# *McField*, 14 OCB2d 28 (BCB 2021)

(IP) (Docket No. BCB-4413-21)

***Summary of Decision***: Petitioner alleged that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by terminating her in retaliation for having sought union assistance regarding a counseling memorandum and a denied leave request. NYCHA argued that Petitioner has failed to establish a *prima facie* case of retaliation and that the decision to terminate her was based on legitimate business reasons. The Board found that although Petitioner established a *prima facie* case of retaliation, NYCHA demonstrated legitimate business reasons for her termination. Accordingly, the petition was denied. ***(Official decision follows).***

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**OFFICE OF COLLECTIVE BARGAINING**
**BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Proceeding**

***-between-***

**AVRIL MCFIELD,**

***Petitioner,***

***-and-***

**NEW YORK CITY HOUSING AUTHORITY,**

***Respondent.***

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## DECISION AND ORDER

On January 25, 2021, Avril McField ("Petitioner") filed a verified improper practice petition against the New York City Housing Authority ("NYCHA"). 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") by terminating her in retaliation for having sought the assistance of Local 957, District Council 37, AFSCME, AFL-CIO ("Local 957") regarding a counseling memorandum and a denied leave request. NYCHA argues that Petitioner has failed to establish a *prima facie* case of retaliation and that the decision to

terminate her was based on legitimate business reasons. The Board finds that although Petitioner established a *prima facie* case of retaliation, NYCHA demonstrated legitimate business reasons for her termination. Accordingly, the petition was denied.

## BACKGROUND

The Trial Examiner held three days of hearings and found that the totality of the record, including the pleadings, exhibits, transcripts, and briefs, established the relevant facts set forth below.

On May 28, 2018, Petitioner was hired by NYCHA as a provisional Customer Information Representative ("CIR").[1] On April 8, 2019, Petitioner was appointed to the non-competitive civil service title of Community Assistant.[2] As a Community Assistant, Petitioner was subject to an 18-month probationary period that would have ended on October 7, 2020, if not for her termination on September 29, 2020.

Throughout her employment at NYCHA, Petitioner worked at the Customer Contact Center ("CCC") as a call agent, where she was responsible for taking calls from residents and constituents regarding work orders and emergencies at NYCHA's residential and commercial facilities. The CCC uses key performance indicators ("KPIs") to measure and evaluate quantitative performance for call agents.[3] Petitioner's Team Manager as a CIR was Enrique

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[1] Local 957 is the certified bargaining representative for NYCHA employees in the title of CIR.

[2] The Social Service Employees Union, Local 371 ("SSEU"), is the certified bargaining representative for NYCHA employees in the title of Community Assistant. However, Petitioner did not know that her bargaining representative changed from Local 957 to SSEU until after she was terminated. She testified that all her union activity while employed was with Local 957.

[3] The CCC has quantitative targets for each KPI, including average calls per hour, percentage of "not ready time," calls held, handle time, and log-in time.

Parajon, an Administrative Staff Analyst.[4] After her title change to Community Assistant, her Team Manager was Francine Adams, a CIR Level III.[5]

On December 20, 2019, a meeting was held between Parajon, Adams, and Petitioner, in which Petitioner received, but refused to sign, a December 19, 2019 counseling memorandum from Parajon regarding an alleged incident of insubordination that transpired on December 3, 2019 ("First Counseling Memo").[6] The First Counseling Memo provides, in pertinent part:

> On December 3, 2019 at approximately, 4:50 p.m., while I was in discussion with TEMP employee, Chantel Bell and informing her as to the reasons I could not meet with her, you abruptly rose from your chair in the middle of the Customer Contact Center and began to continuously question me as to why I would not meet with Ms. Bell on an email that I sent to her. You commented: "but why, but why, but why" and began to berate your supervisor, team manager, Francine Adams, stating: "how long are you guys going to allow Ms. Adams to continue to mistreat her like that; you know it's wrong[.]" This statement was made on the open floor with other staff in proximity. Minutes later, while discussing, once again with CIR-Level 2, Rafael Vasquez in the hallway leading to the public elevators, I stopped to ask, what was going on. You again started a tirade of the same comments above towards your supervisor, Francine Adams. I informed you that you were out of order and reminded you that you were on probation and needed to go back to your station and perform your duties as a call agent. You looked at Mr. Vasquez and he too instructed you to go back to your work station. Your behavior, in both instances, was inappropriate and disruptive to the department and your remarks against your supervisor was inflammatory. Your insubordinate behavior is unacceptable and intolerable.
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> . . .

