Local 376, DC 37, 13 OCB2d 3 (BCB 2020)

(IP) (Docket No. BCB-4243-17)

Summary of Decision*:** The Union alleged that the City violated NYCCBL § 12-306(a)(1) and (3) by twice filing disciplinary charges against one of its members in retaliation for filing a grievance and a workplace violence complaint. The City argued that some of the claims are untimely, that the Union has failed to establish a *prima facie* case of retaliation, and that DEP had a legitimate business reason for its actions. The Board found that some of the claims are untimely and, as to the timely claim, that the City rebutted the Union's *prima facie* case. Accordingly, the Board found that the City did not violate the NYCCBL, and the petition is dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 376, DISTRICT COUNCIL 37,

Petitioner,

-and-

CITY OF NEW YORK AND THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On August 3, 2017, Local 376, District Council 37 ("Union"), filed an improper practice petition against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP"). The Union alleges that DEP 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") by retaliating against Terrence Nickelson for union activities. Specifically, the Union alleges that DEP twice brought disciplinary charges against Nickelson

because he filed a grievance challenging the denial of sick leave and a workplace violence complaint. The City argues that some of the claims are untimely, that the Union has failed to establish a *prima facie* case of retaliation, and that DEP had a legitimate business reason for its actions. The Board finds that some of the claims are untimely and, as to the timely claim, that the City rebutted the Union's *prima facie* case. Thus, the Board finds that the City did not violate NYCCBL. Accordingly, the petition is dismissed in its entirety.

BACKGROUND

The Trial Examiner held a one-day hearing and found that the totality of the record established the following relevant facts.

DEP is a mayoral agency that manages and conserves the City's water supply. It distributes drinking water and collects and treats wastewater through a network of underground pipes and pumping stations. The Union is the certified bargaining representative for Construction Laborers ("CLs") employed by DEP. CLs repair and maintain water supply and sewer lines. Nickelson is a CL and has been employed by DEP for nearly 30 years.

The Union presented only one witness, Nickelson. The City presented one of Nickelson's supervisors, Manhattan Borough Manager Eric DelleCave, and the DEP Director of Labor Relations and Discipline ("Disciplinary Counsel") Johnny T. Vasser, who drafted the disciplinary charges against Nickelson.[1]

Alleged Union Activity

Nickelson's alleged union activity consists of a grievance he filed in March 2016

[1] Nickelson's daily supervisors varied depending upon his assignment. DelleCave is the supervisor of all of Nickelson's supervisors and initiated the disciplinary process that resulted in the charges.

challenging the denial of sick leave ("Sick Leave Grievance") and a workplace violence complaint against one of his supervisors, filed with the assistance of the Union, in July 2016 ("Workplace Violence Complaint").[2]

2016 Sick Leave Grievance

On January 23 and 24, 2016, during a blizzard, Nickelson called in sick without documentation. He was advised by DelleCave that DEP would not allow him to use his accrued sick leave to cover the two days of absence. Instead, DEP subtracted two personal business days from Nickelson's annual leave bank. DelleCave testified that the decision not to allow Nickelson to use sick leave was not made by him but by senior management in response to a Department of Citywide Administrative Services memorandum DEP interpreted as prohibiting CLs from taking undocumented sick leave for the snowstorm. On March 1, 2016, the Union filed a grievance on behalf of Nickelson alleging that DEP's refusal to let him use his accrued sick leave violated DEP's absence control policy.[3]

Nickelson testified that after filing the grievance, he discussed it with DelleCave who told him "don't fight it"; "you're not going to win"; and that "[i]t's not worth it." (Tr. 45) Nickelson could not recall specifically when he discussed the grievance with DelleCave. DelleCave acknowledged discussing the grievance with Nickelson but explicitly denied making the above statements or in any way discouraging Nickelson from pursuing the grievance. The grievance was settled on February 9, 2017, when DEP agreed to credit Nickelson back two personal business days.

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[2] A workplace violence complaint is a formal complaint by an employee documenting an alleged instance of workplace violence.

[3] A Step III decision denying the Sick Leave Grievance was issued on March 12, 2016; on May 24, 2016, the Union filed a request for arbitration.

Workplace Violence Complaint

On July 17, 2016, Nickelson had a verbal altercation with one of his supervisors, Mitchell Berlin. According to Nickleson, shortly after he arrived at work, "Berlin jumped in and started screaming rambling at me for no reason." (Tr. 30-31) Nickelson described Berlin as being "out of hand and disrespectful" and claimed Berlin told him to "shut up" and threatened to write-up Nickelson in front of co-workers. (City Ex. 1) On July 18, Nickelson, with the assistance of the Union, verbally filed the Workplace Violence Complaint with DEP's Office of Environmental Health and Safety ("OEHS"). OEHS interviewed Nickelson over the phone later that day. OEHS records indicate that in the interview, Nickelson stated that he believed he would receive a warning letter for leaving an hour early from a voluntary overtime shift on July 15, and he described that action as "retaliatory in nature."[4] (*Id.*)

OEHS investigated Nickelson's complaint and interviewed both Berlin and DelleCave.[5] On December 28, 2016, OEHS issued a confidential advisory memorandum in which it determined that there was "insufficient evidence" to find that an incident of workplace violence had occurred but that the "language and tone" used by Berlin, including telling Nickelson to "shut up," was "inappropriate" and would "be addressed." (City Ex. 1) Nickelson was informed that OEHS had "cautioned [Berlin] to refrain from any form of retaliatory behavior." (*Id.*) OEHS, however, also concluded that Nickelson "contributed to the altercation" by failing to "conduct [himself] in a professional manner including following all orders and directives given by [his] supervisors."[6]

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[4] No warning letter is in the record, nor has it been alleged in the pleadings, hearing, or briefs that Nickelson received a warning letter in retaliation for Union activity.

[5] DelleCave was not involved in the alleged workplace violence incident; he supervises both Nickelson and Berlin.

[6] In addition to finding that Nickelson "disregarded a directive from [his] District Supervisor" by leaving early instead of completing his full overtime shift on July 15, 2016, OEHS found that

(*Id.*) OEHS told Nickelson that the December 28, 2016 memorandum should "serve as a warning that this behavior should immediately cease." (*Id.*)

Alleged Retaliatory Acts: the 2016 and 2017 Disciplinary Charges

In December 2016 and again in July 2017, Nickelson was served disciplinary charges ("2016 Disciplinary Charges" and "2017 Disciplinary Charges," respectively). Both sets of charges stem from incidents where Nickelson used his cell phone instead of his DEP radio for work-related communications, allegedly in violation of DEP policy. It is undisputed that DEP has a policy requiring CLs to use their DEPs radios, not their cell phones, for all work-related communications ("cell phone policy").[7] However, the parties disagree as to whether the cell phone policy was enforced. DelleCave acknowledged that prior to Nickelson, he had never initiated formal written charges for violating the cell phone policy. His unrebutted testimony was that he initiated formal discipline against Nickelson because he had given him a verbal warning regarding using his cell phone instead of the radio a few months before the 2016 Disciplinary Charges. DelleCave further testified that he was unaware of any other DEP employee violating the cell phone policy after receiving a verbal warning. Nickelson testified that he was unaware of a written policy regarding cell phone use but acknowledged on cross examination that prior to receiving the 2016 Disciplinary Charges, DelleCave had verbally informed him of the policy.

Nickelson disregarded a directive that he "must refuel the truck at a specific time." (City Ex. 1)

[7] DelleCave testified that a 2010 memorandum, entitled "Mandatory Use of Two-Way Radio," was posted at the DEP yards. (City Ex. 11) DelleCave explained that it is imperative that conversations occur over the two-way radios, which are monitored by managers and supervisors, so that everyone who needs to hear what is happening is able to do so, especially in the case of an emergency. At an arbitration hearing concerning the 2016 Disciplinary Charges, Wendell Quidley, a retired DEP supervisor, testified that while aware of the policy, he used his cell phone "all the time" because he believed that it was a "better way of communication . . . ." (Joint Ex. 1, at 8) Quidley was a former supervisor of Nickelson.

Both sets of disciplinary charges have been arbitrated, and arbitration awards have issued.[8] Disciplinary Counsel Vasser testified that in both instances the determination to charge Nickelson was not made by Nickelson's supervisors but by Vasser's office, which also drafted the charges and determined the penalties.[9] Vassar's unrebutted testimony was that when the 2016 and 2017 Disciplinary Charges were issued, he was unaware of the Sick Leave Grievance and that he did not recall if he had knowledge of the Workplace Violence Complaint. Vasser further testified that he assessed the penalties based on "principles of progressive discipline" and took into consideration the employee's disciplinary history and how similar situated employees were disciplined. (Tr. 107) Nickelson's disciplinary history includes four prior suspensions between 1994 and 2004.[10] At the improper practice hearing, Nickelson testified that he did not remember if he had received any discipline prior to the 2016 Disciplinary Charges.

2016 Disciplinary Charges

On November 3, 2016, after DelleCave became aware of a phone call between Nickelson and a DEP clerical employee in the office, he instructed Nickelson over the radio not to use his cell phone. Later that day, DelleCave and Nickelson had an in-person conversation in which Nickelson claimed that all of the calls were initiated by the clerical employee, not him. Nickelson then walked away and disregarded DelleCave's instruction to return. DelleCave immediately

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[8] The facts recited in this decision regarding the 2016 and 2017 Disciplinary Charges come from the arbitration awards, which were entered into the record as joint exhibits. Only facts relevant to the claim of retaliation are included in this decision.

[9] Procedurally, charges are initiated by supervisors who file disciplinary complaint data forms, which go through several levels of management before being sent to Vasser at the DEP's Office of the Disciplinary Counsel.

[10] In 1994, Nickelson received a three-day suspension for insubordination that was held in abeyance; in 1995, he received a one-day suspension for being disrespectful to a supervisor; in 1996, he received a one-day suspension for threatening a supervisor; and in 2004, he received a one-day suspension and lost one annual leave day for failing to wear protective equipment.

spoke to the clerical employee, who stated that she had initiated one phone call to Nickelson because Nickelson was not responding to the radio. DelleCave concluded that Nickelson had initiated calls to the office from his cell phone and, therefore, had lied to him.

On December 28, 2016, the 2016 Disciplinary Charges were issued to Nickelson alleging that on November 3, he disobeyed DelleCave's order that he use his radio and instead used his cell phone; walked away from DelleCave; refused to return when ordered; and lied to DelleCave about who initiated a phone call. The proposed penalty for the 2016 Disciplinary Charges was a five-day suspension. Vasser testified that the five-day suspension was determined to be appropriate in light of Nickelson's four prior suspensions.

Nickelson's grievance challenging the 2016 Disciplinary Charges was denied at Step III on April 17, 2017, the Union filed a request for arbitration on May 10, 2017, and an arbitration award was issued on December 21, 2017 ("2017 Arbitration Award"). At the arbitration hearing, the City produced phone records establishing that Nickelson used his cell phone to call DEP five times on November 3, 2016. The 2017 Arbitration Award reflects that two other DEP employees also used phones instead of the radio to contact Nickelson on November 3, neither of whom received written disciplinary charges. The first was the clerical employee who used the office phone to call Nickelson because he was not responding to his radio. DelleCave's unrebutted testimony is that this employee received a verbal warning. The second was Nickelson's former direct supervisor, Wendell Quidley, who testified that he used his cell phone "all the time." (Joint Ex. 1, at 8) Nickelson testified at the arbitration hearing that he was singled out for discipline because he filed the Sick Leave Grievance.

In 2017 Arbitration Award, the Arbitrator sustained all of the 2016 Disciplinary Charges and found that Nickelson violated the cell phone policy, was insubordinate, and that he had lied to his supervisor. The Arbitrator noted that the use of phones by other DEP employees did not negate

Nickelson's culpability. The Arbitrator explicitly found Nickelson not to be credible in part based on his non-sensical explanations of his comments to his supervisor and phone logs that contradicted his denial that he used his phone for DEP work. Regarding Nickelson's claims of retaliation, the Arbitrator found that there was no "conspiracy or negative action taken against [Nickelson] because of any alleged grievance filed." (Joint Ex. 1, at 14) However, the Arbitrator concluded that the appropriate discipline was a written reprimand.[11]

2017 Disciplinary Charges

On May 18, 2017, Nickelson and a co-worker were in a DEP vehicle that experienced mechanical difficulties. While it is undisputed that the radio in the vehicle only works when the engine is on, the parties disputed whether the radio was operable when the vehicle was experiencing mechanical difficulties, and the City alleged that at times Nickelson chose to use his cell phone when he could have used the radio. Nickelson first reported having mechanical difficulties over the radio and then discussed the matter with one of his supervisors over his cell phone. The parties dispute who initiated that call, but it is undisputed that Nickelson initiated a phone call to a supervisor to whom he did not report who was in charge of the yard to which he was directed to go.

On July 11, 2017, the 2017 Disciplinary Charges were issued to Nickelson alleging that on May 18, 2017, he used his cell phone, rather than the DEP radio, to communicate with supervisors regarding mechanical issues with a DEP vehicle; that he failed to notify his district supervisor about the mechanical issues; and that he used his cell phone to call a district supervisor to whom he did not report regarding the mechanical issues. The proposed penalty for the 2017 Disciplinary

[11] In the arbitration, the Union represented that Nickelson had a "spotless" record. (Joint Ex. 1, at 13) Apparently, the City did not rebut this assertion. Therefore, the Arbitrator relied upon Nickelson's "clean record" in concluding that the proposed penalty was too severe. (*Id.* at 16)

Charges was a ten-day suspension, which Vasser described as "progressive" in light of Nickleson's disciplinary history, including the five-day suspension issued with the 2016 Disciplinary Charges.[12] (Tr. 114)

On December 14, 2018, the Arbitrator issued her award ("2018 Arbitration Award"). The Arbitrator found that Nickelson and his co-worker provided a credible explanation for why, during the mechanical difficulties, Nickelson sometimes used the radio and sometimes used his cell phone. The Arbitrator also found that it was reasonable for Nickelson to communicate with a supervisor to whom he did not report because that supervisor was in charge of the DEP yard where he was instructed to take the malfunctioning DEP vehicle. Therefore, the Arbitrator concluded that "the City has failed to meet its burden of proving by a preponderance of the evidence that it had just cause for disciplining" Nickelson, sustained the grievance, and overturned the discipline.[13] (Joint Ex. 2, at 11)

POSITIONS OF THE PARTIES

Union's Position

The Union contends that DEP violated NYCCBL § 12-306(a)(3) and derivatively NYCCBL § 12-306(a)(1) by filing disciplinary charges against Nickelson in retaliation for his protected union activity of filing the Sick Leave Grievance and the Workplace Violence Complaint.[14] The Union describes the cell phone policy as "honored more in the breach than the

[12] The 2017 Disciplinary Charges were issued after the 2016 Disciplinary Charges were upheld at Step III but before the 2017 Arbitration Award that reduced the penalty to a written reprimand.

[13] The Union did not allege at arbitration that the 2017 Disciplinary Charges were issued in retaliation for union activity, and the 2018 Arbitration Award does not address that issue.

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

observance" and describes Nickelson's actions as "trivial infractions." (Union Br. at 1) It notes that the Board has found on eight prior occasions that DEP retaliated against the Union's members.

As evidence of DEP's anti-union animus, the Union argues that DEP chose to file charges against Nickelson while, as established by the arbitration awards, it decided not to issue disciplinary charges to the other DEP employees who used phones. It notes that a retired supervisor testified at one of the arbitrations that he used his cell phone all of time. The Union claims "DelleCave testified unequivocally that no one other than Nickelson had ever been served with disciplinary charges" for violating the cell phone policy. (Union Br. at 4; citing Tr. 92-94) The Union argues that the "inescapable conclusion" is that DEP "seized on a technical infraction" to retaliate against Nickelson for his union activity. (*Id.*)

City's Position

The City argues that some of the Union's claims are time-barred by the four-month statute of limitations. The 2016 Disciplinary Charges were served on December 28, 2016. According to the City, the Union had until April 28, 2017, to file an improper practice petition regarding them; the instant petition was not filed until August 2, 2017. DelleCave's alleged statements to dissuade Nickelson from pursuing the Sick Leave Grievance were made in 2016. Thus, the City argues,

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

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

any claims based upon them are also untimely. According to the City, only the claim that the 2017 Disciplinary Charges were retaliatory is timely.

The City argues that the Union has failed to establish a *prima facie* case of retaliation in violation of NYCCBL § 12-306(a)(3) or a derivative violation of NYCCBL § 12-306(a)(1). The City does not dispute that Nickelson was engaged in union activity. According to the City, the Union has not established the requisite causal connection between Nickelson's union activity and the alleged retaliatory acts. It argues that the Union has set forth nothing more than speculation, suspicions, and unsubstantiated allegations in support of its claim that anti-union animus motivated the disciplinary charges served upon Nickelson. The only evidence offered by the Union, the City asserts, are the statements DelleCave allegedly made in the conversation about the Sick Leave Grievance. However, the City disputes that DelleCave made these statements. It argues that DelleCave's testimony that he did not make the statements was credible, while Nickelson's was not due to his "conveniently" fallible memory. (City Br. at 19) It further argues that, even presuming that DelleCave made the statements, there is no evidence that he sought to frustrate or impede Nickelson's pursuit of the grievance.

The City also argues that the decision to issue disciplinary charges was not made by DelleCave, but by Vasser, whose unrebutted testimony was that he lacked knowledge of the Sick Leave Grievance and Workplace Violence Complaint when he decided that charges should be issued. Thus, according to the City, the Union has failed to show a causal connection between Nickelson's union activity and the disciplinary charges.

The City further argues that it has established a legitimate business reason for the 2016 and 2017 Disciplinary Charges; specifically, management's need to enforce rules that "implicate safety and basic efficiency." (City Br. at 18) The City asserts that any DEP employee who engaged in

similar misconduct with a similar "longstanding disciplinary record" would face similar disciplinary charges.[15] (*Id.* at 20)

DISCUSSION

This Board finds that some of the claims are time barred and that the evidence does not support the conclusion that anti-union animus motivated DEP's employment actions against Nickelson. Accordingly, no violation of the NYCCBL has been proven.

We first address the City's argument that some of the Union's claims are untimely. *See Hyppolite*, 12 OCB2d 10, at 8 (BCB 2019); *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) ("timeliness is a threshold question"). An improper practice charge "must be filed no later than four[-]months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *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. Oct. 8, 2003) (Beeler, J.) (citing NYCCBL § 12-306(e) and OCB Rules § 1-07(d);[16] *see also Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd.*, *Matter of Mahinda v. City of New York*, Index No. 117487/09 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.*, 91 A.D.3d. 564 (1st Dept 2012). Consequently, "claims antedating

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[15] The City argues the Union has not established an independent violation of NYCCBL § 12-306(a)(1). However, the Union has not asserted, either in the pleadings or in its post-hearing brief, an independent NYCCBL § 12-306(a)(1) violation. Accordingly, we do not address that claim. *See DC 37*, 11 OCB2d 41, at 12 n. 11 (BCB 2018).

[16] NYCCBL § 12-306(e) provides, in relevant part: "A petition alleging . . . 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 Rules § 1-07(d) 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 [NYCCBL § 12-306] may be filed with the Board within four (4) months thereof . . . ."

the four[-]month period preceding the filing of the Petition are not properly before the Board and will not be considered." *Nardiello*, 2 OCB2d 5, at 28 (citations omitted). However, "facts occurring outside of the four[-]month limitations period may illuminate the motivations for actions that are the basis of timely claims." *Colella*, 79 OCB 27, at 56 n. 64 (BCB 2008) (citing *DC 37, L. 1113,* 77 OCB 33, at 28 (BCB 2006)). Thus, untimely claims are "are admissible as background information." *Hyppolite*, 12 OCB2d 10, at 8.

The instant petition was filed on August 3, 2017. Accordingly, any claims arising more than four months earlier are time-barred. Thus, the claim that the 2016 Disciplinary Charges were filed in retaliation for union activity is time barred as those charges were served upon Nickelson in December 2016, more than eight months prior to the filing of the petition. However, the claim that the 2017 Disciplinary Charges were filed in retaliation for union activity is timely as those charges were served upon Nickelson in July 2017, less than a month prior to the filing of the petition.

NYCCBL § 12-306(a)(3) provides that it shall be an improper practice for a public employer or its agents "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization." A violation of NYCCBL § 12-306(a)(3) is also a derivative violation of NYCCBL § 12-306(a)(1). *See Kalman*, 11 OCB2d 32, at 11 (BCB 2018); *Local 621, SEIU*, 5 OCB2d 38, at 2 (BCB 2012).

The Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny to determine whether an alleged action constitutes impermissible discrimination or retaliation based on anti-union animus in violation of NYCCBL § 12-306(a)(3), and derivatively of NYCCBL § 12-306(a)(1). To establish a *prima facie* showing of retaliation under the *Bowman/Salamanca* test, a petitioner must establish 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.

Kalman, 11 OCB2d 32, at 11 (citing *Bowman*, 39 OCB 51, at 18-19). If petitioner establishes a *prima facie* case of retaliation, "the burden shifts to the employer who may refute a petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *CSTG, L. 375*, 4 OCB2d 61, at 24-25 (BCB 2011) (citations omitted); *see also SBA*, 75 OCB 22, at 21-22 (BCB 2005).[17]

It is undisputed that Nickelson was engaged in union activity and that his supervisors were aware of his union activity. The City emphasizes that the decision to charge Nickelson was not made by his supervisors but by Vasser, who was unaware of Nickelson's union activity when he decided to issue disciplinary charges. However, the record clearly establishes that Nickelson's supervisors initiated the disciplinary process. Thus, their knowledge is imputed to the Office of the Disciplinary Counsel, which issued the charges. *See Kalman*, 11 OCB2d 32, at 12 n. 12 ("[T]he employer's general knowledge of union activity may be established by demonstrating the employer's participation in the grievance process.") (quoting *DC 37, L. 1113*, 77 OCB 33, at 26); *see also Local 1180*, 8 OCB2d 36, at 17 n. 17 (BCB 2015) (citing *DC 37, L. 376*, 1 OCB2d 40, at

[17] We note that the fact that the Arbitrator dismissed the 2017 Disciplinary Charges is not determinative of the issue before us. Whether the issuance of the 2017 Disciplinary Charges was retaliatory in violation of the NYCCBL is an issue within the Board's jurisdiction. The issues in the arbitration and the improper practice proceeding are not identical, and the two proceedings "have legally independent origins" such that a ruling in one "does not vitiate" the other. *Matter of City School Dist., Peekskill v. Peekskill Faculty Assn.-NYSUT*, 59 A.D.2d 739, 741 (2d Dept 1977). *See also Levitant*, 1 OCB2d 6, at 26-27 (BCB 2008); *Zeigler*, 59 OCB 13, at 5 (BCB 1997).

14 (BCB 2008)). Accordingly, we find that the Union has established the first prong of the *Bowman/Salamanca* test.

To satisfy "the second prong of the *Bowman/Salamanca* test requires proof of a causal connection between the alleged improper act and the protected [u]nion activity." *Kalman*, 11 OCB2d 32, at 12. Typically, a causal connection is "proven through the use of circumstantial evidence, absent an outright admission." *Benjamin*, 4 OCB2d 6, at 16 (BCB 2011) (quoting *Local 2627, DC 37*, 3 OCB2d 37, at 16 (BCB 2010)); *see also CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). However, a "petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22. Such "allegations of improper motivation must be based on statements of probative facts." *Feder*, 5 OCB2d 14, at 25 (BCB 2012). It is well established that while "temporal proximity alone is not sufficient to establish causation, the temporal proximity between the protected union activity and the alleged retaliatory action, in conjunction with other facts supporting a finding of improper motivation, [may be] sufficient to satisfy the second element of the *Bowman/Salamanca* test." *Feder*, 4 OCB2d 46, at 44 (BCB 2011); *see also SSEU, L. 371*, 75 OCB 31, at 13 (BCB 2005), *affd., Matter of Soc. Serv. Empl. Union, Local 371 v. N.Y.C. 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).

Nickelson's union activity preceded the 2017 Disciplinary Charges. The 2017 Disciplinary Charges were served two months after the Union's request for arbitration of the 2016 Disciplinary Charges and five months after the settlement of the Sick Leave Grievance.[18] Accordingly, we find temporal proximity between Nickelson's union activity and the 2017 Disciplinary Charges.

[18] The Sick Leave Grievance was settled on February 9, 2017. The Union filed a request for arbitration of the 2016 Disciplinary Charges on May 10, 2017; the 2017 Disciplinary Charges were served on July 11, 2017.

We find that the Union has alleged other facts which, taken together with the temporal proximity, satisfies the second prong of the *Bowman/Salamanca* test. DelleCave's alleged statements to Nickelson regarding the Sick Leave Grievance (*i.e.*, "don't fight it"; "you're not going to win"; and that "[i]t's not worth it"), indicate that pursuing the grievance would be futile and therefore may evince anti-union animus. (Tr. 45) *See SSEU, Local 371*, 12 OCB2d 15, at 11 (BCB 2019). Further, it is alleged that Nickelson was the first employee in his division to receive written disciplinary charges for violating the cell phone policy and that prior to December 2016 other DEP employees in his division had used their cell phones for DEP work-related matters without being disciplined. These facts suggest possible disparate enforcement of the cell phone policy against Nickelson. Accordingly, we find that the Union has shown *prima facie* evidence of retaliation.

However, we find that the City presented evidence that rebuts the *prime facie* evidence. We find that DelleCave did not make the anti-union statements that Nickelson attributes to him. Since the testimony of Nickelson and DelleCave on this point cannot be reconciled, we must make a credibility determination. *See SSEU, L. 371*, 3 OCB2d 22, at 13 (BCB 2010). We find DelleCave's denial of the alleged animus statement to be credible. Overall in his testimony, he possessed a clear, consistent recollection. *See SSEU, L. 371*, 12 OCB2d 15, at 12; *SBA*, 4 OCB2d 50, at 23 (BCB 2011). Further, we find that Nickelson was less credible.[19] His testimony was often evasive, providing detailed responses to the Union's questions but not the City's, and he exhibited a selective memory. *See Local 376, DC 37*, 4 OCB2d 58, at 12-13 (BCB 2011). For example, he did not remember any of the discipline he had received prior to the 2016 Disciplinary

[19] We note that, while we accept the Arbitrators' findings of fact, our credibility determination are independent of those of the Arbitrators and are based upon the record created in this improper practice petition, including the observations of the Trial Examiner at the improper practice hearing.

Charges, even though he had been suspended four times. Accordingly, we find that DelleCave did not make an anti-union statement to Nickelson. *See SSEU, L. 371*, 12 OCB2d 15, at 11-12.

We also conclude that the City rebutted any evidence that it treated Nickelson differently than similarly situated employees when it issued the 2017 Disciplinary Charges. It is undisputed that Nickelson had been verbally warned about using his cell phone prior to December 2016. A clerical employee received a verbal warning for violating the cell phone policy arising from the same 2016 incident that involved Nickelson. Therefore, prior to the issuance of the 2017 Disciplinary Charges, another employee had been disciplined for violating the cell phone policy. Moreover, while there was evidence that prior to December 2016 one supervisor regularly used his cell phone, there is insufficient evidence to conclude the supervisor's use violated the cell phone policy or that DEP knew of his use while he was employed. Further, it is undisputed that prior to the 2017 Disciplinary Charges being issued, Nickelson had been suspended on four prior occasions in addition to the verbal warning for a prior violation of the cell phone policy. In this regard, we credit Vassar's explanation that the penalty his unit sought in the 2017 Disciplinary Charges was merely progressive discipline based on Nickelson's disciplinary record. Thus, we conclude that the City did not treat Nickelson differently than similarly situated DEP employees when it issued the 2017 Disciplinary Charges. *See Kalman*, 11 OCB2d 32, at 13 n.13; *Local 2627, DC 37*, 3 OCB2d 37, at 19-20; *Local 1087, DC 37*, at 1 OCB2d 44, at 30 (BCB 2008).

Therefore, we do not find that DEP violated NYCCBL §12-306(a)(3) by retaliating against Nickelson for his union activity. As we find no violation of NYCCBL §12-306(a)(3), there can be no derivative violation of NYCCBL § 12-306(a)(1), and we dismiss the petition in its entirety.[20]

[20] As we find that the Union has failed to establish a violation of the NYCCBL, we need not address the City's legitimate business reason defense. *See PBA*, 79 OCB 16, at 16 (BCB 2007); *Local 983, DC 37*, 67 OCB 15, at 7 (BCB 2001); *LBA*, 61 OCB 49, at 7 (BCB 1998).

ORDER

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

ORDERED, that the improper practice petition filed by Local 376, District Council 37, against the City of New York and the New York City Department of Environmental Protection, docketed as BCB-4243-17 hereby is dismissed.

Dated: February 3, 2020
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER