Huo, 16 OCB2d 22 (BCB 2023)

(IP) (Docket No. BCB-4505-23)

Summary of Decision*:** Petitioner alleged that HHC violated NYCCBL § 12-306(a)(1) and (3) when it terminated his employment in retaliation for requesting that a Union representative be present at a supervisory meeting. HHC claimed that Petitioner, a probationary employee, failed to allege a *prima facie* case of retaliation and that it terminated him for poor work performance. The Board found that a *prima facie* case was not established because Petitioner did not plead facts to show that his union activity was a motivating factor in HHC's decision to terminate him. Accordingly, the Board denied the petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

JING HUO,

Petitioner,

-and-

NEW YORK CITY HEALTH + HOSPITALS,

Respondent.

DECISION AND ORDER

On February 6, 2023, Jing Huo ("Petitioner") filed a verified improper practice petition *pro se* alleging that New York City Health + Hospitals ("HHC") violated § 12-306(a)(1) and (3) of the New York Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Petitioner claims that HHC terminated his employment in retaliation for requesting that a representative from his union, the Organization of Staff Analysts ("Union"), be present at a meeting with a supervisor. HHC argues that Petitioner, a probationary employee, failed to allege a *prima facie* case of retaliation and that it terminated him for poor work

performance, a legitimate business reason. The Board finds that a *prima facie* case was not established because Petitioner did not plead facts to show that his union activity was a motivating factor in HHC's decision to terminate him. Therefore, we find no violation of NYCCBL § 12-306(a)(1) or (3). Accordingly, the petition is dismissed in its entirety.

BACKGROUND

HHC hired Petitioner on June 7, 2021, in the civil service title of MetroPlus Coordinating Care Manager Level I, which is a title represented by the Union.[1] Petitioner remained in the MetroPlus Coordinating Care Manager Level I title until his termination. Upon hiring, Petitioner was given the functional title of Care Manager. Petitioner served as a probationary employee until his October 28, 2022, termination.

On October 22, 2021, Petitioner's then-supervisor, the Director of Managed Long Term Care ("MLTC") Clinical Programs, held a counseling session with him and issued three memos to him concerning his work performance and conduct. The first memo states that it is intended to serve as a record of a conversation with Petitioner regarding "a total lack of follow up for member services, copied notes, and SDC authorization that is still not provided due to waiting until after the authorization was expired to follow up." (Pet. Ex. 9) The memo further states that MetroPlus would be conducting a "more stringent audit" of Petitioner's documentation and will meet with him again on November 10, 2021, to discuss "review of documentation audits completed." (*Id.*) The second memo states that it is intended to serve as a record of insubordination and specifies that during a conversation on Teams in the presence of the "Team Lead," Petitioner stated that he

[1] MetroPlus, a subsidiary of HHC, is a health maintenance organization that offers New York State-sponsored health insurance programs such as Medicaid Managed Care, Child Health Plus, Family Health Plus, and Partnership in Care.

would not speak and disconnected from the call. (*Id.*) The memo provides that multiple attempts were made to reconnect Petitioner to the call but that he continued to hang up on the other Teams participants. The third memo documented a conversation with Petitioner regarding his late entry of notes on "members" and his failure to complete an assessment. (*Id*.) As in the first memo, the third memo also states that MetroPlus would be conducting a "more stringent audit" of Petitioner's documentation and will meet with him again on November 10, 2021, to discuss "review of documentation audits completed." (*Id.*) Petitioner was transferred from the case management unit to the assessment unit on November 29, 2021. According to HHC, on or about December 13, 2021, it changed Petitioner's functional title from Care Manager to Assessment Nurse due to poor work performance.

Petitioner received a performance evaluation in February 2022 from his supervisor in the assessment unit, Ma Buena Nepomuceno-Espaldo ("Supervisor"). He asserts that the assessment "graded [him] as meet[ing] the requirements." (Pet. ¶ 6b) HHC asserts that the evaluation "indicated that he met requirements, in certain applicable areas, during the *limited time frame of November 2021 and December of 2021 only.*" (Ans.¶ 7)[2] (emphasis in original)

On June 7, 2022, Petitioner, his supervisors, and a representative from the MetroPlus Labor Relations Department attended a meeting, during which Petitioner was advised of certain performance issues. Those issues were: having three unscheduled absences in a six-month period, submitting a patient assessment late, improper use of the Uniform Assessment System (UAS-NY) web application, not signing and finalizing assessments on time, leaving a comment in a child's assessment that did not make sense, and entering patient assessments to the UAS-NY for another

[2] Neither Petitioner nor HHC produced the February 2022 evaluation for the record.

company while on duty with HHC.[3] During this meeting, HHC proposed and Petitioner agreed to extend his probationary period by six months, from June 7, 2022, to December 7, 2022. The Probationary Period Extension Agreement, dated June 7, 2022 ("Agreement"), provides that the extension was due to job performance issues and describes the above issues with Petitioner's performance. The Agreement also provides a plan for future expectations, including "biweekly call[s,] productivity review[s] and coaching session[s] during supervision time" and creation of a "mutually agreed improvement plan" for Petitioner's work performance. (Pet. Ex. 8) Petitioner claims that these sessions never took place.

On September 21, 2022, the Supervisor scheduled a meeting with Petitioner for September 28, 2022, with the following proposed agenda:

1. Discuss performance
    a. Signing and finalizing
    b. Inconsistency report
2. TBT policy and procedure see attachments for this topic (will be reviewed)
3. Tasking hours pediatrics vs. adults
4. Completing courses in Lenavi

(Pet Ex. 4) Petitioner believed that the meeting could potentially lead to disciplinary action against him and asked a Union representative to attend the meeting. On September 27, 2022, Union delegate Lawson Chase emailed the Supervisor requesting to attend the meeting. The Supervisor responded that she had to cancel the meeting due to a conflict but would reschedule it and include the Union delegate as an invitee. However, the meeting was never held. On September 28, 2022, a Union attorney called Petitioner and informed him that MetroPlus had notified her that "management of MetroPlus was concerned about [Petitioner's] performance and would terminate [his] employment should [he] not resign." (Pet. ¶ 3) According to Petitioner, prior to his request

[3] Petitioner admits to having a job with another company for which he used the UAS-NY but denies that he performed work for that company while on duty with HHC.

for Union representation, "there had been no discussion of termination of [his] employment whatsoever[.]" (Pet. ¶ 7b)

On October 12, 2022, HHC discovered that Petitioner had improperly utilized his MetroPlus UAS-NY account on June 27 and September 11, 2022, when he "attested" two Fidelis members as MetroPlus Health members in a database.[4] (Pet. ¶ 4a) HHC requested that MetroPlus' Labor Relations and Privacy Departments investigate Petitioner's use of that account. On or around October 20, 2022, the Supervisor contacted him regarding the incidents. Petitioner does not deny that these incidents occurred but asserts that they were mistakes, that this was the first time that the Supervisor had discussed these incidents with him, and that they did not cause any "severe consequences" for anyone involved.[5] (*Id.*) Following completion of the investigation into Petitioner's MetroPlus UAS-NY account, HHC concluded that Petitioner violated several policies and guidelines. HHC management held a video conference with Petitioner on October 28, 2022, during which they reviewed of his work performance and informed him of his termination.[6]

Sometime thereafter, Petitioner wrote to MetroPlus and HHC's Office of Equal Employment Opportunity seeking to appeal his termination. On December 21, 2022, he received a response from a Human Resources representative informing him that there is no appeal procedure

[4] The UAS-NY is a web application that "allows qualified assessors to securely conduct standardized health assessments which generate outcomes that are used to determine eligibility and service level authorization, as well as guide care planning for New York State residents." (Pet. Ex. 6) Petitioner routinely entered assessment information into the app for both MetroPlus and his other job. Users like Petitioner who have multiple UAS roles with multiple organizations login separately for each position. The incidents in question involved Petitioner mistakenly entering an assessment for a Fidelis member while logged in with his MetroPlus account.

[5] Petitioner claims to have quickly realized the error and corrected the entry each time.

[6] Petitioner contends that the Supervisor cited New York State Department of Health policy on suspendable actions to justify his termination but that the Department of Health had not taken any disciplinary action against him after HHC reported his violations.

in place for probationary employees, but that they had nevertheless reviewed his complaint and decided that the termination would stand.

Petitioner also reached out to the Union and alleged that HHC terminated his employment as a result of his request for Union representation at the meeting scheduled for September 27, 2022. In a December 28, 2022, written response, the Union informed Petitioner that it had investigated his complaint but could not substantiate it. Thus, the Union stated, HHC had authorized his termination for unsatisfactory job performance. The letter noted that as a probationary employee, Petitioner could be terminated at any time for unsatisfactory job performance.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that HHC's termination of his employment was the result of discrimination based on his union activity, in violation of NYCCBL § 12-306(a)(1) and (3).[7] Specifically, he asserts that the termination had nothing to do with his work performance since there had been no discussion of his termination prior to September 27, 2022, when the Union

[7] 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. . . .

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 of all of such activities.

contacted management to represent him at the September 28, 2022, meeting. Petitioner argues that a causal link between his termination and union activity is established by the combination of temporal proximity between the two events and the fact that HHC did not have "any justifiable reason" that Petitioner's performance issues warranted termination. (Rep. at 24)

Petitioner does not deny that he received memos and attended meetings with supervisors regarding his performance issues prior to his termination. However, he claims that the Supervisor did not raise any issue about his performance between June 7, 2022, and September 28, 2022, and that she did not discuss the two Fidelis members that he "attested" as MetroPlus members on June 27 and September 11, 2022, with him until October 20, 2022. (Pet. ¶ 4a) He further argues that he attested the members by mistake, the incidents did not cause severe consequences "for any parties involved," and he did not "break any MetroPlus member's privacy; if anything I only violated Fidelis 'policies and procedures.'" (Pet. ¶ 4d) Petitioner also argues that the State never took action against him after MetroPlus reported his two mistakes.

Petitioner claims that he did not repeat the mistakes he had made that were recorded in the October 2021 memos after his transfer. Thus, he questions why he should be terminated for "the very same reasons" and states that it is like he "was punished twice for the same reason." (Pet. ¶ 6a) He asserts that as of September 28, 2022, his supervisors did not inform the Union that the October 2021 memos were a factor in his termination and posits that HHC used the memos to support his pending termination when they realized that other evidence could not justify it.

HHC's Position

HHC argues that Petitioner has failed to allege a *prima facie* violation of NYCCBL § 12-306(a)(3). While it does not dispute that Petitioner sought Union representation for the September 28 meeting, it contends that he has failed to satisfy the second prong of the *Bowman* test because he cannot establish a causal link between his termination and any protected activity under the

NYCCBL. HHC claims that Petitioner did not provide any evidence of an improper motive for the termination. HHC asserts that, in fact, Petitioner's request to have a Union representation at the meeting was granted. It points to the September 27, 2022, communication from the Supervisor to Union delegate Chase informing him that the meeting was cancelled and confirming that he would be included when the meeting was rescheduled.

Even assuming, arguendo, that Petitioner is able to establish *a prima facie* case of retaliation, HHC argues the petition must be dismissed because it has demonstrated a legitimate business reason to terminate him. It points to Petitioner's "well-documented and undisputed" history of poor work performance preceding his termination, including unscheduled absences, performing work for other companies while on duty with HHC, insubordination, failure to follow applicable policies and procedures, failure to carry out the functions of his job titles as a Care Manager and an Assessment Nurse in accordance with applicable policies and procedures, and failure to meet productivity quotas. (Ans. ¶ 67) HHC thus maintains that Petitioner's termination would have occurred regardless of any alleged union activity. Indeed, HHC contends that Petitioner conceded his extensive history of poor work performance, including the misuse of his MetroPlus UAS-NY account, which preceded both the date he requested representation at the September 28 meeting and his termination date.

HHC asserts that Petitioner has failed to allege any activity that was inherently destructive of his rights under NYCCBL § 12-305 to sustain a violation of NYCCBL § 12-306(a)(1). Instead, Petitioner merely offered a conclusory assertion that his request for union representation resulted in his retaliatory termination.

For all of these reasons, HHC requests that the Board dismiss the petition.

DISCUSSION

In reviewing the sufficiency of the allegations in the pleadings, we will draw all permissible inferences in favor of Petitioner and assume, arguendo, that the factual allegations are true. *See Feder,* 1 OCB2d 23 at 13 (BCB 2008); *D'Onofrio*, 79 OCB 3, at 20 n. 11 (BCB 2007). Because Petitioner is *pro se* in this proceeding, we are especially aware that such review "should be exercised with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and not define such claims only by the form of words used by Petitioner." *Feder*, 1 OCB2d 23, at 15; *see also Morris*, 3 OCB2d 19, at 14 (BCB 2010). Based on the evidence submitted, we construe Petitioner's claim as discrimination based on union activity, in violation of NYCCBL § 12-306(a)(1) and (3).[8]

To establish discrimination under the NYCCBL, we apply the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, such as *State of New York (Division of State Police)*, 36 PERB ¶ 4521 (2003), adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). Pursuant to the test, 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 DC 37*, 1 OCB2d 6, at 27 (BCB 2008).

Regarding the first prong, the record establishes that Petitioner engaged in union activity prior to his termination. It is undisputed that Petitioner requested that a Union representative join the proposed September 28, 2022, meeting with the Supervisor. The Supervisor became aware of

[8] We find that no evidence of an independent NYCCBL § 12-306(a)(1) violation has been submitted. We therefore construe Petitioner's claim of an NYCCBL § 12-306(a)(1) violation as a derivative violation based on the NYCCBL § 12-306(a)(3) retaliation claim.

that request on September 27, 2022, when the Union representative emailed her requesting to join the meeting. While the meeting was never held, the Supervisor acknowledged and agreed to the Union representative's request to be included. Accordingly, we find that the Supervisor had knowledge that Petitioner had sought union representation and has satisfied the first prong of the standard. *See Kaplin*, 3 OCB2d 28, at 14 (BCB 2010) (employer's knowledge of petitioner's desire to secure union assistance satisfies first element of the *prima facie* case); *DC 37, L. 376*, 77 OCB 12, at 14-15 (BCB 2006) (knowledge that member sought union assistance in addressing time and leave issues sufficient).

The second prong of the *Bowman* test requires that Petitioner "demonstrate a causal connection between the protected activity and the motivation behind management's actions [that] 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). Regarding the motivation behind the employment actions in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26 (BCB 2006); *see also CEU, L. 237*, 67 OCB 13, at 9 (BCB 2001); *CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). However, to establish motive, "a petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22 (BCB 2005) at 22. Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001); *Kaplin,* 3 OCB2d 28 (BCB 2010). A petitioner may establish a *prima facie* case by "deploying evidence of proximity in time, together with other relevant evidence." *Colella*, 79 OCB 27, at 54 (BCB 2007); *CWA, L. 1182*, 57 OCB 26 at 22 (BCB 1996).

Here, there is temporal proximity between Petitioner's request for Union representation and his termination. On September 27, 2022, Petitioner's Union delegate emailed his Supervisor requesting to join the meeting scheduled for September 28, 2022. Petitioner learned of the plan to

terminate him for the first time on September 28, 2022, and was terminated on October 28, 2022. Thus, a close proximity in time between the protected activity and the adverse action has been established.

However, "temporal proximity alone is not sufficient" to establish a *prima facie* case. *COBA*, 2 OCB2d 7, at 42 (BCB 2009); *see also Colella*, 79 OCB 27, at 55. Petitioner claims that, in addition to temporal proximity, HHC demonstrated anti-union animus by terminating him without sufficient justification. He argues that the issues with his work performance do not warrant termination and that therefore the termination must have been motivated by anti-union animus.

Under the facts presented, we cannot conclude that that Petitioner's termination was motivated by his request for union representation. Notably, Petitioner's record of work performance issues was documented as early as October 2021 and continued to at least June 7, 2022, when his probationary period was extended. Petitioner does not dispute these work performance issues, all of which predate his request for union representation and his supervisor's knowledge of that request. *DC 37, Local 1505*, 15 OCB2d 27 at 24 (BCB 2022); *see Leiva*, 9 OCB2d 11, at 16; *DEA*, 79 OCB 40, at 22. (action taken "that predate[s] knowledge of union activity cannot be motivated by that union activity.") In addition, Petitioner does not dispute HHC's assertion that he misused the database twice after June 7, 2022. Further, mere disagreement with HHC's conclusion that Petitioner's poor performance and/or misconduct justifies termination is not sufficient to establish an improper motive. *See Kalman,* 11 OCB2d 32 at 13 (BCB 2018) (temporal proximity alone insufficient to establish a *prima facie* case where employee disputed the justifications for his termination but did not present evidence suggesting hostility to union activity).

Here, Petitioner provides no direct or circumstantial evidence of anti-union animus. Accordingly, we find that Petitioner's claim that his termination was motivated by anti-union

animus is conclusory. *See Turner*, 3 OCB2d 48 at 13 (BCB 2010) (holding that claims of retaliation and/or interference that are conclusory and unsupported by facts sufficient to state a claim must be dismissed). Thus, we find that the Petitioner has failed to establish a *prima facie* case. In the absence of sufficient evidence that Petitioner's termination was based on his request for Union representation, we find no violation of the NYCCBL.

Therefore, the improper practice petition is denied in its entirety.

ORDER

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

ORDERED, that the improper practice petition docketed as BCB-4505-23, be and the same hereby is, dismissed as to all claims.

Dated: August 3, 2023

New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA SILVERBLATT
MEMBER

PETER PEPPER
MEMBER

CHARLES MOERDLER
MEMBER