[4] In September 2018, Petitioner received her only probationary report as a CIR, and her overall performance was noted as satisfactory. However, the "quantity of work" section explained that "a plan to improve her KPIs was discussed which includes individualized training." (Petitioner Ex. 5)

[5] In July and September 2019, Petitioner received her first two probationary reports as a Community Assistant, and her overall performance was noted as satisfactory.

[6] Parajon explained that he issues "write-ups" against call agents on behalf of other Team Managers when he reviews reports and observes poor job performance. (Tr. 183)

> You may consider this correspondence as a Counseling Memorandum for Misconduct-Insubordination. Please be advised that this memorandum may be used in any disciplinary action against you.

(Petitioner Ex. 1A; NYCHA Ex. 1B)

Parajon's testimony regarding the incident was consistent with his description in the First Counseling Memo.[7] Petitioner testified that she was not insubordinate to Parajon or Adams.[8] Following the December 20, 2019 meeting, Petitioner contacted Donna Harris at Local 957's grievance department about the First Counseling Memo, and Harris told her to write a rebuttal. Thereafter, Petitioner received a phone call from Harrison Campbell, Local 957 President. Campbell advised Petitioner to write a rebuttal and stated that he would speak with Margaret Podmore, CCC Deputy Director, about the First Counseling Memo. On December 31, 2019, Petitioner submitted a rebuttal to Parajon, in which she admitted to asking Parajon why he would not meet with Bell "in a joking way," but also denied allegations of misconduct/insubordination. (*See* NYCHA Ex. 20)

In January 2020, Petitioner testified that she received another call from the Local 957 President in which he stated that the CCC Deputy Director told him that Adams would no longer be speaking with Petitioner moving forward and that other managers would be responsible for communicating with her about work related issues. Parajon testified that the CCC Deputy Director

[7] Parajon also explained that termination would be the typical consequence for a probationary employee who engages in insubordination, but he did not know why Petitioner was not terminated after this incident. He explained that Adams would have been responsible for following up on it. Adams did not testify regarding why Petitioner was not immediately terminated thereafter.

[8] According to Petitioner, although she did ask Parajon to speak with Bell on two different occasions, she never interrupted a conversation between Bell and Parajon, or berated Adams.

never spoke with him about the incident alleged in the First Counseling Memo or told him that Local 957 had contacted her about it.[9]

Between January and July 2020, Petitioner received her Third, Fourth, and Fifth Quarter probationary reports from Adams, and her overall performance was noted as satisfactory. However, in the "cooperation and attitude" section of the Third Quarter report, Adams rated Petitioner as "does not work or provide customer service willingly" and wrote, "[Petitioner] was issued a [First Counseling Memo] on December 19, 2019 for Misconduct/Insubordination."[10] (Petitioner Ex. 5; NYCHA Ex. 3)

Petitioner also received monthly KPI "scorecards" from Shiv Choythani, Adams' Assistant, which highlighted KPI expectations and areas that she needed to improve. Petitioner's May 2020 scorecard shows that she missed KPI targets for average calls per hour, not ready percentage, calls held percentage, and log-in time. Petitioner's June 2020 scorecard shows that she missed KPI targets for average calls per hour, not ready percentage, calls held percentage, log-in time, and handle time. Petitioner's July and August 2020 scorecards show that she missed KPI targets for average calls per hour, calls held percentage, log-in time, and handle time.[11]

On September 3, 2020, Petitioner emailed Adams a request to take leave from September 16 to 18, 2020. Adams denied the request and cited "short-staffed" as the justification for denial. (Petitioner Ex. 3) On September 4 and 5, 2020, Petitioner modified her request and asked Adams for two and then only one of the three days off, but both modified requests were rejected because

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[9] Adams testified that neither the CCC Deputy Director nor anyone else at the CCC informed her that Local 957 called regarding the First Counseling Memo.

[10] In March and May 2020, Petitioner received commendations reflecting positively on her customer service.

[11] However, the July and August 2020 scorecards show that Petitioner met the target for average not ready percentage.

of staffing issues. On September 8, 2020, Petitioner testified that she reached out to Harris at Local 957 for assistance with her denied leave request and that Harris stated that the Local 957 President would call her.

On September 10, 2020, Petitioner's leave request for all three days was approved by Adams. According to Petitioner, the Local 957 President called and stated that he spoke with the CCC Deputy Director and that the days were approved.[12] Additionally, Petitioner testified that Adams called to inform her that her request was approved, but also stated that Petitioner "didn't have to reach out to [Local 957] to ask for the three days to be to be approved." (Tr. 33-34) Adams testified that between September 3 and 10, 2020, she came to realize that she looked at the wrong leave calendar in rejecting Petitioner's leave request and that she made a mistake by not initially approving it. Adams testified that she then called Petitioner to inform her that she made a mistake and that her request was approved. Adams testified that the CCC Deputy Director never told her that she was contacted by Local 957 regarding the denied leave request nor did she receive a call from Local 957 about it herself.[13]

Thereafter, Petitioner testified that Adams' demeanor towards her became very dismissive. For instance, Petitioner explained that when she had computer issues in the past, she would send Adams a text message to keep Adams informed about her status. However, Petitioner testified about an alleged incident following the leave request in which she sent Adams a text message about a computer issue, and Adams told Petitioner to stop texting or calling her and to contact IT instead. Petitioner alleged that Adams then texted, "you guys need to start coming to me and stop

[12] NYCHA admitted in its answer that "it spoke to [the Union President]" regarding the denied leave request. (*See* Ans. ¶ 12) The Answer did not aver which NYCHA representative spoke to the Local 957 President.

[13] Adams testified that she only became aware that Local 957 made complaints about her regarding the denied leave request after the improper practice petition was filed.

going to the union every time you have a problem," to which Petitioner replied that she did not go to the union and that she just wanted Adams to know that her laptop was not working. (Tr. 35) According to Petitioner, Adams further stated, "that is you guy[s'] problem. You guys are quick to tell everyone else your problem instead of coming to me."[14] (*Id.*) Adams did not testify regarding these alleged statements.

In a meeting with Parajon and Adams on September 14, 2020, Petitioner received an August 28, 2020 counseling memorandum from Adams regarding an alleged incident of misconduct that occurred on August 13, 2020 ("Second Counseling Memo"), a September 14, 2020 instructional memorandum from Parajon for poor work performance ("Instructional Memo"), and her final probationary evaluation from Adams dated September 14, 2020 ("Final Evaluation"), in which Petitioner's overall performance was rated as unsatisfactory.

**Second Counseling Memo**

The Second Counseling Memo provides, in pertinent part:

> On August 13, 2020, after making an announcement for an Elevator OOO, you continued to speak on the overhead intercom without hanging up your phone. For ten minutes you were heard over the air ordering food in the drive-thru and having a conversation with the cashier regarding your upcoming Water Park visit during a time that was not your scheduled Break. Not only did you disturb the CCC, but another department as well. You were scheduled to be working at this time and not taking care of your personal business. This behavior is unacceptable and will not be tolerated.
>
> You are instructed to ensure you are always at your work station as scheduled and observe your assigned Break/Lunch schedules. Failure to comply will result in progressive disciplinary action.

[14] A screenshot of text messages between Petitioner and Adams from August 6, 2020 shows that Petitioner informed Adams that her computer system went offline and that she was waiting on assistance, and that Adams replied, "stop texting my phone. Call JP and hold on." (Petitioner Ex. 13) Adams does not make any comments relating to union activity and no other text messages were introduced in evidence.

> You may consider this correspondence as a Counseling Memorandum for Misconduct.
>
> This memo can be used in any future disciplinary action against you.

(Petitioner Ex. 9; NYCHA Ex. 1C)

It is undisputed that on August 13, 2020, an incident occurred in which Petitioner, who was working from home, made an announcement over the office intercom regarding an elevator that was out-of-order at a NYCHA facility.[15] However, after making the announcement, Petitioner failed to hang up the intercom for a period of 5-10 minutes and it was otherwise unusable.

Adams testified that she heard a voice over the intercom speaking to another person about vacationing or a water park with their friends. Adams testified that you could also hear a third person in the background asking, "can I take your order please." (Tr. 104-05) The third person asked three times and then the voice on the intercom responded by stating, "oh my gosh, I didn't even realize you were asking me a question because I was so engrossed in my conversation." (*Id.* at 105) Adams testified that the other departments who could hear the intercom approached her and asked if the voice could be disconnected

Petitioner testified that the allegations of misconduct against her in the Second Counseling Memo are untrue. According to Petitioner, she inadvertently failed to hang up the intercom after making an announcement. However, she worked from her bedroom the entire day on August 13, 2020, and was never at a drive thru. Petitioner explained that she informed Adams during the week of August 13, 2020, that there was a flood in her apartment building that required

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[15] The office intercom is used and heard by three departments, including the Emergency Services Department. All emergency announcements, such as gas leaks and elevator out-of-orders in NYCHA's facilities, are made over this intercom. Only one announcement can be made over the intercom at any given time. Call agents dial into the intercom from home through a phone that is built into their laptops.

construction in her bathroom and that there would be heavy drilling and workers coming in and out of her apartment. On the date of the alleged incident, Petitioner testified that there were workers in her apartment, along with her family and friends. Petitioner testified that the voices Adams heard over the intercom must have been the workers or her family members or friends having a conversation in the background.

Subsequently, Petitioner called Adams to apologize for her failure to hang up. Adams told Petitioner that she heard her at a drive thru talking about how she was going to a water park. According to Adams, Petitioner did not admit or deny that she was at a drive thru and, instead, apologized for failing to hang up the intercom. Adams testified that she told Petitioner that she was going to be written up for causing a disruption and interfering with office operations. Petitioner testified that before she could finish apologizing, Adams stated that she heard Petitioner at a drive thru. Petitioner testified that she tried to tell Adams that she was working from home the entire day, but that Adams did not believe her.[16]

**Instructional Memo**

The September 14, 2020 Instructional Memo from Parajon states, "[a] review of statistics for the month of July and August [2020] indicates that you are performing outside the targeted range of Key Performance Indicators (KPI). The area of concern is the Not Ready time being over 1 Hour and 20 Minutes and this limit being surpassed frequently." (Petitioner Ex. 10; NYCHA Ex. 1D) The Instructional Memo notes that in July 2020, Petitioner was 23 minutes and 35 seconds over the 1 hour and 20 minutes target for not ready time. In August 2020, Petitioner was 2 minutes and 46 seconds over the target. In total, the Instructional Memo states that Petitioner should have

[16] Petitioner testified that she texted Adams a picture of her bathroom to demonstrate that she was home and not at a drive thru. Adams denied receiving this text message, and no evidence of this alleged text message was offered for the record.

taken 7.4 calls in the lost time. The Instructional Memo further provides, "[y]our failure to make improvements despite the training resources and supervision provided to you is unacceptable and will not be tolerated. You are therefore instructed to take immediate steps to correct your work performance. This Instructional Memo for Poor Work Performance may be used in any future disciplinary action against you . . . ." (*Id.*)

Parajon testified that Petitioner received the Instructional Memo for excess not ready time because she often returned late from her lunch and meal breaks and disrupted other employees on calls with customers when she walked from her desk to speak with her supervisors. Petitioner testified that the Instructional Memo does not accurately reflect her not ready times. She testified that she told Parajon during the September 14, 2020 meeting that it was inaccurate because her KPIs were great prior to July and August and that the not ready times on the Instructional Memo must have been someone else's. Moreover, she tried to explain to Parajon that her computer had been "messing up" and that she had previously sent Adams a screenshot regarding her computer issues.[17] (Tr. 79) Petitioner also testified that Parajon's alleged justification regarding her disrupting colleagues at the CCC was untrue because she was working from home full-time in July and August 2020, and therefore she could not have interacted with supervisors and other colleagues as Parajon testified.

**Final Evaluation**

Petitioner's Final Evaluation from September 14, 2020 rated Petitioner's overall performance as unsatisfactory and explained that she "was out of assigned area at Drive-Thru having clocked-in working remotely from home. Counseling memo issued on this date [September

[17] Parajon admitted that the computer system goes down occasionally. However, he testified that before instructional memos are issued, the CCC's quality unit reviews the underlying data to ensure its accuracy.

14, 2020]." (Petitioner Ex. 5; NYCHA Ex. 1E) In the "quantity of work" section, Adams rated Petitioner as "works slowly[,] [a]ccomplishes very little work," and wrote, "Instructional memo issued for NOT READY percentage for Poor Work Performance and a Counseling Memo issued for Misconduct on 9/14/2020." (*Id.*) Additionally, although Adams rated Petitioner "acceptable" in the "quality of work" section, she wrote, "[q]uality does not denote the Average Handle Time and Average Not Ready." (*Id.*) Petitioner's KPI scorecard for September 2020 shows that she missed KPI targets for average calls per hour, handle time, calls held percentage, and log-in time.[18]

Adams testified that Petitioner failed her probation because of the incidents described in the counseling memos and an issue with her KPIs.[19] On September 15, 2020, Adams emailed Marla Edmonson, a NYCHA Employee Relations Coordinator, stating that Petitioner failed her final probationary evaluation and that NYCHA would be seeking her termination. On September 18, 2020, Adams emailed George Williams, CCC Director, with a memorandum requesting Petitioner's termination ("Termination Memo"). The Termination Memo provides, in pertinent part:

> During her appointment as a Community Assistant, Ms. McField has been late 9 times totaling 114 minutes and absent 6 times.
>
> On December 19, 2019, Ms. McField received a Counseling Memorandum for Misconduct/Insubordination. Ms. McField interfered and aggressively confronted a supervisor while he was counseling a subordinate employee. This confrontation occurred in the presence of other staff members on the floor.
>
> August 13, 2020, having clocked-in working remotely from home, Ms. McField made an announcement over the office intercom

[18] However, the September 2020 scorecard shows that she met the target for average not ready percentage.

[19] Petitioner testified that Adams stated during the September 14, 2020 meeting that she only failed because of the allegations described in the Second Counseling Memo. Parajon testified that he did not recall Adams saying that Petitioner's unsatisfactory evaluation was solely related to the Second Counseling Memo.

> regarding an Elevator outage. After making the announcement, Ms. McField did not disconnect the phone. She was heard over the air in a Drive-Thru ordering chicken and discussing her waterpark vacation with the cashier. At the time of Ms. McField's visit to the drive- thru she was in work status and not on a scheduled break or lunch. This incident caused a disturbance to the entire Customer Contact Center and the Emergency Service Department since it prohibited the use of NYCHA's intercom service and all other agents' ability to make emergency announcements. The interruption lasted for more than five minutes.
>
> Ms. McField was subsequently issued a Counseling Memorandum for [Misconduct] on September 14, 2020. Additionally, Ms. McField was also issued an Instructional Memorandum for Work Performance on September 14, 2020 for repeatedly exceeding the Department's KPI "Not Ready."
>
> Ms. McField has signed and received The New York City Housing Authority's General Regulations of Behavior and the CCC Code of Conduct. Nonetheless her continuous pattern of behavior has proven her to be an unreliable employee to the CCC and to NYCHA and consequently I am recommending termination of employment.

(NYCHA Ex. 15)

Also on September 18, 2020, the CCC Director approved the request for Petitioner's termination, and Adams forwarded his approval along with supporting documentation to Edmonson for her review and approval. Edmonson testified that she processed Petitioner's termination package and determined that the Termination Memo and supporting documentation warranted termination.[20] She testified that nothing about Petitioner's termination was remarkable.

On September 25, 2020, Edmonson sent Adams Petitioner's termination letter and noted that Petitioner's termination was scheduled for September 29, 2020. In a September 29, 2020 meeting with Parajon and Adams, Petitioner was notified that she had been terminated and was

[20] Edmonson testified that supporting documentation in a termination case would normally include documents such as counseling memos, instructional memos, and anything else showing that the employee is not performing up to standards. In Petitioner's case, Edmonson recalled reviewing at least one counseling memo and some of Petitioner's performance evaluations.

given the termination letter.[21] During the meeting, Parajon stated that Petitioner could have been terminated for the First Counseling Memo, but was not because of her rebuttal and dedication to the job. Parajon advised Petitioner that she could write a rebuttal to the Second Counseling Memo, but also stated that Petitioner's sole focus when working from home should have been NYCHA work. Parajon explained that the decision to fail Petitioner's probation took everything into account, including time and attendance and KPIs.

## POSITIONS OF THE PARTIES

### Petitioner's Position

Petitioner argues that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by terminating her in retaliation for having sought Local 957's assistance regarding the First Counseling Memo in December 2019 and the denied leave request in September 2020.[22] Petitioner asserts that Adams, the NYCHA representative who she alleges was responsible for her termination, was aware of her union activity. She avers that this is evidenced by the CCC Deputy Director telling the Local 957 President that Adams would have no further contact with Petitioner following her

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[21] Petitioner testified that she had a voice recording of the meeting. Following her testimony, the parties stipulated to the voice recording's admission into the record. The summary of the meeting is taken from the voice recording.

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

> 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;
>
> * * *
>
> (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[.]

submission of the rebuttal to the First Counseling Memo, and Adams telling Petitioner that there was no need to have gone to Local 957 regarding the denied leave request. Petitioner contends that the evidence, including Adams' negative statements to Petitioner about seeking the assistance of Local 957, establishes that union activity was a motivating factor in her termination.

Further, she argues that the evidence demonstrates that the alleged business reasons advanced by NYCHA for her termination were pretextual. Specifically, Petitioner identifies the fact that she received various favorable performance evaluations and written commendations for good work performance prior to suddenly being rated unsatisfactory in her Final Evaluation. Additionally, she received the Second Counseling Memo, Instructional Memo, and Final Evaluation all during the same meeting on September 14, 2020, which she alleges was held to set up her ultimate termination. Moreover, she was terminated only eight days prior to becoming a permanent employee with due process rights.

As a remedy, Petitioner seeks an order directing NYCHA to reinstate her to her former position with full back pay, benefits, and seniority, to cease and desist from discriminating or retaliating against Petitioner or any other SSEU represented employee in the future, and such other further relief as may be just and proper.

**NYCHA's Position**

NYCHA argues that Petitioner has failed to establish a *prima facie* case of retaliation in violation of NYCCBL § 12-306(a)(1) and (3). It asserts that there is no evidence that any NYCHA employee responsible for Petitioner's termination was aware of her alleged union activities. Adams testified that she was unaware of any complaints that Petitioner made to Local 957 regarding the First Counseling Memo or the denied leave request, and Petitioner acknowledged that Adams never mentioned that she knew of any conversation between the CCC Deputy Director

and Local 957 President following the submission of Petitioner's rebuttal to the First Counseling Memo. However, even if Adams was aware of Petitioner's union activities, NYCHA contends that Adams was not the sole decisionmaker in Petitioner's termination. Adams had to submit a termination request with supporting documentation to the CCC Director for approval. Thereafter, with the CCC Director's approval, Adams forwarded the termination request to Edmonson, who performed an independent review to ensure that it was appropriate.

Assuming *arguendo* that the NYCHA agent responsible for Petitioner's termination was aware of Petitioner's alleged union activity, NYCHA contends that Petitioner has presented no evidence that there is a causal relationship between her union activity and her termination. However, even if Petitioner did establish a *prima facie* case of retaliation, NYCHA avers that there were at least three legitimate business reasons for her termination. First, NYCHA argues that it could have terminated Petitioner for the misconduct documented in the First Counseling Memo. Second, it asserts that it could have terminated Petitioner for the incident described by the Second Counseling Memo, in which it is undisputed that Petitioner failed to hang up the intercom and caused a disruption to office operations at the CCC and two other departments, including the Emergency Services Department. Third, NYCHA contends that it has a legitimate business purpose to terminate any probationary employee with poor work performance and Petitioner was below the target on at least four KPIs in the months of June, July, August, and September 2020. It avers that Petitioner received monthly KPI scorecards that put her on notice of how her performance compared with stated expectations. Further, NYCHA argues that the fact that Petitioner was not terminated until the final weeks of her probationary period is proof that it gave her the opportunity to improve her performance prior to the competition of probation.

Consequently, the City asserts that it demonstrated legitimate business reasons for Petitioner's termination and the petition should be dismissed in its entirety.

## DISCUSSION

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).

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. The test states that, 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 Kalman*, 11 OCB2d 32, at 11.

The first prong of the *prima facie* case is satisfied where "the employer is shown to have knowledge of the protected union activity." *CSTG, L. 375*, 7 OCB2d 16, at 20 (BCB 2014) (citing *Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011); *Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004)). In this case, it is undisputed that Petitioner contacted Local 957 at least twice prior to her termination. First, she contacted Local 957 after receiving the First Counseling Memo in

December 2019. Second, she contacted Local 957 following her denied leave request in September 2020. Petitioner testified that the Local 957 President spoke with the CCC Deputy Director on her behalf regarding the First Counseling Memo in December 2019/January 2020 and the denied leave request in September 2020. Although Petitioner's assertions as to the Local 957 President's actions are hearsay, NYCHA admitted in its answer that the Local 957 President spoke with a NYCHA representative regarding the denied leave request in September 2020. Moreover, Petitioner testified that Adams acknowledged that she knew Petitioner had contacted Local 957 in order to get her leave request approved. Accordingly, we find that Petitioner has satisfied the first prong of the *prima facie* case.

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, causation 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 (BCB 2005). 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).

We find that Petitioner presented sufficient evidence of an improper motivation for her termination to satisfy the second prong of the *prima facie* case. Petitioner offered direct evidence of anti-union animus when she testified that Adams stated, following the reversal of her denial of the September 2020 leave request, that Petitioner "didn't have to reach out to [Local 957]."[23] (Tr. 33-34) Further, we find temporal proximity between Petitioner's union activity regarding the denied leave request in early-September 2020 and her ultimate termination on September 29, 2020. Accordingly, we find that Petitioner has proffered sufficient evidence of an improper motivation for her termination to state a *prima facie* case of retaliation.

Once *prima facie* evidence of retaliation has been established, our analysis shifts to whether the employer has refuted the *prima facie* evidence and/or established a legitimate business reason for its action. *See Local 30, IUOE*, 8 OCB2d 5, at 23 (BCB 2015); *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006). If the employer refutes the *prima facie* evidence or establishes a legitimate business reason, the retaliation claim is dismissed. *See SSEU, Local 371*, 12 OCB2d 15, at 11-12 (BCB 2019).

We find that NYCHA has established legitimate business reasons for Petitioner's termination. It is undisputed that Petitioner received a counseling memo for misconduct that disrupted the CCC and other departments. Although Petitioner disputes various facts alleged in the counseling memo, she also concedes some of the relevant events. For instance, Petitioner admits that she failed to hang up the office intercom, that she had friends, family, and construction

[23] For the purpose of the *prima facie* case, we need not make a factual finding as to whether Adams made the alleged statement. *See Local 376, DC 37*, 13 OCB2d 3, at 16 (BCB 2020); *SSEU, L. 371*, 12 OCB2d 15, at 11-12 (BCB 2019); *SSEU, L. 371*, 8 OCB2d 35, at 13-14 (BCB 2015).

workers in her apartment who could be heard making noise over the intercom, and that she subsequently called Adams to apologize. It is also undisputed that Petitioner received a counseling memo for insubordination prior to engaging in any union activity. Moreover, the record evidence demonstrates that Petitioner consistently missed KPI targets used to measure quantitative job performance and was advised of these deficiencies in monthly scorecards and instructed that improvement was required.[24]

Therefore, for the reasons stated above, we find that NYCHA has demonstrated legitimate business reasons for Petitioner's termination prior to completion of her probationary period. *See SSEU, L. 371*, 8 OCB2d 35, at 16 (BCB 2016) (finding that a probationary employee's difficult working relationship with her supervisor and co-workers and deficient writing and verbal skills were legitimate business reasons for her termination); *Rockville Centre Union Free School District*, 32 PERB ¶ 3050 (1999), *affd. sub nom.*, *Rockville Centre Teachers Assn. v NYS Pub. Empl. Relations Bd.*, 281 A.D.2d 425 (2d Dept. 2001) (recognizing "the wide latitude the courts have granted municipal employers with respect to termination of probationary employees"). Accordingly, we dismiss the petition in its entirety.

[24] Even assuming *arguendo* that Petitioner is correct that her Instructional Memo is inaccurate with respect to not ready times in July and August 2020, the evidence shows that she consistently failed to meet other performance factors.

**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-4413-21, filed by Avril McField, against the New York City Housing Authority, is hereby dismissed in its entirety.

Dated: December 2, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER