

Local 1180, CWA, 8 OCB2d 36 (BCB 2015)
(IP) (Docket No. BCB-4092-15)

Summary of Decision: The Union alleged that HHC violated NYCCBL § 12-306(a)(1) and (3) by removing certain job duties from an employee and transferring her in retaliation for filing a grievance and serving as a shop steward. HHC argued that the removal of duties claim was untimely; that the alleged retaliatory acts were not motivated by the employee's union activities; and that it had legitimate business reasons for its actions. The Board found that the removal of duties claim was untimely. The Board also found that the Union proffered a *prima facie* case of retaliation, which was rebutted by HHC. Accordingly, the petition was dismissed. (*Official decision follows.*)

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

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA,

Petitioner,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On January 16, 2015, the Communications Workers of America (“CWA”) and its affiliated Local 1180 (collectively, “Union”) filed a verified improper practice petition against the New York City Health and Hospitals Corporation (“HHC”). The Union alleges that HHC 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 removing certain duties from an employee and transferring her in retaliation for filing a grievance and serving as a shop steward.

HHC argues that the removal of duties claim is untimely; that the decision makers did not have knowledge of the employee's union activities prior to the alleged retaliatory acts; that the alleged retaliatory acts were not motivated by the employee's union activities; and that it had legitimate business reasons for its actions. The Board finds that the removal of duties claim is untimely. The Board also finds that the Union proffered a *prima facie* case of retaliation, which was rebutted by HHC. Accordingly, the petition is dismissed.

BACKGROUND

A two-day hearing was held, and the Trial Examiner found that the totality of the record establishes the following relevant background facts:

Debera Tyndall has been employed as a Coordinating Manager ("CM") at Kings County Hospital Center ("KCHC") since November 26, 1984. Since 2010, Tyndall has served as the Union's shop steward and is very active in KCHC's joint labor management committee. Tyndall testified that "no one [at KCHC] made any statements [at the joint labor-management meetings] that they were upset with [her] for her union activity." (Tr. 64) In addition, Michelle Emmons, KCHC's Associate Executive Director of Human Resources, testified that she has a very good and cordial working relationship with Tyndall in her capacity as shop steward.

From early 2000 to November 25, 2014, Tyndall worked in KCHC's Community Affairs Department.¹ Tyndall's primary work responsibilities in Community Affairs included serving as the liaison and providing administrative support to the Community Advisory Board ("CAB") and

¹ The Community Affairs Department is responsible for community outreach, developing patient engagement, and ensuring that the needs of the community are met. *See* Ans., Ex. A ¶ 5.

attending Community Board 17 (“CB 17”) meetings.² As the CAB liaison, Tyndall scheduled and attended its meetings and prepared executive meeting reports. As KCHC’s CB 17 representative, Tyndall attended and presented at monthly meetings held after regular working hours. Pursuant to the parties’ collective bargaining agreement, Tyndall received compensatory time for hours worked beyond her regularly scheduled workday.

Due to a vacancy in the Director of Community Affairs position in February 2014, the Department consisted of Tyndall and one other CM. While HHC was recruiting for a Director for Community Affairs, Natasha Burke oversaw Tyndall’s CAB work and Adele Flateau approved Tyndall’s timesheets, compensatory time, and time-off requests.³ On March 28, 2014, Tyndall submitted an out-of-title grievance (“Grievance”) to Flateau and the Union, alleging that she was assigned and performing supervisory responsibilities that were beyond her functional job description.⁴ On or about May 28, 2014, HHC received the Union’s Step II Conference request for Tyndall’s Grievance by letter dated May 23, 2014, which also advised HHC that Tyndall had not received a response to her Grievance.

² The CAB is part of HHC’s internal governance and is a top priority for KCHC’s Community Affairs department. The CAB is a 21-member Board governed by HHC’s Central Office and comprised of KCHC’s leadership and community representatives who advise KCHC on the provision of healthcare services to the community.

CB 17 is a 50-member Board comprised of community business owners and others appointed by the Brooklyn Borough President and City Council. CB 17 meetings cover a wide range of municipal topics, including land use, sanitation, traffic, and healthcare.

³ Natasha Burke is KCHC’s Chief of Staff and had oversight over the Community Affairs Department between February 2014 and May 2014. Adele Flateau is the Associate Director of Public Affairs.

⁴ Emmons testified that Human Resources normally date-stamps grievances upon receipt. Tyndall’s Grievance is dated March 28, 2014, but is not date-stamped.

According to Emmons, Robert Miller, KCHC's Chief Operating Officer, contacted her in May 2014 and expressed concerns that Tyndall's accrual and use of compensatory time was "posing a hardship for the Community Affairs Department" and advised her that Tyndall "was out a lot and [. . .] wasn't there as they needed her to be."⁵ (Tr. 105) Consistent with Human Resources' reassignment process, Miller's concerns prompted Emmons, in May 2014, to identify a vacancy in the Ambulatory Care Services Department ("ACSD") that she believed matched Tyndall's skill-set and to engage Miller, Christopher Mastromano, and Burke in discussions to transfer Tyndall to the ACSD.⁶ Emmons also testified that she consulted with Mastromano in May 2014 to assess Tyndall's qualifications for the vacant ACSD position. Emmons concluded that, based on Tyndall's Community Affairs experience in dealing with the community inpatient population and her understanding of patient needs and KCHC's vision, Tyndall had the skill-set for the ACSD position.

On May 12, 2014, Daphnee Champagne was hired as the Director of Community Affairs and reported to Burke. Tyndall testified that between May 23, 2014 and June 20, 2014, she submitted to Champagne five requests to approve the accrual of 31 hours of compensatory time for work previously performed after regular working hours, five time-off requests to use 82 hours of accrued compensatory time, and two time-off requests to use 70 hours of annual leave

⁵ Miller also had oversight over the Community Affairs Department.

⁶ Christopher Mastromano had oversight over the ACSD. Emmons described KCHC's involuntary reassignment procedure as being initiated by a request from a "sending department" to Human Resources. Upon receipt of a reassignment request, Human Resources identifies a vacancy and notifies the "receiving department" so that it can review the candidate's qualifications. When the receiving department accepts the employee, Human Resources notifies the employee of their reassignment.

time.⁷ Champagne testified that she expected Tyndall to complete her primary work responsibilities during regular work hours and that Tyndall's use of compensatory time was preventing her from doing so. When Champagne reviewed Tyndall's submissions, she identified that some of the 31 hours Tyndall requested as accrued compensatory time was for performing her primary work responsibilities after regular working hours. Since Champagne was new to KCHC, she contacted Burke about the appropriateness of Tyndall's compensatory time accrual requests. Champagne testified that Burke advised her that she had never approved any requests for Tyndall to accrue compensatory time for performing primary work responsibilities after regular working hours and "that this should not be happening." (Tr. 148) Champagne also testified that, thereafter, she advised Tyndall on three occasions, between June 2014 and September 3, 2014, that all requests for compensatory time required prior approval and that she

⁷ Tyndall submitted and Champagne approved compensatory time accrual requests for:

May 23, 2014: 4 hours and 15 minutes;
June 2, 2014: 1 hour and 15 minutes;
June 6, 2014: 11 hours;
June 20, 2014: 11 hours and 30 minutes; and
June 25, 2014: 3 hours.

Tyndall requested and Champagne approved compensatory time off on:

June 3, 2014: 14 hours for June 11, 2014 to June 12, 2014;
June 13, 2014: 2 hours on June 13, 2014;
June 13, 2014: 3 hours on June 19, 2014;
June 13, 2014: 28 hours for June 30, 2014 to July 3, 2014; and
June 13, 2014: 35 hours for July 28, 2014 to August 1, 2014;

Tyndall requested and Champagne approved annual leave time on:

June 13, 2014: 35 hours for August 18, 2014 to August 22, 2014 and
June 13, 2014: 35 hours for August 25, 2014 to August 29, 2014.

See HHC Exs. 1 & 2.

would not approve compensatory time to perform primary work responsibilities after regular working hours.⁸ In contrast, Tyndall testified that Champagne never discussed her accrual or use of compensatory time or any aspect of her work with her.

Champagne further testified that in June 2014, she took over Tyndall's community outreach work. Champagne explained that the summer is a "very busy high volume time" and that she was concerned that certain community outreach follow-ups, for which Tyndall was responsible, would "fall between the cracks." (Tr. 153) Rather than "wonder and continuously ask" Tyndall about the follow-ups, Champagne testified that it was easier to take over the community outreach work. *Id.*

Also in June 2014, Donovan Vassell, the Associate Director of the ACDS was advised by Human Resources "to hold off" hiring into an ACSD vacancy in an Assistant Coordinating Manager ("ACM") position because they "may have somebody." (Tr. 213) Nevertheless, Vassell posted the position, received resumes, and interviewed candidates.

On August 8, 2014, Emmons became aware of Tyndall's Grievance and was notified by email on August 12, 2014 that a Step II Grievance Conference was scheduled.

On September 3, 2014, Tyndall stopped by Champagne's office at approximately 6:30 pm to inform Champagne that she was on her way to a 7 pm CB 17 meeting and to ask Champagne if she had any information for Tyndall to present. Champagne testified that she advised Tyndall not to attend the CB 17 meeting because she would not approve compensatory time for attending the meeting. Champagne also advised Tyndall that she would attend all future CB 17 meetings in place of Tyndall. Champagne explained that she did so because Tyndall did

⁸ Champagne testified that prior notice and approval for CB 17 meetings was required because she was not aware of the meeting dates.

not provide her with the advance notice she had previously instructed Tyndall to provide and because it was easier for her to attend the CB 17 meetings than revisit the compensatory time issues. Tyndall corroborated that Champagne advised her not to attend the September 3, 2014 CB 17 meeting because compensatory time would not be approved. Tyndall also testified that on September 3, 2014 she requested written confirmation of the elimination of her CB 17 duties from Champagne. At Champagne's direction, a letter was sent to CB 17's Chairperson, notifying him that Champagne had replaced Tyndall as KCHC's representative at CB 17 meetings. On September 15, 2014, Tyndall received a copy of the letter.

The Step II Conference on the Grievance was held on September 17, 2014 and resulted in the referral of the Grievance to KCHC for a Step 1(A) Conference.⁹ Champagne learned of Tyndall's Grievance through the September 22, 2014 Step 1(A) Conference notice and participated in the October 6, 2014 Step 1(A) Grievance Conference. HHC advised Tyndall and the Union that the Grievance was denied on November 12, 2014, and on November 13, 2014, the Union again appealed HHC's denial to Step II.

On November 10, 2014, the Union filed an Improper Practice ("IP") with the Office of Collective Bargaining alleging a unilateral change of title for ACMs. Tyndall testified that she notified the Union of a member's complaint that their title was changed from an ACM to a Behavioral Health Associate, but otherwise, she "was not involved in the IP." (Tr. 29) Moreover, Tyndall testified that she did not discuss the IP with anyone at KCHC. On November 13, 2014, HHC's Senior Director of Labor Relations advised Emmons of the IP. Emmons testified that she was not aware of Tyndall's involvement in the IP; that Tyndall was not

⁹ The Grievance was referred back to KCHC for a Step 1(A) Conference because the Step 1(A) Conference was never held.

identified on the IP; and that Tyndall did not participate in the IP settlement discussions between the Union and HHC.

Also on November 13, 2014, Tyndall was notified by letter dated November 12, 2014 that KCHC “ha[d] identified a need for [her] position in the ACSD” and that she was being reassigned to the ACSD effective November 26, 2014. (Jt. Ex. 8) Emmons testified that the decision to transfer Tyndall was made in May 2014 and had nothing to do with the Grievance.¹⁰ On direct examination, Emmons asserted that part of the reason for Tyndall’s transfer was her skill-set.¹¹ On cross-examination, Emmons clarified that the only reason for Tyndall’s transfer was the negative operational impact of Tyndall’s accrual and use of compensatory time on Community Affairs and also attributed Tyndall’s transfer, in part, to the reorganization in Community Affairs. Furthermore, Emmons testified that she discussed the timeframe for Tyndall’s transfer with Mastromano in May 2014 and explained that it made strategic sense to delay Tyndall’s transfer because KCHC was recruiting for a Director for Community Affairs at that time and wanted to give the new Director an opportunity to assess the department. Emmons also explained that in May 2014, the Community Affairs Department consisted of just two CMs and that Tyndall was needed to continue performing her CAB liaison responsibilities.

¹⁰ Emmons testified that she sent emails to Mastromano that prove that the transfer decision was made in May 2014, but was unable to retrieve the emails “due to a glitch in HHC’s email archiving mechanism.” (Tr. 98) Emmons also testified that she “would not recommend reassigning someone who’s filed a grievance . . . because [it] would [be] perceive[d] as [] retaliation.” (Tr. 97)

¹¹ In a March 4, 2015 Affidavit, Emmons affirmed that the reason for Tyndall’s transfer was “[i]n early November 2014[,] a vacancy came up in the ACSD that matched Ms. Tyndall’s position and the ACSD was interested in Ms. Tyndall.” (Ans., Ex. B ¶ 11)

When Tyndall reported to the ACSD sometime after November 26, 2014, Vassell did not assign her to either of the two existing ACM vacancies.¹² Vassell attributed this, in part, to Tyndall having “no experience in ambulatory care” and the need to train her “literally from the ground up.” (Tr. 214) When Tyndall completed her training in February 2015, Vassell assigned her to adult medicine, where her responsibilities include providing administrative support, supervising and scheduling four clerks, interacting with patients, directing patient flow, and ensuring the availability of patient rooms.¹³

Champagne testified that she was not involved in the decision to transfer Tyndall and did not approve it. She stated that KCHC’s Director of Labor Relations advised her in October 2014 that Tyndall would be transferred at some future date. Nevertheless, Champagne testified that she “was fine” with the decision to transfer Tyndall.¹⁴ (Tr. 168) According to Champagne, after Tyndall was transferred, she decided to upgrade Tyndall’s former CM position to an Assistant Director position. This position is currently vacant.

POSITIONS OF THE PARTIES

Union’s Position

The Union claims that HHC removed Tyndall’s CB 17 duties and transferred her from a high profile position in Community Affairs to a stressful and less desirable position in the ACSD

¹² The record is unclear as to the exact date Tyndall reported to the ACSD.

¹³ The ACSD adult medicine vacancy did not exist at the time of Tyndall’s transfer.

¹⁴ Emmons also testified that Champagne “concurred that it [made] business sense to have Tyndall serve [in] another role.” (Tr. 95)

in retaliation for filing a grievance and serving as a shop steward, in violation of NYCCBL § 12-306(a)(1) and (3).¹⁵

In support of its claims, the Union argues that Emmons and KCHC's Director of Labor Relations devised and implemented a plan to transfer Tyndall and that they were aware of Tyndall's union activities as a shop steward and the Grievance prior to effectuating her transfer to the ACSD.

The Union also argues that Tyndall's involuntary transfer was motivated by her protected union activities. The Union asserts that HHC's decision to transfer Tyndall was made shortly after Tyndall filed the Grievance. Moreover, the Union asserts five circumstances surrounding the transfer that evince a retaliatory motive. First, Emmons offered multiple contradictory reasons for Tyndall's transfer. Initially, Emmons stated that the transfer was necessitated by a vacancy in the ACSD that "matched Tyndall's position" and that the ACSD was interested in Tyndall because she had the "skill set for the job in question." (Ans., Ex. B ¶ 11; Tr. 94) Emmons then contradicted her sworn statement by testifying that the only reason for Tyndall's

¹⁵ NYCCBL § 12-306(a) provides, in pertinent part, that it shall be an improper practice for the 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[.]

The Union's claim relating to the removal of Tyndall's CB 17 duties and the alleged NYCCBL § 12-306(a)(1) violation was not addressed in its brief.

transfer was the operational impact of her use and accrual of compensatory time on the Community Affairs Department. As such, the Union asserts that Emmons' testimony was "not credible" and "must be largely disregarded." (Pet. Br. at 9) Second, there was no immediate need to transfer Tyndall to the ACSD because she had no special skills, qualifications, or experience in ambulatory care, and there were numerous applicants for the vacant position. Third, Emmons' acknowledgement, that reassigning someone who has filed a grievance establishes a perception of retaliation, evinces HHC's retaliatory motive. Fourth, the decision to transfer Tyndall effectively disposed of the Grievance. Lastly, HHC's decision to transfer Tyndall was intended to have a chilling effect on other employees who contemplate filing out-of-title grievances.

With respect to the HHC's assertion that Tyndall's position and skill-set were needed in the ACSD, the Union argues that Tyndall had no special skills, qualifications, or experience in ambulatory care. With respect to HHC's claim that Tyndall's transfer was due to the reorganization of Community Affairs and/or the upgrade of Tyndall's former CM position, the Union argues that neither of these reasons contributed to Tyndall's transfer. The Union asserts that Emmons' description of the changes in Community Affairs do not constitute a reorganization. Moreover, Tyndall's transfer cannot be attributed to the upgrade of her former CM position because the decision was made after Tyndall's transfer and because the upgraded position remains vacant.

With regard to the alleged negative operational impact of Tyndall's accrual and use of compensatory time, the Union asserts that Tyndall's job responsibilities in Community Affairs for the past nine years included CB 17 and CAB duties, which necessitated the accrual of

compensatory time. It argues that HHC never advised Tyndall that her accrual and use of compensatory time negatively impacted the operation in Community Affairs. The Union also questions why HHC maintained Tyndall in Community Affairs for seven months after identifying the negative impact of Tyndall's accrual and use of compensatory time in May 2014. Lastly, the Union argues that the Board should draw a negative inference from HHC's failure to produce the emails referenced by Emmons that "could prove that [HHC's decision to transfer Tyndall] happen[ed]" before HHC had knowledge of the Grievance. (Tr. 98) Accordingly, the Union contends that HHC's reasons for transferring Tyndall are pre-textual and requests that the Board grant the Petition.

HHC's Position

Initially, HHC argues that the Union's removal of CB 17 duties claim is untimely because it was not filed within four months of the date Tyndall learned of the removal of her CB 17 duties.

HHC also argues that the Union failed to establish a *prima facie* case of retaliation. HHC acknowledges that the filing of grievances and improper practices are protected union activities. However, it argues that the Union did not raise Tyndall's status as a shop steward as a basis for the alleged retaliation in its petition or at the hearing.

Further, HHC contends that its decision-makers did not have knowledge of Tyndall's Grievance prior to their decisions to transfer her and to remove her CB 17 duties. HHC argues that its decision to transfer Tyndall was made in May 2014 and arose out of the May 2014 discussions between Miller, Burke, Mastromano, and Emmons. HHC also asserts that the May 2014 decision to transfer Tyndall is corroborated by Human Resources' June 2014 comment to Vassell "to hold off" hiring into the ACSD vacancy "because [they] may have somebody." (Tr.

213) Finally, HHC contends that there is no evidence to dispute that Emmons and Champagne did not become aware of the Grievance until August 8, 2014 and September 22, 2014, respectively.

HHC also argues that Tyndall's transfer and the removal of her CB 17 duties were not motivated by her union activities. With regard to Tyndall's role as a shop steward, HHC argues that KCHC did not harbor any anti-union animus toward Tyndall. Rather, HHC asserts that KCHC's management had a cordial and positive working relationship with Tyndall and that Tyndall acknowledged that she never heard or felt that anyone at KCHC was upset or angry with her because of her union activities. HHC also reasserts that its decision-makers did not have knowledge of Tyndall's Grievance prior to their decisions to transfer her and to remove her CB 17 duties. Moreover, HHC contends that Tyndall was not the only KCHC person reassigned during the Community Affairs restructuring and that Tyndall admitted to having no direct involvement in the IP.

Lastly, HHC argues that it had legitimate business reasons for removing Tyndall's CB 17 duties and for transferring her to the ACSD. HHC generally asserts that it has the managerial right to "direct its employees," to "determine the methods and means and personnel by which government operations are conducted," to "exercise complete control and discretion over its organization," and to reassign its employees "at the discretion of the appointing officer in the interest of managerial effectiveness." NYCCBL § 12-307(b); Rule 7.2.2 of HHC's Rules and Regulations.

With respect to the removal of Tyndall's CB 17 duties, HHC argues that Champagne identified productivity issues with Tyndall's work and decided to take over the CB 17 duties so

that Tyndall could complete higher priority work responsibilities. In doing so, Champagne was exercising HHC's right to manage the workforce and "ensuring that the Department's initiatives and primary goals were being met." (Ans. ¶ 66)

HHC proffers three business reasons for Tyndall's transfer: (1) the need for Tyndall's position in the ACSD; (2) the upgrade of Tyndall's CM position; and (3) the crippling impact of Tyndall's accrual and use of compensatory time on Community Affairs. HHC argues that Tyndall had the skill-set to perform the ACSD position she transferred into because she testified in great detail and understanding about her ACSD position. HHC also argues that the operational issues resulting from Tyndall's accrual and use of compensatory time identified in May 2014 are corroborated by Champagne. Specifically, Champagne identified in June 2014 that Tyndall was accruing compensatory time to complete her work and then taking compensatory time that prevented her from completing other work. Consequently, HHC contends that it had legitimate business reasons for removing Tyndall's CB 17 duties and transferring her, and requests that the Board dismiss the Petition.

DISCUSSION

Timeliness

As a threshold matter, we address the timeliness of Petitioner's removal of duties claim. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). NYCCBL § 12-306(e) provides in relevant part:

A petition that a public employer or its agents. . . has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

See also OCB Rule § 1-07(b)(4) (stating that a petition must be filed within four months of an alleged violation).¹⁶ Any claims that arose more than four months prior to the filing of the petition are not properly before the Board and will not be considered. *See Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007).

It is undisputed that on September 3, 2014, Champagne advised Tyndall not to attend the CB 17 meeting because she would not approve her compensatory time and that she was replacing Tyndall at all future CB 17 meetings. Tyndall acknowledged the removal of her CB 17 duties on September 3, 2014 by requesting that Champagne confirm the removal of these duties in writing. Therefore, we find that the removal of duties claim is untimely because the petition was filed on January 16, 2015, more than four months after September 3, 2014. *See Minervini*, 71 OCB 29, at 12 (BCB 2003).

Transfer to Ambulatory Care Services

This Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the standard in *City of Salamanca*, 18 PERB ¶ 3012 (1985), to determine whether an employer has violated NYCCBL § 12-306(a)(3). This standard provides that a petitioner must establish a *prima facie* case of retaliation by demonstrating that:

¹⁶ Section 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) provides, in relevant part:

One or more public employees or any public employee organization action on their behalf. . . may file a petition alleging that a public employer or its agents. . . has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation.

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 Local 376, DC 37*, 5 OCB2d 31, at 17 (BCB 2012). A violation of NYCCBL § 12-306(a)(3) is also a derivative violation of NYCCBL § 12-306(a)(1). *See L. 621, SEIU*, 5 OCB2d 38, at 2 (BCB 2012). If a petitioner is able to establish 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).

The Union claims that HHC violated NYCCBL § 12-306(a)(1) and (3) by transferring Tyndall in retaliation for filing a grievance and serving as a shop steward. Upon reviewing all of the evidence in this case, we find that the Union proffered a *prima facie* case of retaliation, but that it was rebutted by HHC. We therefore dismiss the petition.

The record clearly establishes that Tyndall engaged in protected union activities. This Board has consistently held that the filing and processing of grievances and improper practices constitutes protected activity under the NYCCBL and that an employer's participation in those proceedings is sufficient to establish its knowledge of the employee's protected activity. *See Locals 1322 & 276, DC 37*, 6 OCB2d 24, at 29 (BCB 2013); *Local 621, SEIU*, 5 OCB2d 38, at 12 (BCB 2012); *Colella*, 79 OCB 27, at 53-54 (BCB 2007). Here, it is undisputed that Tyndall

was a shop steward, filed a grievance, and notified the Union of a union member's complaint, which resulted in the filing of the IP.

Further, HHC had knowledge of Tyndall's union activity. It is undisputed that HHC was aware that Tyndall was a shop steward prior to her transfer and that she actively participated in KCHC's labor management committees. *See Local 237, CEU, 67 OCB 13, at 9 (BCB 2001)* (knowledge of an employee's status as a shop steward is sufficient to satisfy the first prong of the *Salamanca* test). It is also undisputed that HHC received the Step II Grievance request on or about May 28, 2014, that Emmons was aware of Tyndall's Grievance on August 8, 2014, and that Champagne participated in the October 6, 2014 Step 1(A) Grievance Conference.¹⁷

In addition, contrary to HHC's assertion, we find that HHC had knowledge of Tyndall's union activity prior to making its decision to transfer her. The record establishes that the decision to transfer Tyndall was not made until early November 2014. Although Tyndall's transfer was discussed as early as May 2014, we find that a final decision was not made at that time.¹⁸ Rather, Emmons testified that it made strategic sense to delay the transfer until a new Community Affairs Director was hired and had an opportunity to assess the department. Further, Emmons conceded that the ACSD position Tyndall transferred into was not identified until early

¹⁷ HHC had general knowledge of the Grievance as early as May 28, 2014 when it received the Union's request for a Step II Grievance Conference. *See DC 37, L. 376, 1 OCB2d 40, at 14 (BCB 2008)* (finding imputed knowledge from an employer's participation in the grievance process satisfies the first prong of the *Bowman/Salamanca* test).

¹⁸ We do not credit Emmons' testimony that the "decision" to transfer Tyndall was made in May 2014, since this fact is not supported by Vassell's testimony or established by other evidence in the record. Further, we find it unnecessary to draw a negative inference as to HHC's motivation based upon its failure to produce emails related exclusively to the timing of the transfer. Emmons testified that the emails could prove that the transfer decision was made in May, a conclusion that was not established by the evidence.

November 2014. *See* Ans., Ex. B ¶ 11. As such, we find the first prong of the *Bowman/Salamanca* test is satisfied.

The second prong of the *Bowman/Salamanca* test requires proof of a causal connection between the alleged improper act and the protected Union activity. A causal connection is “typically . . . proven through the use of circumstantial evidence, absent an outright admission.” *Benjamin*, 4 OCB2d 6, at 16 (BCB 2011) (citations omitted); *see also CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). A “petitioner must offer more than speculative or conclusory allegations.” *SBA*, 75 OCB 22, at 22. 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).

We reject the Union’s argument that HHC’s decision to transfer Tyndall was motivated by her status as a shop steward. There is no evidence of anti-union animus toward Tyndall for serving as a shop steward. To the contrary, the record establishes that Emmons has a very good professional and cordial working relationship with Tyndall in her capacity as a shop steward. Indeed, Tyndall acknowledged “that no one [at KCHC] made any statements [at the joint labor-management meetings] that they were upset with [her] for her union activity.” (Tr. 64) Further, there is no evidence that establishes HHC’s knowledge of Tyndall’s involvement in the IP. Tyndall did not discuss the IP with anyone at KCHC, was not identified on the IP, and did not participate in settlement discussions between the Union and HHC. As such, we find that HHC’s

decision to transfer Tyndall was not motivated by her status as a shop steward or her involvement in the IP.

However, we find evidence of a causal connection between the Grievance and Tyndall's transfer. The record establishes temporal proximity between the filing of Tyndall's Grievance and her transfer. HHC's decision to transfer Tyndall was made at most within six months after it became aware of the Grievance; less than one month after Tyndall's Step 1(A) Grievance Conference; and contemporaneously with its decision to deny the Grievance. In addition, the evidence does not establish that HHC transferred Tyndall because of her skill-set, the ACSD's need for Tyndall's position or its interest in Tyndall, or a reorganization in Community Affairs. Contrary to some of the reasons HHC proffered through Emmons' testimony and its November 12, 2014 letter, the record establishes that Tyndall did not have experience in ambulatory care and required extensive training before being assigned to a CM position that did not exist at the time of her transfer. Moreover, there is no evidence that the Community Affairs reorganization motivated HHC's decision to transfer Tyndall. Therefore, such temporal proximity coupled with HHC's failure to establish some of the reasons it proffered for the transfer raises a suspicion that the Grievance may have been a motivating factor in HHC's decision to transfer Tyndall.¹⁹

Accordingly, based on this evidence, we find that the Union proffered a *prima facie* case of

¹⁹ We credit Emmons' testimony where it is undisputed or supported by other evidence in the record. Although HHC failed to establish some of the reasons it proffered through Emmons' testimony, there is no evidence that Emmons was a decision-maker in Tyndall's transfer. Rather, Emmons participated in the May 2014 discussions and implemented the transfer as KCHC's Human Resources Director. *See SSEU, L. 371 (Abualroub)*, 79 OCB 34, at 11 (BCB 2007) (credibility findings relate to accuracy, and do not necessarily equate to finding that the "testimony [] is willfully deceptive [or] intended to subvert the process").

retaliation.²⁰ *See DC 37, L. 376, 5 OCB2d 31, at 20 (BCB 2012) (citing County of Monroe, 35 PERB ¶ 4586 (PERB’s “position can be fairly stated as close temporal proximity of the complained of event to the exercise of protected activity, while circumstantial, may raise a suspicion of animus which may be bolstered by a finding that the stated justification for the action taken is wholly pretextual”)).*

Notwithstanding, we find that the HHC rebutted the *prima facie* case.²¹ The totality of the evidence established that HHC’s decision to transfer Tyndall was not motivated by anti-union animus. Rather, the transfer was motivated by Miller’s and Champagne’s beliefs as to the negative operational impact of Tyndall’s accrual and use of compensatory time on the Community Affairs Department and a desire to reduce the accrual and usage of compensatory time in the office.²² There is no direct evidence in the record that HHC harbored any anti-union animus toward Tyndall for filing the Grievance. To the contrary, neither Tyndall nor Emmons indicated that anyone at KCHC made any statements that would indicate that they were upset

²⁰ We reject the Union’s remaining arguments in support of a *prima facie* case. There is no evidence in the record to establish that Tyndall’s transfer was intended to have a chilling effect on other employees contemplating filing out-of-title grievances. Similarly, we do not find Emmons’ statement that she would not recommend transferring an employee who has filed a grievance proof of HHC’s anti-union animus. *See SBA, 75 OCB 22, at 22* (“petitioner must offer more than a speculative or conclusory allegations”).

²¹ Our dissenting colleagues highlights the fact that the ACSD position did not match Tyndall’s skill-set, and would use it as a basis to find that her transfer to that position was unlawful retaliation. We disagree. While we find the mismatch to be a factor which justified our conclusion that a *prima facie* case was established, an employer may rebut such evidence, and the HHC did so here.

²² In so finding, we recognize that the accrual and usage of compensatory time may have been a function of the duties of Tyndall’s position, rather than her performance. However, we disagree with our dissenting colleagues that this merits a finding of discrimination when applied to the facts of this case.

with Tyndall for filing the Grievance. Further, while we do not opine on the merits of the Grievance, transferring an employee to remedy an out-of-title grievance does not constitute unlawful retaliation. *See Cerra*, 27 OCB 27, at 8 (BCB 1981) (“diminution of responsibility and the reduction of duties were not acts of discrimination [when] taken to resolve [an] out-of-title grievance”); *L. 1757, DC 37*, 67 OCB 10, at 18 (BCB 2001) (adoption of a revised job specification to avoid future grievances did not provide factual support of anti-union animus required to establish a claim of retaliation).

The record supports the HHC’s position that the motivation to transfer Tyndall was based upon the Community Affairs Department’s desire to reduce the accrual and usage of compensatory time, and its perceived impact on the operations of the office. Emmons’ testimony that Miller identified the hardship Tyndall’s accrual and use of compensatory time posed for Community Affairs in May 2014 is corroborated by Champagne. Champagne’s testimony establishes that, similar to Miller, she was concerned with the operational impact of Tyndall’s accrual and use of compensatory time and concurred in the decision to transfer her. Champagne testified that she expected Tyndall to complete her primary work responsibilities during regular working hours and that in June 2014 she identified that some of the 31 hours Tyndall accrued as compensatory time resulted from Tyndall performing primary work responsibilities after regular working hours.²³ Further, Champagne explained that Tyndall’s accrual and use of compensatory

²³ While there is no dispute that the compensatory time that Tyndall used was approved, it is also undisputed that Champagne identified that Tyndall was out of the office for significant periods of time. These absences support Champagne’s claim that Tyndall’s compensatory time negatively impacted the operation of a three-person Community Affairs Department during a high-volume time. This also undermines the dissent’s assertion that the only change of circumstance that resulted in the transfer was Tyndall’s filing of an out-of-title grievance and their conclusion that the grievance was the reason for the transfer. Rather, we find that the hiring

time made her concerned with Tyndall's ability to complete follow-ups on matters during a high volume time. Thereafter, it is undisputed that Champagne took steps to address this issue. First, she removed Tyndall's community outreach responsibilities in June 2014. In addition, Champagne sought to limit Tyndall's compensatory time accruals. We credit Champagne's testimony that on three occasions between June 2014 and September 3, 2014, she advised Tyndall that all compensatory time accruals required prior approval and would not be approved to perform primary work responsibilities.²⁴ Thereafter, Champagne removed Tyndall's CB 17 duties in September 2014 because Tyndall failed to provide advance notice and request approval for a compensatory time accrual. Accordingly, we find that Tyndall's transfer out of the three-person Community Affairs Department was due to the perceived negative operational impact of Tyndall's accrual and use of compensatory time.

In sum, we find that HHC rebutted the *prima facie* case because the HHC's decision to transfer Tyndall was not motivated by her union activities. We therefore dismiss the petition. *See CSTG, L. 375, 7 OCB2d 18 (BCB 2014)*, at 18 (dismissing a discrimination claim when Respondents rebutted a *prima facie* case).

of Champagne and her identification of operational issues associated with Tyndall's accumulation and usage of compensatory time was a significant factor in the decision to transfer Tyndall.

²⁴ Although Tyndall testified that Champagne never discussed the accrual or use of compensatory time or any aspect of her work with her, she also stated that Champagne spoke to her about her accrual of compensatory time on September 3, 2014 and did not dispute the removal of her community outreach responsibilities or Champagne's rationale for doing so. *See DC 37, L. 375, 2 OCB2d 26*, at 17-18 (BCB 2009) (citing *DC 37, L. 379, 79 OCB 38*, at 22 (BCB 2007) (inconsistencies strain credibility); *COBA, 2 OCB2d 7*, at 52 (BCB 2007) (failure to rebut testimony strains credibility)). Further, we do not find facts to support that HHC's delay in implementing Tyndall's transfer until November 2014 demonstrates that the transfer was motivated by her union activity.

ORDER

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

ORDERED, that the verified improper practice petition, docketed as BCB-4092-15, filed by the Communication Workers of America and its affiliated Local 1180 against the New York City Health and Hospitals Corporation is hereby dismissed.

Dated: December 3, 2015
New York, New York

SUSAN J. PANEPENTO

CHAIR

CAROL A. WITTENBERG

MEMBER

ALAN R. VIANI

MEMBER

M. DAVID ZURNDORFER

MEMBER

CAROLE O'BLENES

MEMBER

I dissent (see attached opinion)

GWYNNE A. WILCOX

MEMBER

I dissent (see attached opinion)

CHARLES G. MOERDLER

MEMBER

**DISSENT OF GWYNNE A. WILCOX IN BCB-4092-15 IN WHICH CHARLES G.
MOERDLER CONCURS**

I concur with the finding that the Union established a *prima facie* case of retaliation, but I dissent from the finding that HHC rebutted the retaliation and the decision to dismiss the petition.

The majority found that the decision to transfer Tyndall was due solely “to reduce the accrual and usage of compensatory time, and its perceived impact upon the operations of the office”. However, except for her claim in her March 28, 2014 grievance that she was performing out- of- title work of her former supervisor since February 2014, it is undisputed Tyndall had been in the same position with the same responsibilities for about 14 years. It is further undisputed that her position required her to attend CB 17 meetings after regular working hours, thereby, requiring her to accrue compensatory time. However, HHC relied upon Tyndall’s request for approved compensatory time accrual requests, approved compensatory time off and approved annual leave time for only a three month period from May through August 2014. Further, HHC granted all of the request for compensatory time off and annual leave, without any discussion with her. HHC created the problem and now relies upon the impact of their approval decisions as the basis of their decision to transfer her.

I find that the decision to transfer Tyndall was a mere pretext because HHC approved her time off for a three-month period, and this would have been same exact circumstance for many years. The only difference is that on March 28, 2014, Tyndall had previously filed a grievance. Also, the decision to transfer was justified by the fact that the ACSD position would match Tyndall’s skill-set. However, the evidence is to the contrary. She had “no experience in ambulatory care” and she had to be trained “literally from the ground up” for three months before she could assume her new responsibilities in ACSD. Therefore, I would have granted the petition.