaudeen testified that if she said anything to Anderson at the end of the meeting while Petitioner was a few feet away, it was "a cordial good-bye." (Tr. at 335) Anderson testified

[9] Salaudeen did not expressly deny Petitioner's claim. However, at the hearing in this matter she elaborated on the limited circumstances under which such a situation would be allowed. This testimony is summarized below.

that although he never spoke with Salaudeen or anyone else from NYCHA about mediation, he told Petitioner at the end of the meeting that "if we don't get the results he wanted, then I think I told him that the only thing left to do that you can seek mediation outside, that's it." (Tr. at 267) He also told Petitioner that he did not know very much or have any information about mediation, but he explained that "[mediation is] something I just threw out to him." (*Id*.)

Follow-up After Meeting

After the meeting, Petitioner followed-up with Anderson in an August 24, 2015 e-mail, stating that he had not heard anything from NYCHA and asking if Anderson had. The e-mail concluded by asking: "If they do not send us a written response to our request, do we then request mediation?" (Pet., Ex. 22) Petitioner testified that Anderson never responded to this e-mail.

On September 9, 2015, Salaudeen sent Petitioner an e-mail that re-capped the August 7 meeting and provided NYCHA's formal response. It stated, in pertinent part:

> During our meeting, you shared with us your commitment to providing the best representative service to your members, and your desire to work in collaboration with NYCHA. As you know, NYCHA shares in the same commitment and has historically allowed for Release Time to achieve these goals.
>
> NYHCA's policy on Release Time is clear and unambiguous. It affords employees that are authorized union representatives with two options for conducting union business during the work day – 1) use accrued leave time, or 2) take such time off without pay. At this meeting, you requested approval to make up the time used when released for approved activity. As we discussed, this would be a deviation from the current policy, and to afford you an option different from policy would be inappropriate and unmanageable. Consequently, your request is denied. Please adhere to the policy, as written, to allow for the continuous service to your members and our employees.

(Pet., Ex. 23)

Petitioner forwarded this e-mail to Anderson the following day. In his e-mail, Petitioner stated that "[i]t's quite obvious they will not move an inch on allowing me to perform split-shift

work days over [NYCHA's] flex-band and working [hours] of 8am – 6 pm, but only over my given 8 hour work day . . . ." (*Id.*) Therefore, he stated that "I would like you to pursue[], as discussed, 'mediation' with [NYCHA]." (*Id.*)

When Petitioner once again did not receive a response from Anderson, he e-mailed him on November 17, 2015, stating, in pertinent part:

> Just wondering if the mediation has been set up? Haven't heard anything.
>
> If we can't resolve [NYCHA's] change in policy concerning me and flex-time usage during the day for union activity, I will be forced to file an IPP [improper practice petition] / DFR [duty of fair representation charge] which I really do not want to do, but I / we must protect our legal rights from their abuse.
>
> Please keep me posted- the clock is ticking,
>
> I believe this is a very winnable case for us.

(Pet., Ex. 24) Petitioner testified that in addition to these e-mails, he also called and texted Anderson a number of times after the meeting with NYCHA. He maintains that Anderson only returned one out of about six phone calls and never returned the text message.[10]

When questioned as to why he did not return any of Petitioner's follow-up e-mails, Anderson testified that since there was no grievance filed there was nothing that he could do. Furthermore, he stated that he thought he had told Petitioner that if he wanted to address anything further it should be directed to DC 37's Executive Director. Regarding Petitioner's request for more information about mediation, Anderson stated that he "didn't respond to that because, you know, I mention[ed] that you should seek mediation. We don't do mediation at the council. So there's nothing to respond to." (Tr. at 274) When pressed further, he said that he did not respond

[10] It is unclear whether the returned call from Anderson resulted in a phone conversation, a voice message, or neither.

at any time in writing because he had suggested to Petitioner verbally after the meeting that he should seek mediation on his own. Anderson also stated that he did not recommend to anyone at DC 37 that further action should be taken regarding NYCHA's HR policies because he did not see that there was any policy applicable to split shifts. Furthermore, he had never heard of the issue as a problem being brought to DC 37's attention by any member of the other locals.

Claims Against NYCHA

Petitioner submitted multiple documents to support his claim that he had been performing split shifts with NYCHA's approval for many years. Specifically, he submitted e-mails dating back to 2004 between himself and his supervisors, as well as various members of NYCHA's HR Department, in which he requested and was granted approval to perform a split shift. (*See* Pet., Exs. 33, 35, 38, 39, 40) He also submitted "Time Detail" reports from 2011-2015 showing the dates and times that he clocked in and out when he performed a split shift, as well as whether or not he utilized annual leave to make up for time (*See* Pet., Ex. 34). Additionally, Petitioner submitted LOA reports dating from 2005-2016 for dates on which he took a split shift but was required to utilize annual leave to reach the full seven hours. (*See* Pet., Ex. 36) While these documents are not a comprehensive list of all of the dates on which Petitioner performed a split shift, they demonstrate that Petitioner did so regularly, including periods where he would work a split shift approximately once a month, and other periods where he would do so multiple times in one week.

However, Petitioner also testified, and some of the e-mails demonstrate, that there have been occasions when problems or issues arose related to his use of a split shift. Specifically, the e-mails show multiple instances in which Petitioner received permission from his supervisor to work a split shift but thereafter was contacted by someone from the timekeeping unit asking him to submit a LOA report to account for any hours worked beyond the eight-hour interval. (*See* Pet.,

Ex. 35) This request usually lead to a back-and-forth discussion between Petitioner, his supervisors, and the timekeeper wherein Petitioner would explain his hours and confirm that he had received permission from his supervisor to work such a schedule. It appears that after receiving this confirmation, the timekeeper made an adjustment to the KRONOS system to credit Petitioner for the hours he worked.

Similarly, in a chain of e-mails dated June 2, 2009, a timekeeper instructed Petitioner that any hours he worked after the eight-hour time block on a day during which he attended a mid-day funeral would be considered overtime. After Petitioner continued to question her, the timekeeper told him to check with HR if he was not satisfied with her explanation. Petitioner then contacted Adam Eagle, NYCHA's Chief of Labor Relations, asking for clarification. Eagle explained that the timekeeper was correct and further stated that "[KRONOS] does not count working additional hours at the end of the day to make up for the time missed for personal business, unless you receive supervisory approval. This information is the same as what I provided [the timekeeper] (and [the timekeeper] forwarded you) earlier this year." (Pet., Ex. 39)

NYCHA claims that Petitioner was instructed that he could no longer perform split shifts in 2015 because NYCHA's policies do not allow for such a practice, and not because it was motivated by any desire to frustrate or interfere with Petitioner's Union activity. It presented several witnesses in support of its position.

As Assistant Director of HR, Wendy Alexander oversees a number of units within NYCHA, including the timekeeping unit. Alexander testified, and Petitioner does not dispute, that the KRONOS system is not programmed to track an employee's time over a split shift. Rather, KRONOS calculates the time in eight-hour blocks, starting from when the employee first swipes in at the beginning of the day. Therefore, regardless of how many times an employee swipes in or out in the middle of the day and how many hours are actually worked, KRONOS calculates the

end of the shift as being eight hours from the initial swipe. Any hours worked beyond those first eight are automatically calculated as overtime. The only way to avoid these hours being calculated as overtime is to make a manual adjustment in the KRONOS system. Alexander stated these adjustments can be time consuming and require the timekeepers to run reports on the employee's time and contact the employee's supervisor to determine whether prior approval was granted for the employee to work outside of the eight-hour block. Then the timekeeper must go into the KRONOS system and add a pay code to describe the adjustments being made.

Petitioner's supervisor, Amy Stokes, testified regarding Petitioner's practice of working split shifts. Stokes is the Deputy Director of Underwriting and Asset Management and had worked for NYCHA for approximately one year and eight months when the events in question first occurred. In her supervisory capacity, she is responsible for approving LOA reports and time off requests. She explained that when she became Petitioner's supervisor, he approached her to explain the concept of split shifts. She stated that she "didn't feel the need to bring it up to HR because it made sense and he communicated that he'd been doing this for a very long time." (*Id*.) Stokes stated that she did not think there was any problem with the practice because she never received an overtime report from HR. She only became aware that the practice was an issue when HR contacted her and told her that Petitioner was not allowed to continue to work split shifts. Additionally, she stated that while she has granted permission for other employees to leave in the middle of the day for doctor's appointments, no other employee has ever requested to work a split shift. Finally, Stokes testified that although she felt that it would be better if Petitioner was in the office more during work hours, his use of split shifts had not negatively impacted his work production.

Three individuals from NYCHA's HR Department, Salaudeen, Marcinek, and Alexander, testified regarding NYCHA's HR policies and why Petitioner's use of a split shift was not

permitted under these policies.[11] All three witnesses testified that NYCHA's HR Manual and time and leave policies do not provide for employees to take split shifts, or for employees to make up missed time outside of their regular work hours. Additionally, they all testified that no one other than Petitioner has ever worked a split shift. Salaudeen and Marcinek both explained that they did not become aware of Petitioner's practice of performing split shifts until July 2015, when Petitioner himself asked for clarification of the HR policies after he had been instructed that he could no longer take split shifts.

When asked how an employee who leaves work in the middle of the day for personal business should account for his time, Salaudeen explained that, in accordance with the text of the HR Manual, "they should submit a [LOA] or a time off request form to obtain approval." (Tr. at 317) Additionally, "[t]hey should swipe out in KRONOS . . . and swipe back in when they return."[12] (*Id*.) Salaudeen also clarified that "[t]here's no making up of time" because the time taken in the middle of the day is either charged to leave, taken as unpaid time, or "there's some other documentation for why they've . . . left work in the middle of the day." (Tr. at 329) Regarding time taken to engage in Union activity, Salaudeen stated that this is done in accordance with Chapter X § 14 (c) of the HR Manual, but that this provision does not permit employees to make

[11] Salaudeeen was hired as NYCHA's HR Director in November 2014. In this capacity, she is responsible for the overall administration of employee and labor relations, performance management, and HR administration at NYCHA. As such, she has oversight over NYCHA's HR Manual and policies, including its time and leave policies. Marcinek has been employed by NYCHA in the HR department in various capacities since 1998. In his current position of Deputy Director of HR for Research and Information, he oversees the data reporting unit, customer service unit, and the classification unit, and he is responsible for producing the HR Manual. He therefore plays a role in determining what rules are promulgated and how they are worded.

[12] Similarly, Marcinek testified that an employee who leaves work in the middle of the day for personal reasons "would need to secure the permission of the supervisor, and in order to do that, they would submit a [LOA] request." (Tr. at 379) The request would have to be approved, and the employee would use the KRONOS system to record their departure and swipe back in using the same system.

up time spent performing union activities.

Salaudeen testified that she is aware of Petitioner's status as a Union representative as well as the various improper practice claims that he has previously filed against NYCHA. She denied, however, that her instruction to Petitioner that he could no longer take split shifts had anything to do with his Union activities. Rather, she gave Petitioner this instruction simply because split shifts are contrary to NYCHA's policy. Additionally, there was no change or increase in Petitioner's "consistently high level of union activity" at the time that this instruction was given. (Tr. at 326)

Petitioner questioned Salaudeen about various provisions of the HR Manual that allow for alternative schedules or reasonable accommodations.[13] Salaudeen stated that when these provisions are utilized the individuals involved "consult with HR and then a decision is made about whether or not they're approved" based on whether they meet the criteria. (Tr. at 340-341) She stated that an example of an alternative work schedule is when a parent is on maternity or paternity leave and works part-time in the office while staying home part-time, or when someone must stay at home part-time to care for themselves or another family member who is ill. Salaudeen estimated that approximately 100 employees are approved to work such alternative schedules, and stated that she is aware of just one employee who works a modified work schedule under the provision for a reasonable accommodation.

Petitioner also asked Salaudeen what would happen if an employee had to leave work in

[13] Specifically, Petitioner referenced a section of Chapter 72 of the HR Manual titled "Alternative Work Schedules," which states: "Alternative work schedules may be available where approved by [HR]. For additional information, employees should consult with their Department Director who in turn will consult with the [HR] Department." (Pet., Ex. 10). Petitioner also referenced NYCHA's Standard Procedure Manual for "Reasonable Accommodation for Employees and Job Applicants." (Pet., Ex. 11) This procedure obligates NYCHA to provide a reasonable accommodation, which may include "modifying work schedules," in accordance with the Americans with Disabilities Act of 1990 and the New York State Human Rights Law.

the middle of the day, but upon returning to work his supervisor asked him to stay past the end of his normal shift in order to complete time-sensitive work. Salaudeen testified that this would be allowed, with the supervisor's approval, and the hours worked outside the employee's regular work day would be considered straight work hours.[14] However, the determining factor in whether this type of arrangement would be acceptable would be "[t]he priority of the project or work that needs to be done." (Tr. at 353)

Petitioner testified that being instructed that he can no longer work split shifts has had a negative impact on his ability to attend Chapter meetings at worksites that are far away. He explained that some locations are as far as an hour and a half away, and if he had to continually use his annual leave to cover the entire time that he was at the meeting, "over time this just knocks your days out real quick." (Tr. at 119) Therefore, he stated that "now my members are being interfered with [and] the operations of my [C]hapter are being interfered with." (Tr. at 120)

Claims Against Local 375 and DC 37

Petitioner claims that Local 375 and DC 37 both failed to properly assist him, in bad faith, and at the behest of President Fort. In support of this claim, Petitioner presented evidence to show animosity between him and Fort, as well as evidence that Fort has "a history of retaliation and vindictiveness against his union political opponents." (Pet. ¶ 61)

Over the years, Petitioner has run against Fort and/or Fort's slate of candidates in various elections- twice for the position of President, once as Treasurer, once as Second Vice President, and most recently as First Vice President. In support of his claims that Fort has retaliated against political opponents, Petitioner points to a number of AFSCME Judicial Panel ("Panel") cases, in

[14] She clarified, however, that if working these extra hours caused the employee to work in excess of his regularly scheduled hours for the week, overtime would have to be authorized.

which Fort was found guilty of wrong-doing, some of which were the result of charges that were filed by Petitioner.[15] The Panel decision in one such case, rendered on August 20, 2010, states that "the evidence demonstrates a consistent pattern of conduct by Brother Fort that was designed to punish his political opponents and reward his allies . . . ." (Pet. ¶ 61) (citing Pet., Ex. 26) The decision in that case found that "[t]he evidence establishes a clear pattern of conduct on Brother Fort's part of providing office space and facilities to his supporters, including those who were defeated in the recent election, while dragging his feet, or in one case refusing, to make comparable provision for his opponents." (Pet., Ex. 26) The Panel therefore sustained the charges and, as a penalty, Fort was removed from his position as President of Local 375.[16]

Petitioner testified that over the years, there has been a buildup of animosity between Fort and himself. In support of this contention, Petitioner submitted a print-out from a page of Local

[15] Petitioner estimated that he has filed more than five internal Union charges against Fort over the years with the Panel. Additionally, he submitted as evidence a letter detailing 11 Panel cases in which Fort was found guilty of various violations, including one filed by Petitioner, where Fort was found to have violated "Robert's Rules of Order and the local constitution for refusing to recognize or act on properly made challenges to [his] rulings from the chair." (Pet., Ex. 28)

[16] Besides these official findings from AFSCME, Petitioner presented the testimony of three witnesses who gave examples, some of them personal, of incidents in which Fort treated his political opponents unfavorably, while bestowing special treatment upon those who supported him politically. These witnesses were Ahmed Shakir, Secretary of Local 375 and Vice President to the Executive Board; Michael Troman, current President of Local 375 and Chapter 31 President; and Stacey Moriates, Executive Chair of Local 375. The following are representative examples of the witnesses' testimony. Shakir testified that during the 2015-2016 Local election, he was originally on Fort's slate to run as Secretary for the Local. However, once he beat Fort for the position of Vice President to the Executive Board, Fort immediately removed his name from the slate for the Local election and began campaigning against him. Troman testified that in February 2015, he was elected Second Vice President of the Local, defeating a candidate that Fort favored. Thereafter, Fort delayed securing him release time for three or four months, resulting in a situation in which Troman was not able to effectively represent the members. Moriates testified that when she ran for and won the Executive Chair position in a previous term on Fort's slate, he secured one day of Union release time for her. However, when she ran on the opposition slate in the current term and won, Fort had her release time removed.

375's website titled "Message from Local 375 President Claude Fort, P.E."[17] (Pet., Ex. 30) The message begins by providing an update on the state of negotiations and then goes on to address a number of individual issues. As relevant here, the message states that

> Money issues and expenses are the purview of the board, the Delegates, the accounting office and the treasurer. Only one person has . . . 24-hour access to the Local money and that person is treasurer Mitchell Feder. He can transfer money 24 hours a day from our accounts. He is the only one who could potentially engage in financial wrongdoing with the Local money, no one else. However, if he does anything wrong, we will catch him within 24 hours and he knows it and I have told the executive board and the delegate body the same thing, many times. So if someone comes to you and tells you that there are financial improprieties in this Local, and you know some people will do that to try to discredit the Local leadership, look at him or her in the eye and say you are lying or you don't know the full story.

(Pet., Ex. 30) According to Petitioner, this message illustrates Fort's practice of attacking and trying to discredit him.

Petitioner also claims that he is the "only treasurer in union history never to have release time." (Tr. at 98) However, Fort has designated other Union officials to be eligible for some type of regular release time. Therefore, Petitioner argues that this disparate treatment is further evidence of Fort's animus towards him.[18]

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[17] Petitioner testified that this message was published in 2014 or 2015, and the date on which it was accessed, December 11, 2015, is on the bottom of the print-out admitted into evidence.

[18] In particular, Petitioner claims that the Union and NYCHA have given another Union official "secret release time" while doing nothing for Petitioner. (Pet Br. at 18-19, ¶ 9) Troman testified that this Union official acknowledged to him that he has release time. We note that the Board does not have jurisdiction over internal union matters such as who it decides should have release time and, therefore, we do not address the substance of these claims. *See Brown*, 75 OCB 4 (BCB 2005); *Fabbricante*, 61 OCB 46 (BCB 1998).

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that NYCHA has treated him in a disparate and discriminatory manner by no longer allowing him to work "split shifts," while at the same time allowing other employees to work various alternate work schedules, in violation of NYCCBL § 12-306(a)(1) and (3).[19] According to Petitioner, the evidence demonstrates that he has been performing split shifts for over a decade in order to engage in Union activity and many members of upper-level management were aware of this. Furthermore, Petitioner alleges that NYCHA has a history of anti-union animus against Petitioner and the Union.[20]

According to Petitioner, NYCHA's statement that split shifts are against policy is not a legitimate business reason for its action, because nowhere in NYCHA's rules, regulations, or HR Manual does it state that making up for lost time during business hours is prohibited. Furthermore, NYHCA allows "alternate work schedules" for other employees, and managers are allowed to

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

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization[.]

[20] As evidence of anti-union animus, Petitioner points to the following Board decisions in which NYCHA was found to have retaliated or discriminated against Petitioner in violation of NYCCBL § 12-306(a)(1) and (3): *Feder*, 4 OCB2d 46 (BCB 2011); *CTSG, L. 375*, 4 OCB2d 61 (BCB 2011); and *Local 375, DC 37*, 5 OCB2d 27 (BCB 2012). Petitioner also cited to *DC 37*, 4 OCB2d 47 (BCB 2011), in which NYCHA was found to have interfered with employees' exercise of protected Union rights when it promulgated a policy that prohibited the use of its email system for union business.

"shift" up to four hours per week so that they do not have to use annual leave time.[21] (Pet. Br. at p. 17, ¶ 5) By denying Petitioner and others the ability to work split shifts, it is more difficult for Union representatives to carry out their responsibilities and employees are dissuaded from seeking to hold Union office. Additionally, once Petitioner runs out of his saved annual leave, he will be forced to take time off without pay to engage in Union activity, which will also affect his pensionable income.

Petitioner also alleges that Local 375 and DC 37 have both separately violated their duty of fair representation, in violation of NYCCBL § 12-306(b)(3), by failing to properly represent him in his efforts to challenge NYCHA's decision to no longer allow him to utilize split shifts. As regards Local 375, Petitioner alleges that President Fort never had any intention of assisting him, or allowing any Local 375 representative to assist him, because Petitioner is his political rival and Fort has a long history of retaliating against his opponents. Petitioner contends that, after Rosario informed him that he would not represent him at the meeting and to contact Fort's secretary to set up a meeting, Petitioner did not do so because contacting Fort would have been futile. Just as Fort did not want Petitioner to obtain Union release time, he did not want to assist him with an issue that would allow him easier access to meet with chapter members. Petitioner argues that testimony established it was highly unusual, if not unprecedented, for a Union representative to be directed not to attend a meeting to assist a member. Furthermore, DC 37 also requested that President Fort send a local representative and even then he did not. Thus, Petitioner contends that Local 375 was "motivated by bad faith and political undermining and a reckless disregard for [his] rights." (*Id.* at 11)

[21] Petitioner also argues that, under the HR Manual, employees are allowed to work some type of alternate work schedule for religious observances, pregnancy, blood donations, cancer screening, and reasonable accommodations.

As regards DC 37, Petitioner alleges that Anderson never had any true intent to seriously negotiate an amenable settlement with NYCHA, nor did he attempt to advocate for Petitioner at the August 7, 2015 meeting. Petitioner argues that Anderson's testimony was disingenuous when he stated that he could only think of mediation as a possible solution, since even a novice representative would know that arbitration is available.[22] Petitioner contends that Anderson made it appear to him as though NYCHA had agreed to go to mediation and that they would wait for NYCHA's response concerning when to set up the mediation, when in fact no such agreement existed. Rather, according to Petitioner, this was just a ploy to drag out time. Anderson's ulterior motive not to help Petitioner is further evidenced by the fact that he did not respond to any of Petitioner's inquiries following the meeting. Anderson's testimony that if Petitioner wanted or needed any further action he would have had to go through the Executive Director is false because, in his email, the Executive Director directed Anderson to assist Petitioner. Thus, Petitioner contends that DC 37 violated its duty of fair representation through Anderson's actions. [23]

NYCHA's Position

NYCHA contends that, as a threshold issue, it is not possible for Petitioner to have been retaliated against because he has no right to take a split shift. Neither NYCHA's HR Manual or the parties' Agreement provide for split shifts. Rather, Chapter X § 14 (c) of the HR Manual specifically states that while employee representatives may take time off to conduct certain union activities, this time is to be taken without pay or chargeable to annual leave. Although Petitioner

[22] Petitioner also contends that the entirety of Anderson's testimony was evasive, as he denied everything that Petitioner asked him under cross-examination.

[23] The petition also alleged that the Union violated NYCCBL § 12-306(b)(2) because it failed to bargain in good faith over a mandatory subject of bargaining on Petitioner's behalf. However, Petitioner does not have standing to allege such a violation and therefore any claims regarding NYCCBL § 12-306(b)(2) are dismissed. *See Brown*, 75 OCB 30, at 8 (BCB 2005) ("[A]n individual lacks standing to raise a failure to bargain claim under § 12-306(b)(2)."

was able to convince supervisors to allow him to work split shifts, these supervisors "have no role in creating or expertise in interpreting human resources policy." (NYCHA Br. at 7). Thus, their past approval of split shifts "lends no credence" to Petitioner's claim that he was taking split shifts in accordance with a practice that NYHCA recognized and condoned. (*Id*.) Furthermore, Petitioner does not have standing to file a grievance regarding such an alleged past practice because he is not the bargaining representative.

NYCHA also contends that Petitioner has not demonstrated that his Union activity motivated the decision to no longer allow him to perform split shifts. Petitioner's theory of anti-union animus consists only of pointing to prior improper practice claims that occurred years earlier. However, he has not pointed to any facts to demonstrate a causal connection between those events and his current claim. Thus, the allegations consist only of "surmise, conjecture or suspicion" and are insufficient to establish anti-union animus. (*Id*. at 9) Additional evidence that Petitioner was not targeted in any way for retaliation is that NYCHA's HR Department did not act until he requested that it take a position on his practice of taking split shifts. Finally, NYCHA contends that it had a legitimate business reason for instructing Petitioner that he could no longer take split shifts. It did so because "in order for [NYCHA] to run smoothly and efficiently and to keep all employees on an equal footing, the established rules must be applied equally to all employees." (*Id*. at 10).

Union's Position

The Union contends that the petition is untimely as to the claims against Local 375. Rosario advised Petitioner on July 21, 2015, that Local 375 would not be representing him at the meeting with NYCHA. As the petition was filed more than four months later, the claim against

Local 375 must be dismissed. [24]

The Union further contends that Petitioner has failed to demonstrate that the Union's actions were in any way arbitrary, discriminatory or in bad faith. According to the Union, Petitioner first characterized the issue as one affecting all elected officers and members of Local 375. Thus, it was "not surprising or unusual for Mr. Rosario to bring the matter to the attention of Mr. Fort." (Union Br. at 13) Once Rosario did so, Fort advised him that the Union was already aware of NYCHA's position that split shifts were not allowed and it had previously accepted this response. Fort therefore advised Rosario that Local 375 "had no stake in the meeting that Petitioner had called with the NYCHA." (*Id*. at 13) Thus, the Union "evaluated the issue and made a well[-]thought out determination that the issue . . . was a personal issue that affected Petitioner alone." (*Id*. at 2)

The Union argues that Petitioner has also failed to demonstrate that Fort discriminated against him. Although Petitioner has filed many internal Union charges against Fort, Petitioner admitted that Fort had not filed any against him. Thus, the political animosity "seems to flow more freely and frequently from Petitioner to Mr. Fort rather than the other way around." (*Id*. at 14) Furthermore, none of Petitioner's witnesses testified that they had personally witnessed or heard Fort deny Petitioner representation because he was a political enemy. Additionally, Petitioner never even called or spoke to Fort in connection with the instant matter. Thus, the Union contends that Petitioner has not established that Fort discriminated against him in any way.

The Union also contends that Petitioner failed to prove that Local 375 did more for other employees similarly situated than it did for him. Although Petitioner "offers speculative and

[24] We note that this argument was not addressed in the Union's closing brief but was argued in its answer. At the conference, the Trial Examiner declined to dismiss Petitioner's claims as untimely and determined that a hearing was necessary. The development of the record and the parties' post-hearing submissions warrant consideration of the Union's timeliness argument at this time.

aggrandized statements that the issue affects thousands of members and the 11 [DC 37] locals," NYCHA's witnesses credibly testified that Petitioner is the only employee who has engaged in the practice of performing split shifts. (Union Br. at 15) As to the other Union member who had requested a similar arrangement in the past, Local 375 accepted NYCHA's response on that matter without grieving it. Thus, Local 375's handling of the issue is consistent here with what it has done for at least one other Union member.

With respect to DC 37, the Union argues the record is devoid of any evidence that it breached its duty of fair representation because Anderson properly represented Petitioner at his meeting with NYHCA. The Union contends that Petitioner has not demonstrated any source of right with respect to his claim that Anderson failed to negotiate on his behalf. The meeting at issue was not a labor-management meeting, but rather was a meeting about an issue that was personal to Petitioner. Furthermore, both Anderson and NYCHA's witnesses credibly testified that they had never agreed to mediate Petitioner's complaint. Thus, the Union was entitled to determine whether Petitioner's complaint was meritorious as well as whether it wanted to pursue the complaint and how far. The Union states that, "having received all of the Union representation he was entitled to under the [parties' Agreement] and the NYCCBL," Petitioner is "simply unhappy with the Union's tactics and [the] outcome of that representation." (*Id*. at 19)

Finally, the Union avers that Petitioner has not suffered any harm, as he has not been disciplined, and his complaint about exhausting his annual leave time is speculative. Therefore, it contends that the instant petition should be dismissed.

DISCUSSION

Claims against NYCHA

Petitioner claims that NYCHA retaliated and discriminated against him because of his Union activity, in violation of NYCCBL § 12-306(a)(1) and (3), when it instructed him that he could no longer perform a split shift in order to make up for time spent on Union business. He also claims that NYCHA's enforcement of its time and leave policies is discriminatory, since it is only being done to interfere with union activity.

As an initial matter, we reject NYCHA's assertion that it could not have retaliated against Petitioner because its time and leave policies do not give him the right to take split shifts. A similar argument was previously rejected by this Board— in another case involving Petitioner— where we stated that "NYCHA's managerial rights to formulate policies . . . [do not] shield it from Petitioner's discrimination and/or retaliation claim" because "such a policy can be applied in a discriminatory manner." *Feder*, 4 OCB2d 46, at 41 (BCB 2011); s*ee also CTSG, L. 375*, 4 OCB2d 61, at 24 (BCB 2011); *DC 37*, 61 OCB 13, at 16 (BCB 1998) ("[T]he right to manage is not a delegation of unlimited power, nor does it insulate the [employer] from an examination of actions claimed to have been taken within its limits."). Here, the record indicates that regardless of whether NYCHA's policies did or did not expressly permit Petitioner to take split shifts, Petitioner did so with the knowledge and approval of numerous members of NYCHA management for as many as 12 years.[25] Nevertheless, the question remains whether NYCHA's decision to no longer

[25] We reject NYCHA's argument that only Petitioner's supervisors were aware of his use of a split shift, as this is contradicted by the Board's decision in *Feder*, 1 OCB2d 23 (BCB 2008), which discusses Petitioner's use of split shifts and constitutes notice to NYCHA. This argument is also contradicted by e-mails between Petitioner and managers in the HR and Labor Relations Departments discussing Petitioner's use of a split shift. *See* Pet., Ex. 38, 39 (November 14, 2006 and June 2, 2009 e-mails between Petitioner and Eagle); Pet., Ex. 40 (November 15, 2006 e-mail between Petitioner and one of his supervisors, in which Marcinek is copied).

allow Petitioner to work a split shift was motivated by a desire to discriminate or retaliate against Petitioner for Union activities.

To determine whether 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 the Board in *Bowman*, 39 OCB 51 (BCB 1987), and its progeny. This test states that, in order to establish a *prima facie* claim of retaliation, a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. the employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also CWA, L.1182*, 8 OCB2d 18, at 11 (BCB 2015).

It is undisputed that Petitioner engaged in protected union activity. As the Treasurer for Chapter 25, Petitioner regularly attended Union meetings. In fact, it was his attendance at such meetings that prompted his requests to utilize split shifts in May and June of 2015. Furthermore, NYHCA admits that it was aware of Petitioner's Union activities, which Salaudeen labelled as occurring at a "consistently high level." (Tr. at 326) Thus, prong one is established.

As to the second prong, "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions which are the subject of the complaint." *OSA*, 7 OCB2d 20, at 19 (BCB 2014) (quoting *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007)) (internal quotation marks omitted). "[T]ypically, motivation is proven through the use of circumstantial evidence, absent an outright admission." *Colella*, 7 OCB2d 13, at 22 (BCB 2014) (internal quotation and editing marks omitted) (quoting *Burton*, 77 OCB 15, at 26 (BCB 2006**)**). Consequently, the Board considers "whether the temporal proximity between the protected union activity and the retaliatory action, in conjunction with other facts, supports a finding of improper motivation." *Id.* (citing *DC 37, L. 376*, 6 OCB2d 39, at 19 (BCB 2013)).

Claims of improper motivation must be based on statements of probative facts, rather than speculative or conclusory allegations. *See DC 37, L. 983*, 6 OCB2d 10, at 29 (BCB 2013) (citing *Morris*, 3 OCB2d 19, at 15 (BCB 2010)).

Here, there is temporal proximity between Petitioner's Union activity and the events leading to NYCHA's decision to no longer allow Petitioner to work split shifts. On May 28, as well as June 2, 3, and 4, 2015, Petitioner worked a split shift in order to attend Union meetings. Shortly thereafter, on June 9, he was instructed that he needed to submit LOA reports for two of these dates and was forwarded an e-mail stating that he should not continue to work split shifts in the future. This led Petitioner to contact NYCHA's HR department for clarification, which in turn led to NYCHA's final decision on September 9, 2015, denying Petitioner's request to continue to work split shifts. These events all occurred successively and within a close period of time.

We find, however, that Petitioner has provided no other probative facts to support a finding of improper motivation. In support of his claim, Petitioner points to animus found in past Board decisions from 2011 and 2012, in which NYCHA was found to have violated NYCCBL § 12-306(a)(1) and (3). However, as we have previously stated in a case also involving Petitioner, we do not find that prior findings of discrimination by NYCHA are a basis to conclude that NYCHA "is or was hostile to all union activity." *Feder*, 5 OCB2d 14, at 27 (BCB 2012). This is especially true where, as here, these prior findings occurred three and four years before NYCHA's actions.

Petitioner also alleges that he was treated disparately because of his Union activity. However, as will be discussed more fully below, Petitioner did not present evidence of any other non-managerial employee who was allowed to work a split shift for any reason, whether union-related or otherwise.[26] Thus, Petitioner has demonstrated only temporal proximity between his

[26] We do not find Petitioner's arguments regarding the fact that NYCHA managers can "shift" up

Union activity and NYCHA's decision, which, standing alone is insufficient to make out a *prima facie* case of retaliation. *See Local 376, DC 37*, 6 OCB2d 39, at 19 (citing *DC 37, L. 376*, 6 OCB2d 18, at 15 (BCB 2013)).

Furthermore, there is evidence to demonstrate that NYCHA's actions were not improperly motivated. Petitioner testified, and various e-mails reflect, that multiple times over the years questions or issues had arisen with timekeepers regarding the processing of Petitioner's split shift hours in the KRONOS system. On this occasion, like several times earlier, a KRONOS Liaison initiated the question of whether Petitioner could work a split shift. She did so by contacting NYCHA's Labor Relations Department to obtain clarification on the time and leave policies, and she was instructed that such policies do not provide for the use of split shifts. This message was passed along to Petitioner, who then requested a meeting with members of NYCHA's HR Department. Thus, the record demonstrates that it was the KRONOS Liaison's inquiry to the Labor Relations Department that triggered the events leading up to NYCHA's decision that Petitioner could no longer perform a split shift. There is nothing in the record to indicate that this inquiry was based on union animus rather than a genuine question about an occurrence that the timekeeping system did not automatically accommodate. Indeed, the record demonstrates that Petitioner's use of a split shift was questioned even when it was done to engage in non-union activity. *See* Pet., Ex. 39. Therefore, the evidence demonstrates that NYCHA's ultimate decision was based upon a desire for uniformity in its timekeeping procedures unrelated to union activity.

We also find no merit in Petitioner's allegations that NYCHA's enforcement of its time and leave policies restrains union activities and is therefore discriminatory. As we have previously stated, "the adoption and/or enforcement of policies, procedures, or rules by an agency that

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to four hours of their time relevant to our determination here. Petitioner is not a NYCHA manager and, therefore, this practice is not applicable.

specifically prohibit employee involvement in union activity constitutes interference, as defined by NYCCBL § 12-306(a)(1)." *DC 37*, 3 OCB2d 56, at 11 (BCB 2010) (citing *DC 37*, 69 OCB 23, at 12 (BCB 2002), *affd.*, *District Council 37 v. City of New York*, No. 112450/03 (Sup. Ct. N.Y. Co. Mar. 15, 2004), *affd.*, 22 A.D. 3d 279 (1st Dept. 2005)). Additionally, the Board has found that it is improper to treat activities or communications of a similar character disparately because of their union status. *See id*. at 12. Thus, the Board has found that an agency's policy prohibiting the use of its office technology for union activity, while permitting other non-work related usage, constituted interference under NYCCBL § 12-306(a)(1). *See id*. at 13; *see also DC 37*, 4 OCB2d 47 (BCB 2011); *Feder*, 4 OCB2d 46.

Here, NYCHA's policies do not specifically prohibit split shifts for union activity while permitting such shifts for other reasons. Nor is there evidence that Petitioner has been denied authorization to attend union meetings and functions. Instead, Petitioner theorizes that certain provisions of NYCHA's HR Manual that allow for employees to work "alternate work schedules" or "modified work schedules" could be interpreted and applied so as to allow him to make up time missed while conducting union business. Therefore, because NYCHA's HR Manual and policies allow for alternative schedules, it cannot refuse to allow him to use split shifts for union activity. Petitioner claims that in doing so, NYCHA has applied these policies to discriminate based on union activity.

The evidence, however, demonstrates that none of NYCHA's time and leave policies have been applied in such a manner. Salaudeen credibly testified that, to her knowledge, no other employee has ever been allowed to work a split shift, for any reason. Rather, she stated that approximately 100 employees have met the criteria and been approved by the HR Department to

work alternative schedules as set forth in NYCHA's HR Manual.[27] These situations are not analogous to Petitioner's desired arrangement. Petitioner seeks the ability to make up for lost time outside of a regular eight-hour interval, on a variable, as-needed basis, with only notice to and permission from his supervisor. There is no evidence that any other employee has been permitted to do so, whether for personal, medical, or any other reason. Furthermore, Chapter X § 14 (c) of NYCHA's HR Manual explicitly provides for the manner in which *ad hoc* employee representatives such as Petitioner may conduct union business during working hours. Petitioner's request to work a split shift does not comply with this provision, which states that the time taken shall either be without pay or chargeable to the employee's leave allowance.

Consequently, we do not find that NYCHA's time and leave policies, as written or interpreted, unlawfully interfere with union activity. We therefore dismiss the petition with respect to Petitioner's claims that NYCHA violated NYCCBL 12-306 (a)(1) and (3).

Timeliness of Claim Against Local 375

Petitioner alleges separate violations of NYCCBL § 12-306(b)(3) against both Local 375 and DC 37. As such, we will consider the actions of each individually. As an initial matter, we must first consider whether Petitioner's claim against Local 375 is timely. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). NYCCBL § 12-306(e) provides that an improper practice may be filed "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." *See also* § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of

[27] We note that the examples that Salaudeen gave of employees who do so— such as those who work part-time while on maternity leave or to care for an ill family member—likely fall under federal provisions such as the Family and Medical Leave Act. Salaudeen also stated that she is aware of one employee who works a modified schedule as part of a reasonable accommodation for a disability.

the City of New York, Title 61, Chapter 1) ("OCB Rules") (stating that a petition must be filed within four months of an alleged violation).

The statute of limitations regarding a claimed breach of the duty of fair representation "runs from the date the employee knew or should have known that the Union allegedly acted or failed to act on the petitioner's behalf." *Johnson*, 8 OCB2d 24, at 11 (BCB 2015) (quoting *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003) (Beeler, J.)) (internal quotation marks omitted). The instant petition was filed on January 8, 2016. Therefore, only claims arising within four months prior to that date are timely, and any claims preceding September 8, 2015 are not remediable by this Board. Nevertheless "factual statements comprising untimely claims may be admissible as background information." *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007); *see also Nealy*, 8 OCB2d 2, at 15 (BCB 2015).

Petitioner's claims against Local 375 concern the actions of President Fort and his alleged failure to provide Petitioner with local representation at a meeting with NYCHA due to personal and political animosity. The record demonstrates that on July 17, 2015, Fort instructed Rosario not to attend the meeting at which Petitioner requested assistance, and Rosario informed Petitioner that same day that he would not be attending. After some communication back and forth between Petitioner and Rosario, on July 21, 2015, Rosario confirmed that "the local has found no reason to be in attendance" at the meeting. (Pet., Ex. 19) Thereafter, Petitioner did not attempt to contact Fort personally about the issue because he thought that doing so would be "futile." (Tr. at 200) Instead, later that day he contacted the Executive Director of DC 37 to ask for assistance. Based on these facts, we find that Petitioner knew on July 21, 2015 that Local 375 did not intend to assist him at the meeting with NYCHA. Because the petition was filed more than four months after this date, the Board finds that the petition is untimely as to the claims against Local 375, and it is

therefore dismissed in this regard.

Claim Against DC 37

There is no dispute that Petitioner's claims against DC 37 arising on or after September 8, 2015 are timely. Thus, we consider those claims on the merits.

NYCCBL § 12-306(b)(3) makes it "an improper practice for a public employee organization or its agents . . . to breach its duty of fair representation to public employees under this chapter." This duty requires that "a union must not engage in arbitrary, discriminatory, or bad faith conduct in negotiating, administering, or enforcing a collective bargaining agreement." *Nealy*, 8 OCB2d 2, at 16 (citing *Walker*, 6 OCB2d 1 (BCB 2013); *Okorie-Ama*, 79 OCB 5). The "burden of pleading and proving a breach of this duty lies with the petitioner and cannot be carried simply by expressing dissatisfaction with the outcome . . . or questioning the strategic or tactical decisions of the Union." *Nealy*, 8 OCB2d 2, at 16 (quoting *Okorie-Ama*, 79 OCB 5, at 14) (quotation marks omitted); *see also Gertskis*, 77 OCB 11, at 11 (BCB 2005). Further, "to meet this burden, a petitioner must allege more than negligence, mistake or incompetence." *Bonnen*, 9 OCB2d 7, at 17 (BCB 2016) (quoting *Sims*, 8 OCB2d 23, at 15 (BCB 2015)) (internal quotation marks omitted). "Even errors in judgment do not rise to the level of a breach of this duty, unless it can be shown that the union's actions were arbitrary, discriminatory, or in bad faith." *Morales*, 5 OCB2d 28, at 20 (BCB 2012) (citing *Del Rio*, 75 OCB 6, at 11 (BCB 2005)).

Petitioner alleges that DC 37, through Anderson, had "ulterior motives" and never had any true intention to assist Petitioner with his dispute with NYCHA regarding the use of split shifts. According to Petitioner, this is evidenced by the fact that Anderson did not advocate for him at the meeting; did not file a grievance or improper practice on his behalf; and misrepresented to him that NYCHA had agreed to mediate the dispute. Furthermore, Petitioner contends that this misrepresentation, and Anderson's failure to respond to Petitioner's e-mails, were simply a ploy

to "drag out time."

We do not find any basis to conclude that Anderson approached the August 7, 2015 meeting with any bad faith or intention. Although Petitioner presented evidence to demonstrate that Fort may have harbored personal and political animosity towards him, there is no such evidence concerning Anderson or DC 37's Executive Director. Nor is there any indication that either of them spoke to or took any direction from Fort. Consequently, we cannot conclude that any alleged bad faith on the part of Local 375 flowed to DC 37's representation of Petitioner.

Additionally, while Petitioner complains that Anderson did not attempt to advocate for him at the meeting, it is not clear from the record what Anderson could have done. Anderson testified that he had never heard of a split shift before Petitioner brought the issue to his attention and, as he saw it, NYCHA did not maintain a policy that would provide for split shifts. Indeed, Petitioner is the only employee to have ever worked a split shift. Thus, at the meeting, Anderson asked NYCHA to listen to Petitioner and to grant his request. We find that under these circumstances Petitioner's complaints regarding Anderson's level or quality of advocacy do not establish a breach of the duty of fair representation. *See Shymanski*, 5 OCB2d 20, at 11 (BCB 2012) ("dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.") (quoting *Gertskis*, 77 OCB 11, at 11) (additional citations omitted); *see also James-Reid*, 77 OCB 29, at 18 (BCB 2006) ("The burden of establishing a breach of the duty of fair representation cannot be carried simply by expressing dissatisfaction with the outcome of the . . . proceeding, or questioning the strategic or tactical decisions of the Union."). As to Petitioner's allegations that Anderson did not file a grievance or improper practice on his behalf, the record is devoid of any evidence indicating that Petitioner ever asked him to do so. However, even if we were to construe Petitioner's communications with Anderson as such a request, "it is well settled that a union does not breach its duty of fair representation merely because it refuses to advance

each and every grievance" or claim. *Bonnen*, 9 OCB2d 7, at 17 (quoting *Cooke*, 57 OCB 46, at 9 (BCB 1996)).

We next address Petitioner's complaint that Anderson deliberately misled him regarding whether or not NYCHA had agreed to mediation and how or if such mediation would proceed. Anderson testified that he told Petitioner that if he did not get the answer he wanted from NYCHA he could possibly pursue mediation on his own. However, he denied that he ever told Petitioner that NYCHA had agreed to go to mediation. Petitioner, on the other hand, testified that he left the meeting with the understanding that NYCHA had agreed to do so. Petitioner's belief in this regard is reflected in his e-mails to Anderson.[28]

While we find that there was clearly a miscommunication or lack of mutual understanding regarding access to mediation, we do not believe that Anderson deliberately misled Petitioner in this regard in order to "drag out time." Anderson testified that although he did not have very much information about mediation, it was something that he "just threw out" to Petitioner. (Tr. at 267) We find no basis to ascribe malicious intent to Anderson's actions. Instead, we find that Anderson was simply trying to suggest an alternative source of recourse for a member whom he believed did not have an otherwise meritorious grievance. Furthermore, there was no impending deadline for which Anderson would have a reason to cause delay. As mentioned above, Petitioner never asked Anderson to file a grievance or improper practice on his behalf, and there is no evidence that if mediation had been requested there was any deadline for doing so. Thus, we do not find Anderson's actions in this regard rise to the level of a breach of the duty of fair representation. *See Civil Serv. Employees Ass'n, Inc. v. Pub. Employment Relations Bd.*, 132 A.D.2d 430, 432 (3d

[28] Specifically, Petitioner's first e-mail to Anderson asks: "If [NYCHA does] not send us a written response to our request, do we then request mediation?" (Pet., Ex. 22) His next e-mail affirmatively requests that Anderson pursue mediation, "as discussed." (Pet., Ex 23) In his final e-mail, Petitioner asks Anderson whether or not mediation has been set up yet.

Dept. 1987), *aff'd.*, 73 N.Y.2d 796 (1987) (citing *Matter of Trainosky v. New York State Dept. of Taxation & Fin.,* 105 A.D.2d 525 (3d Dept. 1984) ("An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.").

Finally, we address Petitioner's allegations regarding Anderson's failure to respond to his e-mails and other inquiries requesting that Anderson assist him with pursuing mediation with NYCHA. As we have previously stated, a Union's duty of fair representation generally requires it to adequately communicate with its members. *See Cook*, 7 OCB2d 24, at 8 (BCB 2014). This includes informing a member whether or not it will pursue a grievance on his or her behalf and responding to a member's request for information "that is not merely redundant or onerous." *See id*. at 9 (quoting *[Morales]*, 5 OCB2d 28 (BCB 2012)); s*ee also Nardiello*, 2 OCB2d 5, at 40; *Edwards*, 1 OCB 22 (BCB 2008); *Fabbricante*, 69 OCB 39, at 19 (BCB 2002). However, we have also stated that "this Board will not find a breach of the duty of fair representation based on a union's alleged failure to communicate where that alleged failure did not prejudice or injure the petitioner." *Cook*, 7 OCB2d 24, at 9 (citing *Walker*, 6 OCB2d 1).

Anderson testified that he did not respond to Petitioner's emails because there was no grievance filed and because he believed he had told Petitioner to contact the Executive Director of DC 37 if he needed anything further. Regarding Petitioner's requests that Anderson pursue mediation, Anderson stated that he told Petitioner after the meeting that he could possibly do so on his own and therefore he did not feel that there was anything in the e-mails that required a response. While it may have been prudent for Anderson to respond to Petitioner's e-mails to clear up any misunderstandings, under these circumstances, we do not find that Petitioner was prejudiced by Anderson's lack of communication in such a manner that rises to the level of a

breach of the duty of fair representation. Petitioner has not established a contractual or other basis for his asserted right to work a split shift. Even so, he pursued his claim by timely filing the instant improper practice petition against NYCHA for discrimination. *Cf. Morales,* 5 OCB2d 28 (finding a breach of the duty of fair representation where the union's unexplained failure to communicate resulted in the loss of a grievant's right to pursue a wrongful termination claim on the merits). Furthermore, it was within the Union's discretion not to pursue a claim that NYCHA changed its practice regarding split shifts, particularly since it was already aware of NYCHA's position that its policies do not allow for such and it had previously declined to pursue the matter on behalf of another Union member. *See Rondinella,* 5 OCB2d 13, at 18 (BCB 2012) (union did not violate its duty of fair representation where there was no indication that it did more for similarly situated members than it did for petitioner).

In conclusion, although Petitioner feels strongly that he had a meritorious claim against NYCHA for failing to permit him to perform split shifts, the Union did not share this belief. As the Union is not obliged to pursue every desired grievance or claim, and Anderson's actions were not undertaken in bad faith, we find that DC 37's actions did not rise to the level of arbitrary, discriminatory, or bad faith conduct. Thus, we find that DC 37 did not breach its duty of fair representation.

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, docketed as BCB-4147-16, filed by Mitchell Feder, against the New York City Housing Authority; Local 375, District Council 37; and District Council 37, hereby is dismissed in its entirety.

Dated: December 6, 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

GWYNNE A. WILCOX
MEMBER