DC 37, 1 OCB2d 5 (BCB 2008)

(IP) (Docket No. BCB-2375-04)
(IP) (Docket No. BCB-2391-04).

Summary of Decision: The Union alleged that the City violated NYCCBL § 12-306(a)(1)-(5) involuntarily transferring an employee, who was a union delegate, docking his pay, refusing to process his grievances, harassing him in the work place by levying false disciplinary charges against him, failing to promote him, and, ultimately terminating him. The City claimed that the discipline imposed upon him this employee was justified because he was disruptive, did not perform his job duties, threatened supervisors, failed to follow orders, and was discourteous to the clients of the agency. The Board found that many of the alleged violations were untimely, and that the Union failed to meet its burden of proof regarding the claims arising out of NYCCBL § 12-306(a)(2) and (5). The Board also found that HRA's failure to promote this employee was based upon a legitimate business reason. However, the Board also found that the agency interfered with and restrained the employee's exercise of his statutory rights and that the agency discriminated and retaliated against this employee for exercising these rights. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO

Petitioner,

-and-

THE CITY OF NEW YORK and THE
NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Respondents.

DECISION AND ORDER

On January 8, 2004, District Council 37 ("Union" or "DC 37") filed a verified improper practice petition on behalf of Zinovy Levitant against the City of New York and the New York

Human Resources Administration ("City" or "HRA") alleging that HRA violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1)-(5), docketed by the Board of Collective Bargaining ("Board") as BCB-2375-04 ("First IP Petition"). The Union claims that HRA interfered with Levitant's statutorily protected rights; chilled collective activity in the work place by targeting and intimidating a shop steward; interfered with the administration of the Union by separating a delegate from his constituency by transferring Levitant out of his work location; retaliated and discriminated against Levitant; refused to bargain in good faith by frustrating the grievance procedures; and unilaterally imposed terms and conditions of employment by ignoring the parties' collective bargaining agreement ("Agreement") and its own rules and regulations. The City maintains that HRA did not interfere with, chill, or intimidate Levitant or any other HRA employee, was not motivated by anti-union animus in its dealing with Levitant or any other HRA employee, did not frustrate the grievance procedure, and did not unilaterally impose any terms and conditions of employment. The City further claims that any actions taken against Levitant were motivated by a legitimate business reason.

On March 22, 2004, the Union filed a second verified improper practice petition on behalf of Levitant, docketed by the Board as BCB-2391-04, alleging that HRA violated NYCCBL § 12-306(a)(1), (3) and (4) ("Second IP Petition"). The Union in the Second IP Petition claims that HRA violated the NYCCBL by bringing additional disciplinary charges against Levitant in retaliation for his filing of grievances and by passing him over for a promotion into a supervisory position, which the Union asserts was an act of retaliation by the supervisors whom he individually named in his grievances and the First IP Petition. The Union further avers that HRA refused to bargain in good faith by failing to respond to the numerous grievances filed by Levitant, thereby circumventing an

obligation imposed by the Agreement. The City maintains that disciplining its employees is a managerial prerogative and that the additional set of disciplinary charges was not motivated by anti-union animus, but rather by the legitimate reason set forth in the charges and specifications. The City maintains that the decision not to promote Levitant was not motivated by anti-union animus and that the promotional process complied with all applicable personnel rules and regulations. Finally, the City claims that the failure to respond to Levitant's grievance does not violate the NYCCBL, since the Agreement provides for a party to advance the grievance to the subsequent step, once the other party fails to respond.

Since the alleged violations of the NYCCBL contained in the First IP Petition and the Second IP Petition were filed close in time, involve largely the same individuals, and reference many of the same events, the Board, acting on its own initiative, consolidated these two matters and renders this decision as to the issues raised in these two petitions. We find that the alleged violations which predated September 8, 2003 are untimely, that no violations of NYCCBL § 12-306(a)(2) and (5) occurred because the Union failed to meet its burden of proof, and that HRA did not discriminate or retaliate against Levitant when it failed to promote him. However, we find that HRA interfered with the employee's exercise of his statutory rights by discouraging participation in protected activity and that the agency discriminated and retaliated against Levitant for exercising his rights under the NYCCBL. Accordingly, we grant these petitions in part and dismiss these petitions in part.

BACKGROUND

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows.

Prior Relevant Employment History

On February 8, 1993, Levitant was hired as a Caseworker by the Child Welfare Administration, and, while working in this agency, received two separate commendations from the Commissioner. Subsequent to the creation of the Administration for Children's Services ("ACS"), Levitant was transferred from ACS to HRA in December 2000.[1] He was assigned to the Adult Protective Services ("APS") field office in Kings County located first at 103 Clinton Street and then 223 Schermerhorn Street (collectively, "Brooklyn Field Office") as a Caseworker.[2] At the Brooklyn Field Office, Levitant was responsible for ensuring that mentally and physically impaired clients under the care of HRA received appropriate services. He was also required to make field visits to client's homes, record his findings, and verify that these clients were adhering to the mandates prescribed by the programs and services they received. When he first arrived at APS, Levitant's immediate supervisor was Martha Barnes, a Supervisor I who reported Dr. Urchin Kennedy, who was a Supervisor III.[3] The Deputy Director of APS in Brooklyn was and still is Sandra Brown, and the Director of APS in Brooklyn was and still is Eileen Anderson.

In May 2001, Levitant was elected as the first alternate delegate for the Social Service

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[1] According to Levitant and unrefuted by the City, Levitant was "on loan" from ACS to HRA from December 2000 to July 5, 2002. During this time, he had to travel biweekly to ACS to pick up his pay check. However, on July 5, 2002, a week after an incident with a supervisor, Levitant received a letter from HRA indicating that he had become a newly appointed Caseworker for HRA and that he would have to complete an orientation session and receive his new HRA identification card.

[2] In May 2003, the Brooklyn Field Office moved from 103 Clinton Street to 223 Schermerhorn Street.

[3] At some point in time during Levitant's tenure at the Brooklyn Field Office, Kennedy retired and was replaced by Barry Simmons, who was also in the title of Supervisor III and was the second level of supervision above Levitant.

Employees Union, Local 371 ("Local 371") at APS and was designated by the Labor Relations Department for HRA as an employee who is eligible for work release for labor-management meetings.[4] Also, in May 2001, he received a Certificate for Achievement for Outstanding Performance and Initiative. Shortly after his official appointment as the first alternate delegate in July 2001, Levitant began to address a number of health and safety issues at the Brooklyn Field Office. According to Levitant, the bathroom facilities were in very poor condition, the toilets were covered in dirt and unable to flush, the floors were flooded, roaches infested the walls, and a pervasive odor resulted from these conditions.

In addition to complaining about the conditions of the bathroom, Levitant testified that, around this time, he also raised the issue concerning the building's air conditioning and heating system on their floor. According to Levitant, the air conditioning units on their floor broke down during the summer months and, there was no heat during the winter months. Furthermore, according to Levitant, the elevators routinely malfunctioned, and employees in APS had to walk six flights of stairs to their offices. Levitant also testified that he raised an issue concerning the quality of the drinking water, "and [that] people were not even allowed to go outside to get a bottle of water because the management at APS were threatening people with discipline charges if they get out [*sic*] of the office." (Tr. 31).[5]

Two of Levitant's co-workers corroborated Levitant's testimony concerning the conditions of the Brooklyn Field Office. Sybil Alexander, an HRA employee since 1962, a union member since

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[4] A year later, in May 2002, Levitant was elected the primary delegate/shop steward for Local 371 members for APS in Brooklyn.

[5] "Tr." refers to citations from the hearing transcript.

1965 and a location delegate for most those 41 years, testified that the building lacked sufficient water pressure to "flush the toilets," there was "no heat in the winter and no air conditioning in the summer," and employees "couldn't drink the water that came out of the fountain." (Tr. 884-885). One of Levitant's colleagues, Mr. Chibuzoh Enwereuzoh, who is a fellow Caseworker, testified that "the air conditions did not work in the office. The bathrooms were filthy, unusable, [and] flooded." (Tr. 620).

According to Levitant, when he initially attempted to broach these subjects with Director Anderson, "[s]he told me get out of my door." (Tr. 39). So, the second time Levitant wanted to discuss these health and safety issues, Levitant "decided that it doesn't make any sense to go to the person who has too much hostility towards labor . . . [and] picked up the phone . . . [and] called the union," yet Director Anderson still refused to meet with him (*Id*.).

According to Alexander, the attempts by Levitant, herself, and other employees in the Brooklyn Field Office were viewed by their supervisors as "anti-management," and these supervisors "became punitive and everyone was subject to being written up and subject to be brought up on charges." (Tr. 887-888). According to Alexander, Director Anderson and Deputy Director Brown, when confronted by either Levitant or herself with problems that affected the employees in the Brooklyn Field Office, refused to deal with either of them, insisted that they return to their "own duties" and allow "everyone [to] speak for themselves," and stated that "if you have a problem, file a grievance." (Tr. 899-900). Additionally, according to Enwereuzoh, the Brooklyn Field Office management did nothing to rectify the issues on their own, and "workers were written up for leaving their job stations and going to those bathrooms [on other floors]." (Tr. 621).

Deputy Director Brown testified that she was not "aware" of any health and safety issues and

"didn't hear anyone express any concerns" regarding the drinking water or the bathroom facilities at the Brooklyn Field Office. (Tr. 1180). Also, according to her testimony, she never met with or had discussions with any employee or union delegate concerning these issues and never knew Levitant was delegate for Local 371. Director Anderson, during her testimony, acknowledged that "there were some plumbing problems" at the Brooklyn Field Office, but never knew of attempts to address these issues made by Levitant and others. (Tr. 1225).

According to Levitant, on June 25, 2002, when he arrived at the Brooklyn Field Office, Kennedy approached Levitant and said, "hurry up, get out, go in the field." (Tr. 93). However, Levitant needed to obtain directions to the residence of a newly assigned client. So, Levitant went to speak with the Caseworker who had been handling that case. Kennedy then approached the two employees and shouted "if you [Levitant] don't get out right away I will write you up." (Tr. 94). Levitant then left to perform his four scheduled field visits.[6]

Upon realizing that Kennedy had only "signed [field slips] for three visits," he returned to the Brooklyn Field Office and went to Kennedy's office. (Tr. 95). According to Levitant, she asked him "what are you doing here?" (*Id.*). Levitant informed Kennedy that she only "signed for three" field visits. (*Id.*) Then, "all of a sudden, I [Levitant] turned around [and] . . . saw Eileen Anderson . . . charging to me and screaming are you still here." (Tr. 96). Director Anderson then grabbed Levitant "forcefully" and pushed him into Kennedy's office. (*Id.*). According to Enwereuzoh, Anderson "got close to Mr. Levitant, and . . . held him by the hand and pushed him into the office of Dr. Kennedy." (Tr. 651). Alexander also witnessed Director Anderson "push" Levitant into

[6] When a Caseworker goes on field visits, he or she is required to submit the names of the clients who are to be visited on field slips, which the caseworker's supervisor must sign to authorize the field visit.

Kennedy's office. (Tr. 911). According to Levitant, after being pushed, he insisted that he be allowed to leave the office, but Director Anderson replied, "We [Anderson and Kennedy] want to talk here." (Tr. 97).

Levitant asked why he was pushed by Director Anderson, who did not respond. Levitant then said, "if you want to have a meeting, I need a union representative here, and since I'm the union delegate here, I'm going to have to contact the local." (*Id*.). Director Anderson stood in the doorway, did not respond to Levitant's request for representation, and placed her arm across the doorway.[7] Levitant then said "you are going to have to let me out . . . . I call[ed] for help. I screamed out to the members that the director just assaulted me and holding [*sic*] me inside the office against my will and I want to get out." (*Id*.). Enwereuzoh testified that Levitant "was shouting, please help me, please help me, I'm being held hostage." (Tr. 651). According to Alexander, she was sitting at her desk with her back to Kennedy's office when she heard Levitant repeatedly say, "help, help, I'm being held hostage." (Tr. 906). Director Anderson then put her arm down and allowed Levitant to leave Kennedy's office. (Tr. 98).

Levitant testified that, when exiting Kennedy's office, he overheard Director Anderson order Kennedy to call the police on Levitant, who, due to the stress of this encounter, left the Brooklyn Field Office and went to his doctor's office. Regarding this incident, Enwereuzoh testified that

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[7] Citywide Agreement, Article IX, § 19 states, in pertinent part:
When a permanent employee is summoned to an interview which may lead to a disciplinary action and which is conducted by someone outside the normal supervisory chain of command, the following procedures shall apply:

* * *

b. Whenever such an employee is summoned for an interview or hearing for the record which may lead to disciplinary action, the employee shall be entitled to be accompanied by a Union representative or a lawyer . . . .

"workers in the office who [were] union members [were] afraid because they can be trampled upon anytime, anyhow, when the delegate can equally be snubbed or treated badly. So it create[d] a lot of fear to union members." (Tr. 664).

According to Director Anderson, she recalled that, upon arriving for work on June 25, 2002, she was confronted by Kennedy, who was trying to find Levitant "because she had instructed him to go to the field and he disappeared." (Tr. 1096). She testified that Kennedy informed her that Levitant was complaining about the amount of field visits to which he was assigned.[8] Later, Kennedy called Director Anderson to come to Kennedy's office to discuss the matter of the field visits with Levitant. According to Director Anderson's testimony, upon arriving at Kennedy's office, she found Levitant just inside the doorway and asked him if they could both step inside the office to discuss this situation. Levitant refused and stated that "[h]e wanted the Union and the Commissioner to know what was happening." (Tr. 1158). Director Anderson testified that she did not want to "bump into him," so this exchange occurred with her standing in the doorway and Levitant standing just inside the doorway. (Tr. 1098). According to Director Anderson, Levitant became "very angry [with] his face getting red" and refused to enter the office to discuss the field visit situation. (Tr. 1098). Levitant then "forcibly" approached the doorway where Director Anderson was standing and stuck his head between Director Anderson and the doorway and "yelled to the staff that he was being held hostage by the Director. Then I said to Dr. Kennedy, 'we need to call 911' . . . at that time he literally pushed me out of the way . . . and ran out of the building." (Tr. 1099). Director Anderson testified that she saw Kennedy lift up the receiver to call the police, but

[8] When asked whether Levitant had the right to complain about an overloaded work schedule, Director Anderson stated: "The union decides the amount of visits. If you're going to go by procedure, the union decides the amount of visits a Caseworker should make." (Tr. 1171).

never saw Kennedy dial "9-1-1" or speak with any police officer. (Tr. 1181).

According to Director Anderson, shortly after the incident, she and Kennedy drafted separate memoranda, requesting that disciplinary charges for insubordination and conduct "unbecoming for a Caseworker" be levied against Levitant and forwarded these memoranda to HRA's Employee Discipline Unit ("EDU"). (Tr. 1100). However, on cross-examination, she testified that she actually did not draft the request for the issuance of disciplinary charges because these requests are drafted by the employee's direct supervisor, who at the time was Kennedy, but she approved Kennedy's request and sent it onto EDU.

Charles Waxman, the Director of Personnel for the Medical Insurance Community Services Administration, which oversees APS, testified that when he received this request for the issuance of disciplinary charges from Kennedy and Director Anderson, he engaged in his routine practice of evaluating these type of requests.[9] Director Waxman testified that a "disciplinary consultant" reviewed the request from Director Anderson "to ensure there [was] sufficient documentation," consulted with Director Waxman, and determined that "there was a feeling that this incident was warranted of forwarding to EDU for charges."[10] (Tr. 1099-1102).

On July 1, 2002, Levitant filed a grievance with Local 371 detailing the June 25, 2002

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[9] Director Waxman testified that, upon receiving a request for the issuance of disciplinary charges, his office reviews the request, the supporting documentation, such as witness statements, and the section(s) of code or regulation that has allegedly been violated. They routinely do not interview the subject(s) of the potential disciplinary charge.

[10] Once the request for the issuance of disciplinary charges is sent from Director Waxman's office to EDU, this unit reviews the request and any supporting documentation. "They [EDU] can say, there is nothing here to draft charges on. Otherwise, they will prepare charges based on the documentation sent. It [then] gets sent up to legal for review and official drafting of charges." (Tr. 1111).

incident.[11]

On August 7, 2002, Charges and Specifications were levied against Levitant ("August 2002 Charges").[12] HRA charged Levitant with insubordination, failure to perform the required duties of his position, being absent from his assigned work location without authorization, engaging in threatening and intimidating behavior, "engaging in conduct prejudicial to good order and discipline," and "engaging in conduct detrimental to [HRA]." (First IP Petition, Ex. N). Many of the specifications contained in the August 2002 Charges stem from the June 25, 2002 incident.

Additionally, in the August 2002 Charges, HRA accused Levitant of insubordination regarding an incident on August 29, 2001, in which he was instructed not to leave his work area without proper authorization. That specification asserted that Levitant continually left his assigned work area to take smoke breaks even though he was not contractually entitled to take such breaks. Furthermore, according to two additional specifications contained in the August 2002 Charges, on December 7, 2001, Levitant was "discussing [Local 371] business" during work hours in a unit to which he was not assigned. When several supervisors ordered Levitant to leave that unit and return to his own unit, he refused and remained conducting Local 371 business.

According to Director Anderson, in support of these disciplinary charges, she had at least two conversations with Levitant "about leaving the office for smoke breaks because . . . Caseworkers are not given smoke breaks; it's not in their contract. . . . I did tell him once he clocks in at his work

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[11] Levitant also filed a complaint with HRA's Equal Employment Opportunity Office ("HRA's EEO Office") regarding the June 25, 2002 incident. By memorandum, dated September 10, 2002, Levitant was informed that his claim did not fall within the protected classes and categories governed by HRA's EEO Office and, as such, was dismissed.

[12] According to the Union, Levitant was not served with the actual written document containing the August 2002 Charges until September 4, 2003.

station he should not be leaving the office for smoke breaks." (Tr. 1102).

On August 14, 2002, Levitant, along with seventeen other co-workers in APS, including Enwereuzoh, sent a letter and a petition containing their names, signatures, and civil service titles to the Mayor of New York regarding their mistreatment at the Brooklyn Field Office and the unsanitary bathroom conditions.

According to the City, on September 9, 2002, an Informal Conference was held regarding the August 2002 Charges, and the hearing officer recommended a penalty of 20-day suspension without pay for Levitant. According to the Union, since Levitant was never formally served with the August 2002 Charges, he did not attend this conference and was not present to refute the allegations contained in these charges.

On that same day, September 9, 2002, in response to complaints filed by Levitant with the Office of the Public Advocate, Ombudsman Heather Francis wrote a letter to Lin Saberski, who was the First Deputy Commissioner of HRA in charge of APS, informing her of Levitant's allegations. The letter requested an investigation of the physical conditions of the Brooklyn Field Office and the claims of harassment.

On September 22, 2002, Levitant again wrote to the Office of the Public Advocate detailing the same claims concerning the unsanitary conditions in the bathrooms, the harassing behavior of Kennedy and Director Anderson, and their attempts to discipline APS employees for using sanitary bathrooms and drinking fountain facilities on other floors. Levitant also wrote that Kennedy and Director Anderson refused to listen to and/or address the concerns of APS employees. According to this letter, Kennedy and Director Anderson began to harass Levitant, by issuing "phony charges" against him and following him to the restroom. (First IP Petition, Ex. I).

Enwereuzoh testified that all of the employees who decided to sign such letters that were critical of Kennedy, Deputy Director Brown and/or Director Anderson experienced such harassment. "People were becoming afraid of losing their jobs because of the . . . letter they signed." (Tr. 629). He testified that Levitant was harassed the most because "he was our delegate." (Tr. 633).

According to Director Anderson, she received copies of letters sent by Levitant and others to the offices of the Governor, the Mayor, and the Commissioner of HRA. However, even though she was aware of the letters and Levitant's participation in the drafting of these letters, she "really didn't feel the need to address these issues with the employees" because her job "does not afford [her] the time to follow up on these allegations." (Tr. 1118-1119). She did testify that, once, she instructed Deputy Director Holt-Knight to address these complaints. According to Director Anderson, First Deputy Commissioner Saberski was notified of these issues, and Director Anderson testified that First Deputy Commissioner Saberski "found the charges to be unfounded . . . that they [the allegations] were all false." (Tr. 1121).

On September 25, 2002, HRA responded to the August 14, 2002 letter sent to the Mayor. The response stated that their letter had been referred to the Office of the Commissioner for HRA, who at the time was Verna Eggleston, and that the then-Executive Deputy Commissioner, Iris Jimenez-Hernandez, would investigate the allegations.

In October 2002, Deputy Director Holt-Knight gathered all the employees in the Brooklyn Field Office and informed them that Commissioner Eggleston was on the premises and that they were going to have a meeting to discuss the series of complaints that had been lodged. Kennedy and Deputy Director Brown attended this meeting, but Director Anderson was absent.

According to Levitant, as soon as Commissioner Eggleston entered the meeting room, she

said, "how dare you [*sic*] complaining about me to the mayor." (Tr. 43). Then, Commissioner Eggleston asked who was the labor representative at APS, and, when Levitant stepped forward, she asked him how she could resolve these issues. Levitant insisted that HRA address the health and safety concerns of APS employees and improve the manner in which APS management treats its employees. (Tr. 44). Levitant testified that he stated that the employees at the Brooklyn Field Office wanted a change in management because of the harassing behavior exhibited by Director Anderson and Deputy Director Brown. "She [Commissioner Eggleston] didn't like it [Levitant's enunciated criticisms]," and ordered Levitant to sit back down. (*Id*.).

According to Levitant, a week later, he received a call from the Office of the Commissioner informing him that Commissioner Eggleston would like to meet with him regarding the issues raised at the October 2002 meeting. That same day, Levitant received a call from Lilla Sexton, from HRA EEO Office informing him that allegations were made that Levitant made some inappropriate sexual comments toward Commissioner Eggleston. He immediately contacted Local 371. Shortly thereafter, Levitant and Michelle Conklin from Local 371 met with Sexton regarding these allegations and explained his version of the encounter with Commissioner Eggleston, and Sexton dismissed the charges because, according to Levitant, Sexton "did not see any merits for this allegation." (Tr. 54).

On February 18, 2003, Enwereuzoh wrote a letter to the New York State Governor's office on behalf of himself and other "concerned APS workers" complaining about extremely high caseloads, unfair promotions, and inequitable treatment by Director Anderson regarding the assigning of cases and the promotion of employees in the Brooklyn Field Office. (First IP Petition, Ex. K). According to this letter, Director Anderson's treatment of these APS employees

"displeased" them, and "most workers [were] afraid to report these, for fear of losing their jobs or [being] retaliated against." (*Id*.).[13]

In May 2003, when the Brooklyn Field Office relocated to 223 Schermerhorn Street, Local 371 Organizer Lisa Turner began to act as the official liaison between the Caseworkers working at this locale and Local 371. She described the manner in which Director Anderson and Deputy Director Brown interacted with Local 371 officials as "rough" and "hostile" because they would be stopped and threatened by management for just trying to do their job." (Tr. 763). When attempting to discuss Local 371 issues with Levitant or any other members, Local 371 Organizer Turner would report to the receptionist to have Director Anderson notified that she would be "on the floor." (Tr. 787). According to Local 371 Organizer Turner, Director Anderson would exit her office and "would start screaming that I'm not supposed to be there, and that she is going to call the police on me." (Tr. 788).

On July 16, 2003, Levitant was approached by Barry Simmons, a Supervisor III, who requested to meet with him to give him his performance evaluation, which lists the tasks and standards of a Caseworker, even though Barnes, Levitant's direct supervisor, is typically responsible for performing that duty.[14] (Tr. 902). Levitant went to Simmons' office with Alexander, however,

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[13] On March 13, 2003, the New York State Office of Children and Family Services sent Enwereuzoh a letter acknowledging receipt of the February 18, 2003 letter and referring their "serious" claims to the "city labor relations department." (First IP Petition, Ex. L).

[14] According to Alexander, this evaluation is on a form, with the tasks required of a Caseworker on the left side of the form and the standards by which these tasks are to be accomplished on the right side of the form. She testified that this form is a managerial means of conveying what is to be expected of each individual employee, and that employee, at the end of the evaluation period, is rated on how each task was performed and whether he/she met the standard previously set forth.

according to Levitant and Alexander, the tasks and standards given to Levitant for his signature were not filled out, and the form was for a probationary employee not a permanent employee, like Levitant. He was then ordered by Simmons to "sign it," but Alexander advised against signing because "who's to keep anyone from . . . putting anything on that form that they want to . . . it's like signing a blank check." (Tr. 903). Levitant refused to sign this evaluation, and Alexander and Levitant left Simmons' office.

Shortly thereafter, Simmons gave Levitant a memorandum indicating that refusal to sign tasks and standards, which is a common agency practice, was insubordination and he may be subject to discipline for refusing to sign. HRA later brought disciplinary charges against Levitant arising out of this incident.

On August 1, 2003, Deputy Director Brown called Levitant into a meeting to discuss the complaints that had been filed by various APS employees against their supervisors. According to Levitant, Deputy Director Brown attempted to interrogate him, even though he requested Union representation at the meeting. According to Levitant, when he refused to continue the meeting, Deputy Director Brown threatened to call the police on him.

Levitant testified that on August 6, 2003, he was called into Director Anderson's office to attend a meeting. Upon arriving, Levitant saw Director Anderson and Deputy Director of Operations Marcy Serber, who did not supervise Levitant on a regular basis and was several steps above him on the supervisory chain of command. While standing outside of Director Anderson's office Deputy Director of Operations Serber informed Levitant that the meeting concerned a group grievance that had been "signed" by him on behalf of himself and other APS employees against Simmons. (Second IP Petition, Ex. B). Levitant informed Director Anderson and Deputy Director of Operations Serber

that this was a "labor relations issue" and attempted to leave. (*Id.*). Levitant testified that Deputy Director of Operations Serber informed him that "if you don't come inside [Anderson's office] you will be insubordinate." (Tr. 192). Levitant agreed to attend this meeting as long as he was allowed to have a representative present. Director Anderson refused to allow Levitant to have representation present, so Levitant left, and no meeting was conducted on that day. HRA later brought disciplinary charges against Levitant concerning this incident.

On Friday August 8, 2003, one of Levitant's clients arrived at the Brooklyn Field Office to pick up a check from him.[15] According to Levitant but denied by Deputy Director Brown, Director Anderson instituted a rule providing that checks were to be issued to clients only between the hours of 9:00 a.m. and 3:00 p.m. (Tr. 210). According to Levitant, this particular client arrived after 3:00 p.m. and insisted that the check be released. Levitant refused, and the client called Barnes, who instructed Levitant to release the check to the client. Levitant responded: "first of all Martha, you know the procedure being set up by . . . Anderson." (Tr. 211). Barnes then "told [Levitant to] go and get the check and wait for [the client] and give [the client] the check." (Tr. 211). Levitant stated "I won't violate the rules set up by [Anderson] . . . and I don't want it to have in my possession something that don't [*sic*] belong to me." (Tr. 211). Barnes became "upset" and decided that she would get the check herself and present it to the client. (Tr. 212).

When Levitant began to interview the client prior to the release of the check, Barnes immediately came over and asked why he was doing so. Levitant abruptly stopped the interview,

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[15] According to Levitant, he handled some clients who are part of a "special program" under which HRA pays their bills and rent out of the public assistance funds allocated to these clients. (Tr. 209). Any excess in the public assistance funds allocated to these clients is then given back to these clients in the form of a check that is distributed by the Caseworker handling that client's case.

and Barnes gave the client the check. Approximately 15 minutes after this incident, Barnes approached Levitant, "started to wave her fingers before my face," and said "don't you dare disobey what I tell you." (Tr. 213). Levitant responded: "I'm going to have to report you to [Local 371], number one, and to the management, number two." (Tr. 214). Barnes left and went immediately to Deputy Director Brown, who called Levitant and asked him to come into her office to discuss what transpired. Levitant then went to speak with Alexander.

According to both Levitant and Alexander, the two approached Deputy Director Brown's office, and only Levitant was allowed to enter. According to Alexander, Deputy Director Brown asked what she was doing there, and Alexander answered that Levitant requested her presence. Deputy Director Brown replied indicating that "the conference was not union related or labor related . . . and refused to let me in. (Tr. 915). Levitant testified that he again requested that Alexander be permitted to stay during the meeting, but Deputy Director Brown refused, stated that no representation was needed, and instructed Alexander to leave. According to Levitant and Alexander, Deputy Director Brown then slammed the door to her office in Alexander's face. Levitant testified that he then stated: "I am going to take this issue up to the union because this is totally incredible and unbelievable what you just did." (Tr. 217). According to Levitant, Deputy Director Brown responded: "you just made a threat, and I will include it as discipline. Also, I'm going to call the police now." (Tr. 218). Levitant reasserted that he would "file the union complaint about you for inappropriate behavior" and left the office. (*Id.*). He ran into Alexander, who told him to "go cool down." (*Id.*). Levitant began to experience some type of "heart palpitation" or "anxiety attack," so he immediately left for his doctor's office. (*Id.*). Alexander testified that ten minutes after Levitant's departure from Deputy Director Brown's office, police officers and APS security

personnel arrived and waited for Levitant for about an hour before leaving.[16]

While at the doctor's office, Levitant received some medication for his heart and was told not to return to work. Levitant then called Director Anderson, informed her that he was at the doctor's office, and faxed her, Deputy Director Brown, and Barnes a medical note informing them of his medical condition. Since Levitant departed from the Brooklyn Field Office at 4:15 p.m., he later requested to use 45 minutes of sick leave to account for the missed time at the end of his scheduled work day.[17]

According to Deputy Director Brown's testimony concerning the same event on August 8, 2003, Levitant was approached by one of his clients for a check, which he refused to give to the client, who then asked to speak with Levitant's immediate supervisor, Barnes. After the client spoke with Barnes, she approached Levitant and ordered Levitant to release the check to the client. Levitant refused and "a verbal disagreement" ensued. (Tr. 1151). Barnes went to Deputy Director Brown's office and told her that "she was having a problem with Mr. Levitant [who] wouldn't abide by what she asked [of] him," and that Barnes claimed Levitant's behavior was insubordinate. (Tr. 1151-1152). Deputy Director Brown testified that she then called Levitant on the phone and ordered him to come to her office to discuss this incident. She testified that Levitant's refusal to comply with Barnes' order to release the check to the client was insubordinate, and if Levitant had failed to report to her office, that too would have been insubordinate.

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[16] The record demonstrates that there are at least two APS security personnel on the floor on which Levitant worked, and they guard the entrances/exits on the floor.

[17] The record is clear that following the altercation, Levitant left the work site without permission prior to the end of his work day and was marked absent without leave ("AWOL") for the remainder of the day.

According to Deputy Director Brown, Levitant arrived at the doorway of her office with Alexander. Deputy Director Brown refused to allow Alexander into her office because she "just wanted to know what transpired with the client situation [and] this was not a disciplinary issue." (Tr. 1152).[18] Levitant would not enter the office until Barnes left, so Deputy Director Brown asked Barnes to leave, which Barnes did. Then, Levitant entered the office, approached Deputy Director Brown in an "aggressive" and "overbearing" manner and said "you don't know who you are messing with. I will hurt you." (Tr. 1153). Deputy Director Brown was "alarmed" and "caught off guard" by Levitant's statement and responded by asking Levitant: "Is this a threat? What are you saying to me?" (*Id.*).

According to Deputy Director Brown, Levitant never responded to her inquiry, so she "called the police and [then] went to the director's office," because she felt unsafe, even though there are security officers on Deputy Director Brown's floor.[19] (Tr. 1154). She told Director Anderson what happened and stayed in her own office until the police arrived. She then "explained to them [the police] what happened and they wrote a report."[20] (Tr.1154). At the direction of Director Anderson,

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[18] Deputy Director Brown, during her testimony, denied ever slamming and/or closing the door to her office in Alexander's face.

[19] The City's contentions regarding who called the police and who made the suggestion to call the police are inconsistent. The Answer to the First IP Petition indicates that Deputy Director Brown called the police on her own volition. Deputy Director Brown on cross examination during a New York City Office of Administrative Trial and Hearings proceeding testified that its was Director Anderson's idea to call the police, but on cross examination during an arbitration proceeding testified that it was her idea to call the police. (Union Ex. 21.) At the hearing in the instant matter, Deputy Director Brown admitted that: "I don't recall which order it occurred in." (Tr. 1221).

[20] According to the City in its written submissions, Deputy Director Brown filed a police report, and produced this report at the disciplinary hearing as corroborating evidence in support of (continued...)

Deputy Director Brown drafted an incident report, a request for the issuance of disciplinary charges against Levitant for "insubordination and making threats to senior staff" and a memorandum to Levitant detailing the events of August 8, 2003. (Tr. 1155; City Exs. 2 and 3).

According to Local 371 Organizer Turner, shortly after the incident on August 8, 2003, Levitant called her to inform her about the altercation. According to Local 371 Organizer Turner, she "attempted to set up a meeting with the director" several times but Director Anderson was not available to discuss the situation. (Tr. 796).

On the subsequent Monday, August 11, 2003, Levitant called Barnes, informed her that he still felt ill and that he would be visiting the doctor again, and assured her that he would provide the requisite medical documentation. Levitant provided a co-worker with the "original doctor's note" and a request to take leave from Monday August 11, 2003 through Friday August 15, 2003, both of which were given to Barnes. (Reply to First IP Petition, ¶ 8). Levitant then was absent from work due to a previously approved request for annual leave, from August 18, 2003 to September 9, 2003.

On August 11, 2003, Enwereuzoh sent another letter to the New York State Governor's office on behalf of himself and the "Concerned Workers of Brooklyn Adult Protective Services." (First IP Petition, Ex. M). This letter stated that Director Anderson had worsened her treatment of the APS workers by timing their trips to the restrooms, intimidating and interrogating employees whenever they filed grievances, and using inappropriate language. In addition, after a group grievance was filed by these employees, Director Anderson "started intimidating . . . union representative Mr. Zinovy Levitant." (*Id.*).

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[20](...continued)
Deputy Director Brown's version of the altercation on August 8, 2003.

Factual Improper Practice Allegations

On September 10, 2003, Ombudsman Lastisha Bell sent a letter to Executive Deputy Commissioner Jimenez-Hernandez regarding the complaints Levitant made to the Office of the Public Advocate.

Also, on September 10, 2003, Levitant notified to his supervisors that he was sick and requested a medical leave of absence with pay from that day until October 7, 2003. Levitant provided medical documentation by faxing a note from his doctor's office to Director Anderson, and his request was approved by Simmons. (Reply to First IP Petition, Ex. B; and Union Ex. 10). During this approved medical leave with pay, Levitant testified that he received a telephone call from a co-worker at the Brooklyn Field Office and was told that Director Anderson stated that if Levitant ever came back to the Brooklyn Field Office, Director Anderson and Deputy Director Brown would call the cops and then stand by Levitant's desk to ensure that he would not escape again. (Tr. 337-338).

According to the Union, on September 24, 2003, Levitant received the August 2002 Charges. The record shows that on October 7, 2003, the end of his requested medical leave of absence with pay, HRA instructed Levitant to report to the Medical Assistance Programs ("MAP") Personnel Department, which he did. According to Director Waxman, Levitant was instructed to move from the Brooklyn Field Office because of the "altercation between him and [Deputy Director] Brown." (Tr. 1106). Director Anderson testified that she did not know that Levitant was "transferred" out of the Brooklyn Field Office and did not know that "the process [of removing Levitant] was called a transfer." (Tr. 1218). Director Anderson also testified that she knew that "he was no longer there [the Brooklyn Field Office]," had no "input" in the decision to move Levitant, and did not even

speak with Director Waxman regarding Levitant's removal (Tr. 1219).

On October 8, 2003, Levitant called in sick and again requested a medical leave of absence with pay until October 23, but this request was denied by Director Waxman.[21] Soon thereafter, HRA brought additional Charges and Specifications against Levitant claiming that he was discourteous and inconsiderate toward his supervisors, failed to obey regulations and orders of his supervisors, threatened fellow employees, and engaged in conduct that was detrimental to HRA ("October 2003 Charges").[22] Most of the specifications contained in the October 2003 Charges arose out of the incident that occurred on August 8, 2003. As a result of the October 2003 Charges, HRA suspended Levitant from October 8, 2003 to October 22, 2003 without pay.

With regards to the October 2003 Charges, Director Waxman stated that his office received a request for the issuance of disciplinary charges, reviewed it for appropriate documentation, and forwarded this request to EDU for charges because there were violations of HRA's code of conduct.

On Thursday October 23, 2003, Counsel for Local 371 wrote to HRA memorializing Levitant's non-receipt of the October 2003 Charges and notice of suspension. Furthermore, Counsel for Local 371 indicated that: "It is Mr. Levitant's understanding that he is out on a medical absence, effective October 8, 2003 . . . . Yury Koyen M.D. certifi[ed] that Mr. Levitant was unable to work for the period of October 8, 2003 through . . . October 24, 2003." (First IP Petition, Ex. O).

On Monday October 27, 2003, Levitant reported to MAP Personnel Department and provided

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[21] Based upon an Explanation of Benefits from Levitant's insurance carrier, dated December 31, 2003, notice is taken that Levitant visited a doctor weekly during the time period of October 8, 2003 to October 27, 2003. (Union Ex. 9).

[22] According to the Union, Levitant was not served with the actual written document containing the October 2003 Charges until he received a copy of them from Counsel for Local 371.

medical documentation for the latest sick leave request to Director Waxman, which had been previously denied. On that same day, Director Waxman called Levitant into his office to address the manner in which Levitant's various leave requests had been entered into Autotime, the time keeping program utilized by HRA at the time. According to Levitant, Director Waxman, who was not Levitant's direct supervisor, said "we are going to have to talk about something that may lead to disciplinary [*sic*]." (Tr. 353). Levitant asked to "call the union because when it turns to disciplinary [*sic*] I have the right to be represented," and Director Waxman denied this request. (*Id.*). Levitant "apologized," walked out of Director Waxman's office, and called both Local 371 and the Union. No meeting subsequently occurred, and Director Waxman forwarded an allegation against Levitant to EDU regarding Levitant's refusal to follow one of his directives. This incident later became a specification in a subsequent set of disciplinary charges.

Also on October 27, 2003, according to Levitant, he was approached by First Assistant to the Deputy Commissioner Richard Marin, who began an amicable conversation, but, then, in a "buddy-buddy" manner, stated "you [Levitant] [expletive deleted] with us and we will [expletive deleted] with you." (Tr. 362). Levitant "felt that his . . . approach was inappropriate based on his title" and told him so. (Tr. 363). Marin, according to Levitant, then just left.

However, according to Director Waxman, Marin came into his office and informed him that Levitant approached him, made that vulgar statement, and then just left. Director Waxman asked Marin for a written statement to forward onto EDU, which Marin subsequently provided. Director Waxman admitted that he never asked Levitant for his version because "he would have his time to be heard at the IC [Informal Conference]." (Tr. 1122). This incident later became a specification in a subsequent set of disciplinary charges. Levitant continued to report to MAP Personnel

Department for the rest of the week, and on October 29, 2003, an Informal Conference was held regarding the October 2003 Charges.

On November 3, 2003, Levitant was transferred out of MAP Personnel Department and into the Lombardi Home Care Center Program located at 109 East 16th Street, New York, which assists clients, who normally would be admitted into nursing homes, and who require certain services such as personal care assistants, registered nurses, and physical, occupational, and speech therapists ("Lombardi Program"). Since HRA does not actually provide any of these services directly, employees at the Lombardi Program work with outside vendors to ensure that their particular clients receive the services to which their clients are entitled. According to Director Waxman, Executive Deputy Commissioner Jimenez-Hernandez made the decision to transfer Levitant into the Lombardi Program.

According to the Union, Levitant's transfer violated several HRA rules, specifically, the "Superseniority" and "55-Minute Transit Hardship" rules. (Tr. 120). Levitant testified that the Superseniority rule states that a "union delegate should be the last person in [the] office who will be transferred because I have seniority over all workers in [the] office, but I was the first one who was transferred." (Tr. 119-120). Further, Alexander testified that Superseniority means that "they [delegates] cannot be transferred involuntarily. They [HRA] have to take the next junior person." (Tr. 923). According to Levitant, the 55-Minute Transit Hardship rule provides that when transferring an employee to a new work location, HRA is required to place the employee in a work location that is less than a 55 minute commute, if such a location is available. According to records from New York City Transit, Levitant's placement at the Lombardi Program increased his commute to 85 minutes.

According to the Union, while working at the Lombardi Program, Levitant was assigned work and duties that were substantially different from the duties set forth in the Caseworker job description, such as communicating with outside vendors and coordinating construction/renovation projects in clients' homes for the installation of stair glides and handrails. According to Levitant, his in-house title was "case manager," and all of the other "case managers" held the civil service title of either Supervisor I or Supervisor II. (Tr. 343). Furthermore, HRA records corroborate the fact that Levitant was the only Caseworker assigned to the Lombardi Program. Levitant's immediate supervisors were in the title of Supervisor II and Supervisor III, and were Local 371 delegates assigned to the Lombardi Program.

On November 5, 2003, Levitant filed a grievance with Local 371 claiming that his involuntary transfer to the Lombardi Program was improper because he was moved to a "non-field assignment," his "super seniority" was ignored, and the transfer created a travel hardship. (First IP Petition, Ex. R).

On November 10, 2003, Levitant filed a grievance with Local 371 regarding the "medical emergency" on August 8, 2003. (First IP Petition, Ex. S). According to Levitant, he submitted a "medical note" to Director Anderson, however, after waiting three months for approval of his documented sick leave request, Director Anderson disapproved Levitant's request and docked him 45 minutes of pay. According to Levitant, upon presentation of a medical note, employees' requests for sick leave usage are approved, except in this instance.

On November 18, 2003, the hearing officer at the October 29, 2003 Informal Conference regarding the October 2003 Charges held that HRA substantiated these charges and recommended a 25-day suspension without pay. Levitant appealed this determination, and the matter was sent to

the New York City Office of Administrative Trial and Hearings ("OATH"), where it was consolidated with Levitant's appeal of the August 2002 Charges which was already before OATH.

On November 21, 2003, Levitant filed a grievance with Local 371 regarding the "indecent and abusive" behavior exhibited by Deputy Director Brown on August 8, 2003. (Second IP Petition, Ex. A). That same day, Levitant filed a grievance alleging that he was threatened with discipline and treated in a hostile and disrespectful manner during his August 6, 2003 meeting with Director Anderson and Deputy Director of Operations Serber.

While working at the Lombardi Program, Director Debora Daniel-Preudhomme testified that Levitant's job performance was sub-par, that Levitant was "constantly on the telephone," and that he had no reason to be on the telephone so much because "he was only assigned to one or two vendors." (Tr. 993 - 994). She was told by two of her subordinates who directly supervised Levitant that he was unresponsive to training, made telephone calls during the work day, took half hour smoke breaks, and refused to become computer literate. Director Daniel-Preudhomme testified that she would ask Levitant his reasons for using the telephone so frequently, and his response was that he was Local 371's delegate and was "calling APS on union business." (Tr. 996).

On December 3, 2003, Director Daniel-Preudhomme met with Levitant to give him a memorandum regarding his conduct during several incidents that occurred from November to December 2003. This memorandum stated that it "is to advise you that as of 12/4/03, you are not the duly elected recognized delegate for Local 371 in the Lombardi Program." (First IP Petition, Ex. P). This memorandum also stated that Levitant continually was instructed by his supervisors to cease using the phone and copier for personal and Local 371 business, and, because of his performance of this non-HRA business, his work for HRA was conducted in a dilatory manner. The

memorandum further stated that Levitant was no longer at APS, that he was assigned as a Case Manager at the Lombardi Program, and that his tasks and assignments should be confined to the operations of the Lombardi Program. Finally, this memorandum informed Levitant that he would be receiving "one to one close supervision" regarding how to be an effective Case Manager.

On December 4, 2003, according to Levitant, Martin Brome, a Supervisor II who was not Levitant's immediate supervisor, called Levitant's name. Levitant approached Brome, who was "very upset." (Tr. 364). Brome was looking for him on behalf of Director Daniel-Preudhomme, who wanted to see Levitant in her office immediately. Levitant attempted to proceed to Director Daniel-Preudhomme's office. According to Levitant, "I was trying to pass by [Brome], [but] he blocked my way; and he approached himself very close to me . . . . I said, I'm going to call the cops right now, and you [Brome] will explain yourself to the police." (Tr. 366). Brome then got out of Levitant's way.

Levitant entered Director Daniel-Preudhomme's office and asked why he was summoned. After she answered that she had been looking for him, Levitant stated that:

> I'm making an official complaint to you as a director that I would like to resolve the inappropriate behavior, threatening of Mr. Brome . . . . She said nothing happened. I said how can you say nothing happened, if you was [*sic*] in your office and he was outside? . . . If you [*sic*] refusing to take action, I'm going to have to call the union and the union will take an action which will be appropriate.

(Tr. 367-368). Levitant then left Director Daniel-Preudhomme's office.

Later that day, Levitant placed telephone calls to Director Waxman and Debra Middleton, Counsel for HRA, both of whom instructed Levitant to submit something in writing regarding the behavior of Brome and Director Daniel-Preudhomme. The incident involving Brome later became a specification in a subsequent set of disciplinary charges.

On December 5, 2003, Levitant filed an out-of-title grievance with Local 371 regarding his performance of duties that were "substantially different" from those performed by a Caseworker. (Second IP Petition, Ex. C). According to Levitant, he performed mostly supervisory functions, similar to those performed by the other employees at the Lombardi Program who were in the civil service titles of Supervisor I and Supervisor II.

On December 16, 2003, the Union filed for arbitration concerning the November 5, 2003 grievance filed by Levitant in connection with his alleged improper transfer to the Lombardi Program. On December 17, 2003, the Union filed for arbitration concerning the November 10, 2003 grievance filed by Levitant in connection with HRA's docking of 45 minutes of pay from his wages for leaving early on August 8, 2003. On December 22, 2003, the Union filed for arbitration concerning the July 7, 2002 grievance filed by Levitant in connection with the June 25, 2002 incident.

On January 8, 2004, the Union filed the First IP Petition alleging that HRA violated NYCCBL § 12-306(a)(1)-(5). The Union alleges that HRA routinely interfered with his protected statutory rights under the NYCCBL when it refused Levitant opportunities to speak with fellow employees regarding terms and conditions of employment and levied disciplinary charges against him for conducting Local 371 business. The Union further alleges in the First IP Petition that HRA interfered with the rights set forth in the NYCCBL by denying Levitant representation during disciplinary meetings, preventing Levitant from representing other employees at meetings, and basically engaging in a practice of behavior that is so pervasive that it discouraged membership participation in Local 371 and the Union. The Union also contends that HRA further violated the NYCCBL by discriminating and retaliating against Levitant for his protected activity; instituting

unilateral changes to mandatory subjects of bargaining by altering HRA policies regarding sick leave and health and safety issues; and failing to bargain collectively "concerning grievances and working conditions." (First IP Petition).

The Union seeks, as relief for these violations, that HRA return Levitant to the Brooklyn Field Office, rescind and expunge any disciplinary actions from his personnel records, make Levitant whole by paying all back pay due that resulted from HRA's illegal actions, and post appropriate notices detailing HRA's violations. The Union further seeks an order directing HRA to cease and desist from all discriminatory actions against Levitant, interfering with or restraining Levitant from engaging in protected activity, and unilaterally changing mandatory subjects of bargaining.

On January 12, 2004, four days after the filing of the First IP Petition, HRA levied additional Charges and Specifications against Levitant ("January 2004 Charges"). He was charged with unauthorized distribution of personal passwords and for making false entries on HRA documents. The January 2004 Charges also averred that Levitant failed to abide by HRA time and leave rules since he was AWOL from September 10, 2003 to October 3, 2003. According to the January 2004 Charges, Levitant distributed his Autotime identification number and password to a fellow employee, and that employee entered Levitant's sick leave requests from September 2003 to October 2003.

Additionally, the January 2004 Charges included a series of incidents involving Levitant that occurred from October 20, 2003 to December 4, 2003: acting insubordinate when Levitant refused to attend supervisory conferences with Director Waxman, refusing to discuss his AWOL status with Director Waxman, and refusing to discuss the Autotime entries made while Levitant was AWOL. In addition, regarding the incident involving Marin, HRA proffered a disciplinary charge for use of obscene and inappropriate language towards a supervisor on October 27, 2003. Finally, the January

2004 Charges averred that on December 4, 2003, Levitant acted in a threatening and intimidating manner towards a supervisor when he stated to Director Daniel-Preudhomme, "unless you make sure that people like Mr. Brome (Supervisor II) never talk to, or come near me, you are going to be sued!" (Second IP, Ex. D).

Concerning the January 2004 Charges, Levitant testified that he did not have an Autotime identification number or password, that Barnes input Levitant's time into Autotime, and, as stated above, his medical leave from September 10, 2003 to October 3, 2003 had been approved. (Tr. 347-349; Reply to First IP Petition, Ex. B; and Union Ex. 10). Levitant further stated that he only received an Autotime identification number and password, and instructions on how to use Autotime when he returned to HRA on October 27, 2003. Furthermore, even though the January 2004 Charges allege that Levitant acted insubordinately toward Director Waxman on October 20, 2003, the record demonstrates that Levitant was not present at MAP Personnel Department because, according to Levitant, he was out on medical leave, and, according to the City, he was suspended until October 22, 2003.

On February 23, 2004, the Union filed for arbitration concerning the December 5, 2003 out-of-title grievance filed by Levitant. On that same day, the Deputy Director of the Lombardi Program, Janet Lugo, sent an intradepartmental memorandum to Director Daniel-Preudhomme indicating that Levitant had completed his Lombardi Program training and was ready to handle for cases the Lombardi Program.

On March 8, 2004, the Union filed for arbitration concerning the two grievances that Levitant had filed on November 21, 2003. The first grievance addressed the manner in which Deputy Director Brown treated Levitant during a meeting on August 8, 2003, and the second dealt with the

August 6, 2003 meeting Levitant had with Director Anderson and Deputy Director of Operations Serber, at which he was allegedly threatened and disrespected.

On March 12, 2004, First Assistant Deputy Commissioner Bridget M. Simone, sent Levitant a letter regarding "problems we [HRA management] are experiencing with your [Levitant's] performance." (Second IP Petition, Ex. E). This letter reads, in pertinent part:

> You [Levitant] are required to attend meetings scheduled by your immediate supervisor and/or by his supervisors to discuss work-related activities. You are not permitted to require a union steward to attend such meetings with you.
>
> The telephone at your desk may only be used for work-related conversations. You may not use the telephone for personal conversations, and any business conversations must be conducted in English.
>
> You are not permitted to disrupt the work of other staff in your area by engaging them in conversations that have no relationship to your work.
>
> It is inappropriate to threaten your colleagues with lawsuits, and to conduct union activities with them during working hours.
>
> It is our understanding that you have permission to require that a specific union steward attend any disciplinary discussion between you and your supervisor. Since we are unable to review your inappropriate actions with you on an impromptu basis, please be advised that a record is being kept of inappropriate performance that falls into each of the above categories. Your supervisor will schedule a series of meetings with you, him, myself and your designated union representative to discuss your inappropriate performance in these areas, and to identify the resulting disciplinary action.

(*Id.*).

According to Levitant, other employees at the Lombardi Program, including Deputy Director Lugo, did not limit their business conversations to English, spoke with clients in their native tongues, but none of them were ever "written up." (Tr. 377). Levitant interpreted this letter as a means of intimidation by preventing Levitant from seeking representation and discussing issues involving

work place issues with colleagues.

According to Isabel Santos, who has been a representative for the Union for 16 years, she met with some of Levitant's superiors at the Lombardi Program to discuss the topics contained in the March 12, 2004 letter. She offered to act as a liaison between HRA management and Levitant so that these issues could be amicably resolved. Concerning this letter, Union Representative Santos testified that: "We have in the City of New York at least 75 different languages, and we [HRA employees] accommodate those languages," and use of a client's native tongue will "expedite" the employee's ability to assist the client. (Tr. 839, 851). Union Representative Santos also testified that HRA's unqualified ban on Levitant engaging in protected activity during the work day was "wrong [because] there are times when you are called on to do this work [protected activity] that are within working hours, and you have a right to perform your duties." (Tr. 853-854).

Union Representative Santos also testified that preceding and subsequent to the issuance of this letter, she was approached by Alan Block, a HRA employee and Local 371's alternate delegate at the Lombardi Program, and Nathan Weiner, a Supervisor II and Levitant's direct supervisor at the Lombardi Program. Block informed Union Representative Santos that "they [HRA management] are not making his [Levitant's] life very easy here. . . . They got everybody watching him." (Tr. 837). She also testified that Weiner called her and said that he is "being told that I have to watch Mr. Levitant . . . [and] they are forcing [him] to do it." (Tr. 841). According to Union Representative Santos, Weiner also said that "they are after Levitant . . . [because] he was a delegate at that time." (Tr. 842).

Samuel Moultrie, Local 371's delegate at the Lombardi Program, testified that he had a discussion with Weiner regarding the level of attention given to Levitant, and that the Director of

the Lombardi Program, Margaret Quinn, told Weiner "to keep a close eye on Mr. Levitant." (Tr. 933, 937). Furthermore, Moultire testified that his attempts to schedule a meeting regarding this scrutiny by Director Quinn or any of her subordinates were rebuffed because they were too busy or had "other things on the calendar." (Tr. 939). Moultrie also testified that he witnessed on several occasions Director Quinn or one of her subordinates scolding Levitant stating, "what are you doing here, you're not in your location, get back upstairs to your work location," when Levitant was talking to Moultrie or Block regarding Local 371 issues. (Tr. 947).

On March 18, 2004, Levitant received an Interview Notice informing him that he had been certified by the Department for Citywide Administrative Services ("DCAS") for possible promotion into the title Supervisor I in various APS Borough Offices and that interviews for these promotions were to be held on March 24, 2004.

On March 22, 2004, the Union filed the Second IP Petition alleging that HRA violated NYCCBL § 12-306(a)(1), (3), and (4). The Union alleges that HRA's levying of the January 2004 Charges interfered with and restrained the statutory rights of Levitant and his fellow Union co-workers, as they were designed to impede the filing of grievances and improper practice petitions and to discourage Levitant's participation in the grievance and/or improper practice processes. Further, the Union alleges that HRA discriminated and retaliated against Levitant when it proffered the January 2004 Charges against him, instructed him that the telephone at his desk was only to be used for business and that all business is to be conducted in English, restricted Levitant's discussion with co-workers regarding Union business to non-work hours, and refused to answer or respond to any of the grievances filed by Levitant. Finally, the Union alleges that HRA's failure to respond and answer Levitant's numerous grievances constituted a refusal to bargain and violated the NYCCBL.

As relief for these violations, the Union seeks a posting of appropriate notices, rescinding and expunging of any disciplinary actions from his personnel records, and making Levitant whole by paying all back pay that was a result of HRA's illegal actions. The Union further seeks an order directing HRA to cease and desist from all discriminatory actions against Levitant, interfering with or restraining Levitant from engaging in protected Union activity, and refusing to bargain with the Union by failing to process Levitant's grievances.

According to Levitant, on March 24, 2004, he reported to HRA, Department of Social Services, Recruitment, Selection and Placement Division for his interview for promotion into the title Supervisor I. Shortly after his arrival, Director Anderson and Deputy Director Brown, both of whom were individually mentioned in the First IP Petition and the Second IP Petition and numerous grievances, interviewed Levitant for this vacancy. According to Levitant, they "spoke with so much accumulated anger and hostility" toward him. (Tr. 407). Director Anderson and Deputy Director Brown "asked me a couple of questions . . . just to make me believe this is [*sic*] a serious interview. (Tr. 408). Levitant testified that this interview lasted only seven minutes and when it ended, he was instructed to wait in the waiting room for their decision. (Tr. 409). Within a couple of hours, Levitant received a hand-delivered letter indicating that he had not been selected for a promotion into the Supervisor I title.

According to Director Anderson, she conducted the Supervisor I interviews with at least one other supervisor, but she could not recall whether Deputy Director Brown, Deputy Director Holt-Knight or both were there with her. She testified that she interviewed four or five candidates and only asked a couple questions during the interview with Levitant. She stated that she could only appoint two candidates because she only had "two tickets [vacancies]" to fill for the Supervisor I title

in the Brooklyn Field Office.[23] (Tr. 1106). According to the Appointment Screening Log filed by Director Anderson, she met with five candidates for these vacancies, appointed two candidates with higher "List Numbers" than Levitant; and only Levitant had disciplinary infractions on his record. (City Ex. 4). Director Anderson further testified that she did not select Levitant because "there were people that out performed Mr. Levitant . . . in terms of skills we were looking for," and that she based her decision on the "list number, the competency, the skill and the knowledge" required for the Supervisor I position. (Tr. 1106-1107). She also testified that, due to these objective criteria, she passed over a candidate that she preferred over Levitant.

Director Anderson, on direct examination, stated that "the final decision [was] mine," but on cross examination, asserted that she made the decision not to promote Levitant "in conjunction with the union rep that's there." (Tr. 1106). Director Anderson also indicated that her decisions to select the candidates she desires for such openings are limited by the "1 to 3 rule," which is codified in the New York City Personnel Rules and Regulations ("Personnel Rules") § 4.7.1, and states, in pertinent part:

> Appointment or promotion from an established eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the commissioner of citywide administrative services or the head of the certifying agency . . . as standing highest on such established list who are qualified and willing to accept such appointment or promotion.

(Answer to Second IP Petition ¶ 32 and Ex. E). Even though Director Anderson testified that "Mr. Levitant's position or activities in the union never entered into any of this [the selection process]" (Tr. 1110), she did admit during cross-examination that she was "aware [Levitant] filed grievances,"

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[23] However, a job vacancy notice disseminated by HRA with respect to the Supervisor I openings indicated that the Brooklyn Field Office had four vacancies.

(Tr. 1215), and that one of the other candidates on the March 24, 2004 list who had a significantly poorer list number than Levitant was eventually hired "at some other time." (Tr. 1192).

On June 15, 2004, the Union filed the Amended Second IP Petition alleging that HRA violated NYCCBL § 12-306(a)(1), (3), and (4). In this amended pleading, the Union realleges the violations of the NYCCBL set forth in the Second IP Petition, seeking the same relief. In addition, the Union avers that HRA retaliated and discriminated against Levitant when it failed to afford him a fair and unbiased interview and rejected him for the promotion into the title of Supervisor I. Thus, the Union additionally seeks, as relief for this new violation, that HRA re-interview Levitant and reconsider his placement into the Supervisor I title.

Subsequent Relevant Information

On September 7, 2004, OATH Administrative Law Judge ("ALJ") John B. Spooner issued his Report and Recommendations regarding the August 2002 Charges and the October 2003 Charges ("September 2004 OATH Determination"). ALJ Spooner, with regard to the incident that occurred on June 25, 2002, found that Levitant did not speak in a discourteous manner to Kennedy; Levitant did not act improperly when he refused to attend a potential disciplinary meeting with Kennedy and Director Anderson; and Levitant did not engage in misconduct when he "glar[ed]" at Director Anderson in Kennedy's office, or when he "yell[ed] that he was being held hostage," or when he "push[ed] his way past [Director] Anderson." (Joint Ex. 1). Nevertheless, ALJ Spooner found that Levitant "was still obliged to notify his supervisors that he was requesting the remainder of the day off prior to leaving" on June 25, 2002 and that his departure from the workplace without notifying either Kennedy, Deputy Director Brown, Director Anderson, or any other supervisor "was a violation of the agency rules." (*Id.*).

With regard to the other incidents contained in the August 2002 Charges, ALJ Spooner found, *inter alia*, that HRA "failed to meet its burden" regarding the specifications of Levitant's unauthorized departures from his work place, Levitant's "conducting union business during work hours," and Levitant's conducting "union business during lunch." (*Id*.). However, ALJ Spooner found that Kennedy and Director Anderson saw Levitant once outside the building smoking cigarettes at a time that was outside of his designated lunch period. Accordingly, ALJ Spooner found that this particular "break constituted misconduct." (*Id*.).

Concerning the October 2003 Charges, ALJ Spooner found that Levitant was not insubordinate when he refused to sign a tasks and standards for a probationary employee that did not contain his name on it. With regard to the August 8, 2003 incident, ALJ Spooner found that Levitant did not speak inappropriately with a client of HRA and did not act insubordinate toward Barnes because Levitant's behavior was not unprofessional. However, ALJ Spooner did find that Levitant threatened Deputy Director Brown and failed to provide notice to any of his supervisors of his early departure from the workplace, both of which constituted misconduct. Finally, in dismissing the "remaining 26 charges" levied against Levitant in the August 2002 Charges and the October 2003 Charges, ALJ Spooner rebuffed HRA stating:

> [HRA] offered no proof whatever or failed to prove them [the remaining 26 charges] by a preponderance of the evidence. There can be little question that [HRA's] decision to move forward with multiple charges which could not be proven prolonged the disciplinary process considerably. It also required the unnecessary expenditure of a considerable amount of resources by the parties . . . . Had [HRA] more carefully drafted and reviewed its charges and initiated disciplinary action only upon factual allegations for which it was clear *prima facie* proof existed, both the employer and the employee would have been afforded a more expeditious, and hence fairer, disciplinary process.

(*Id*.). In the end, ALJ Spooner substantiated only four of the allegations against Levitant and

recommended a penalty of a twenty-five day suspension without pay, primarily for his finding that Levitant made verbal threats to Deputy Director Brown on August 8, 2003.

On November 10, 2004, Levitant filed a grievance alleging that, on the same day, when he received a telephone call from a Russian-speaking client who spoke only limited English and was in need of home care assistance, Deputy Director Lugo, under the belief that he was using the telephone for personal business, instructed him to get off the telephone. Levitant hung up the phone and tried to explain the situation to Deputy Director Lugo, who walked away accusing him of being disrespectful and rude.

On January 15, 2005, Levitant initiated a civil action in the United States District Court for the Eastern District of New York claiming, *inter alia*, that he was subjected to repeated harassing, retaliatory, and discriminatory practices perpetrated by HRA management due to, in part, his Russian national origin and his religious affiliation, Jewish. According to the complaint in this federal court action, Levitant filed three separate complaints with HRA's EEO Office alleging that Kennedy, Barnes, Deputy Director Brown, and Director Anderson targeted Levitant by discriminating against him and subjecting him to a hostile work environment, as exhibited by Director Anderson's assault of Levitant on June 25, 2002, Levitant's transfer to the Lombardi Program, and Levitant's failure to be promoted to Supervisor I in March 2004.

According to Deputy Director Brown, she was not aware of this lawsuit, had never heard of the attorneys for the parties involved in that litigation, and had never been "deposed [or asked to] answer questions about discrimination" involving Levitant. (Tr. 1238). However, the Union provided the complete, two-hour deposition transcript of Deputy Director Brown taken during the course of the federal action. On the other hand, Director Anderson testified that she was aware that

Levitant had initiated this lawsuit and that she had been deposed regarding this matter.

On March 25, 2005, the City rendered a Step III determination concerning Levitant's grievance dated November 10, 2004, which alleged that Deputy Director Lugo ordered Levitant to end a telephone call with a client because she believed Levitant was using the telephone for personal business since he was speaking with the client in Russian. This Step II determination found that "no contractual violation ha[d] been established" and denied Levitant's claim. (Union Ex. 29).

Beginning on September 12, 2005, Levitant stopped reporting to duty at the Lombardi Program due to a medical condition. According to HRA records, Levitant was scheduled to return to work on November 21, 2005 because he was found to have "no disability and no further treatment [was] necessary [and that] Mr. Levitant [was] able to work in his pre-accident occupation as a Caseworker." (Union Ex. 18). Upon such notification, Levitant had an attorney representing him before the New York State Workers Compensation Board forward an up-to-date medical report, dated December 16, 2005, confirming the reasons he was still unable to report to the Lombardi Program.

Beginning on March 31, 2006 and continuing through September 28, 2006, the Office of Collective Bargaining ("OCB") conducted five days of hearings in the instant improper practice proceeding, which were routinely attended by Levitant, Counsel of the Union, and Counsel for the City. Up until that point, a representative from HRA had appeared only once out of the five days of hearing.

On October 30, 2006, Levitant, Counsel for the Union, Counsel for the City, and Deputy Director of Labor Relations for HRA, Eric Ambrose appeared at OCB for the sixth hearing day in the instant matter, which the parties had scheduled on May 19, 2006. The start of the hearing, which

was scheduled for 10:00 a.m., was delayed because the two witnesses that Counsel for the Union intended on calling were not present. After discussing the matter privately with Deputy Director Ambrose, Counsel for the City informed the Trial Examiner and the Union that these employees had been released and were not at their respective work locations. After a number of telephone calls were made by both sides, it was ascertained that the two witnesses were at OATH awaiting the commencement of a disciplinary hearing involving Levitant and the disposition of, *inter alia*, the January 2004 Charges.[24] All parties present at that time asserted that they were unaware of this OATH proceeding or the scheduling conflict.

In order to resolve the confusion and to avoid the adjournment of either proceeding, the Trial Examiner presiding over the instant matter placed a telephone call to the ALJ Tynia D. Richard, who was presiding over the disciplinary proceeding at OATH. Upon speaking with ALJ Richard's assistant, informing this assistant that Levitant was at OCB and requesting to speak with ALJ Richard, the Trial Examiner was informed by the assistant that ALJ Richard did not wish to speak with OCB. (Tr. 879-880). At that time, the Trial Examiner spoke with all parties and instructed Levitant to appear before OATH and resolve the scheduling dispute by requesting from ALJ Richard an adjournment of the OATH proceeding. Levitant went to OATH and discussed the scheduling conflict with the attorney who handled this discipline case outside of ALJ Richard's courtroom. Levitant informed his counsel to request an adjournment and informed ALJ Richard that he could

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[24] The OATH proceeding on that day, which involved the January 2004 Charges, amongst other sets of disciplinary charges, was scheduled by OATH shortly before July 26, 2006, which was over two months after Levitant and HRA knew that the improper practice hearing day had been scheduled for October 30, 2006. It is alleged by the Union and not refuted by the City that Levitant never received notice for the OATH hearing date and that only counsel who represented him in that disciplinary proceeding received notice.

"not participate in the proceeding [at OATH] because of a matter being held simultaneously at [OCB]." (Joint Ex. 3).

Levitant gathered the two witnesses and returned to OCB. When Levitant left, his counsel requested an adjournment, which was denied by ALJ Richard, who then proceeded to conduct the disciplinary hearing *in absentia*. Upon Levitant's return to OCB with the two witnesses, the sixth day of hearing commenced on the alleged improper practices. After the hearing concluded for the day, the Trial Examiner sent a letter to ALJ Richard's attention informing her that Levitant appeared before OCB at an improper practice hearing that had been scheduled almost six months earlier.

On November 22, 2006, Arbitrator Stein issued a decision concerning Levitant's grievance concerning his transfer out of the Brooklyn Field Office, his permanent placement into the Lombardi Program, the docking 45 minutes of pay from Levitant, and the refusal to approve requested sick leave ("November 2006 Arbitration Award"). At the outset of the November 2006 Arbitration Award, Arbitrator Stein stated that HRA "intended to return the sum [of wages] which had been docked [from Levitant's pay check] and to charge the grievant's sick leave time accordingly, [and HRA] would purge the grievant's files of all references to Mr. Levitant's alleged unauthorized use of sick leave on August 8, 2003."[25] (Joint Ex. 2). Thus, Arbitrator Stein dismissed Levitant's grievance regarding the 45 minutes of docked pay and refusal to grant his sick leave request because HRA rendered that particular dispute moot by granting the relief that the arbitration could have awarded Levitant. (*Id*.).

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[25] On April 18, 2006, while the hearing regarding the instant improper practices was being held, approximately two and a half years after the incident, HRA allegedly issued a check to Levitant regarding his 45 minutes of docked pay and had that time subtracted from his sick leave bank. However the check issued by HRA was for the wrong amount, and, so on June 15, 2006, HRA issued another check for the correct amount.

With regard to the transfer of Levitant from the Brooklyn Field Office to the Lombardi Program on November 3, 2003, Arbitrator Stein held that HRA's initial decision to transfer Levitant from the Brooklyn Field Office while the October 2003 Charges were resolved was not violative of the Agreement. However, "once the proceeding was completed, by [HRA's] adoption of the recommendations of [ALJ] Spooner to suspend Levitant without pay for a limited period, [HRA] implicitly concluded that Levitant ceased to constitute a threat to [Deputy Director] Brown" because HRA "implicitly concurred . . . that the suspension would be sufficient to deter the grievant from repeating the misconduct of threatening [Deputy Director] Brown." (*Id*.). Therefore, Arbitrator Stein found that HRA's failure to return Levitant to the Brooklyn Field Office after HRA accepted the penalty set forth in the September 2004 OATH Determination constituted a breach of the Agreement, "given [HRA's] concession that he possessed superseniority [due to his Local 371 delegate status] and greater seniority than others at the [Brooklyn Filed Office] who were not transferred." (*Id*.). Arbitrator Stein then remanded the dispute back to the parties in order to calculate the "contractual damages." (*Id*.).

On December 24, 2006, the Social Security Administration determined that Levitant was disabled and eligible for benefits, contrary to HRA's determination in October and November 2005.

On February 2, 2007, ALJ Richard, issued her Report and Recommendations regarding, *inter alia*, the January 2004 Charges, based on a hearing held *in absentia* ("February 2007 OATH Determination").[26] ALJ Richard found that Levitant was AWOL from September 10, 2003 until October 3, 2003; Levitant, on October 27, 2003, said to Marin, "you [Marin] [expletive deleted]

[26] Due to reasons set forth in the February 2007 OATH Determination, ALJ Richard held that Levitant and his counsel present could not adjourn the hearing and that the hearing would proceed without him or his counsel.

with us and I'm going to [expletive deleted] with you" (*Id.*); and Levitant threatened Brome and Director Daniel-Preudhomme. (*Id.*). However, ALJ Richard found that Levitant was not guilty of insubordination when he refused to accept a notice for a supervisory conference from Director Waxman or when he refused to meet with Director Waxman to discuss the issues about Autotime. ALJ Richard also found that Levitant did not violate HRA's code of conduct for allegedly giving away his Autotime password and identification number. Since ALJ Richard found that Levitant was AWOL for a period of time and threatened supervisors, she recommended Levitant's termination.[27]

On March 6, 2007, current Commissioner Robert Doar adopted the findings of fact and recommended penalty of termination contained in the February 2007 OATH Determination.

On May 4, 2007, the final hearing day in the instant matter, the Union presented a one page print-out of an e-mail chain, dated Friday October 27, 2006, between Counsel for the City, Deputy Director Ambrose, and several HRA employees. In the initial e-mail, Counsel for the City requested Deputy Director Ambrose to release two witnesses for "Monday's hearing," and gave notice that three additional hearing dates had been scheduled, all of which corresponded to the dates scheduled for the improper practice proceeding. (Union Ex. 37). Then, Deputy Director Ambrose forwarded this e-mail to Middleton, Counsel for HRA, and Director Waxman. Middleton then sent an e-mail to the employees who were to be released for Levitant's improper practice hearing which read:

> [Employment Law Division] is requesting the following staff listed below to attend Ms. levitante's [*sic*] hearing. Please report to Office of Administrative Trials and Hearings (OATH) on the following dates Monday 10/30/06 at 9:30 a.m. to be a witness at Mr. Levitant's trial. The hearing will be held at the Office of Administrative Trials and Hearings (OATH) at 40 Rector Street, 6th Floor.

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[27] The February 2007 OATH Determination incorporated six sets of disciplinary charges against Levitant, only one of which was the January 2004 Charges, and ALJ Richard found that Levitant was guilty of a majority of these charges.

(*Id*.).[28]

On August 6, 2007, parties submitted their respective Post-Hearing Briefs in the instant matter.

POSITION OF THE PARTIES

Union's Position

The Union initially argued that HRA violated NYCCBL § 12-306(a)(1)-(5), however, in the Union's Post-Hearing Brief, the Union centered its arguments around alleged violations of NYCCBL § 12-306(a)(1), (3), and (4).[29] The Union contends that HRA violated NYCCBL § 12-306(a)(1) by levying disciplinary charges against Levitant for exercising his statutory rights. Specifically, by

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[28] The Union contended that this e-mail chain demonstrated HRA's deliberate attempt to deceive Levitant's witnesses and undermine the Union's improper practice allegations, while the City averred that the e-mail demonstrated nothing more than a innocuous mis-communication between Counsel for the City and HRA.

[29] NYCCBL § 12-306(a)(1) 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;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(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;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with a certified or designated representatives of its public employees; . . .
(5) to unilaterally make any change as to a mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization . . . .

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

imposing disciplinary penalties against Levitant for exercising and/or invoking his statutory rights, HRA discouraged Levitant and other HRA employees in the Brooklyn Field Office from exercising their rights under the NYCCBL. HRA further interfered with Levitant's statutory rights when HRA management continually reprimanded Levitant for speaking with other HRA employees regarding issues that dealt with collective bargaining matters. HRA also violated Levitant's statutory rights when HRA brought disciplinary charges against Levitant in response to his filing of multiple grievances, initiating two improper practice petitions, advocating for the statutory rights of other employees, and attempting to address issues that dealt with terms and conditions of employment. Finally, HRA violated NYCCBL § 12-306(a)(1) by engaging in a campaign of discriminatory behavior targeting Levitant, which discouraged Levitant and other HRA employees from invoking their statutory rights.

The Union also contends that HRA violated NYCCBL § 12-306(a)(3) by discriminating against Levitant by treating him differently because of his affiliation with Local 371 and the Union. HRA discriminated Levitant by subjecting him to constant monitoring, overly critical supervision, and multiple disciplinary charges because Levitant was the delegate for the Brooklyn Field Office and a vociferous advocate for himself and his fellow employees. Finally, HRA discriminated against Levitant by assigning Director Anderson and Deputy Director Brown, who were individually identified in Levitant's grievances and improper practice petitions, to conduct the promotional interview and make the promotional decision and ultimately, by not promoting him to the position of Supervisor I.

The Union further argues that HRA violated NYCCBL § 12-306(a)(4) when it refused to process Levitant's grievances in a timely fashion. HRA never responded to Levitant's multiple

grievances at either Steps I, II, or III and only responded to Levitant's allegations when the Union filed the multiple requests for arbitration. In addition, HRA's refusal to respond to Levitant's grievances and refusal to address work place concerns raised by Levitant and other employees in a more informal setting created a notorious hostile work environment that discouraged employees from invoking such grievance procedures and "amounts to a willful and bad faith attempt to frustrate the grievance process." (Union's Post-Hearing Brief, p. 24).

Finally, the Union contends that the attempts by the City to discredit the testimony of Levitant and the other Union witnesses should be rejected. The combination of the credible testimony of Levitant and the other corroborating witnesses, the unreliable and inconsistent testimony of the City's witnesses, and the findings in the OATH and arbitration proceedings indicate that Levitant's allegations are credible and based upon persuasive evidence. Moreover, these factors dictate that the City's arguments regarding legitimate business reasons for the unlawful behavior should be ignored.

City's Position

The City contends that most of the acts alleged in the improper practice petitions are untimely because they occurred prior to September 8, 2003.[30] The only acts that can be considered by the Board occurred after September 8, 2003 and prior to June 15, 2004.

The City also contends that the Union has failed to prove its *prima facie* case with respect to all of the allegations set forth in the improper practice petitions. HRA did not interfere with the

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[30] NYCCBL § 12-306(e) provides, in pertinent part:
A petition alleging that a public employer or its agents or a public employee organization 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. . . .

statutory rights of Levitant or other HRA employees, did not discourage Levitant or other employees from exercising their statutory rights, and did not restrain Levitant or other HRA employees from participating in their statutory rights.

With regard to the Union's claim that the City violated NYCCBL § 12-306(a)(3), the City argues that Levitant's protected activity was never the motivating factor behind its actions. All of the disciplinary charges levied against Levitant were based upon a genuine belief that Levitant's acts constituted misconduct and necessitated the initiation of disciplinary charges. Specifically, Levitant initiated a number of verbal and physical altercations; he used his phone for personal use; and he was not entitled to a representative at every meeting with his supervisors. Even though OATH found that many of the disciplinary charges levied against Levitant were unsubstantiated and an arbitrator found that HRA violated the terms of the Agreement, the initiation of the disciplinary charges was based upon a genuine belief that Levitant had engaged in inappropriate behavior. Furthermore, HRA's actions with respect to the disciplinary charges were justified and are protected by the NYCCBL, which allows HRA to discipline its employees.[31] In addition, the Union is unable to demonstrate anti-union animus because no temporal proximity exists, since most of the alleged protected actions occurred in 2002 and not during the relevant time period.

With regard to the Union's allegations that HRA discriminated against Levitant by not promoting him, the decision not to promote Levitant was not motivated by anti-union animus because Director Anderson's decision was predicated upon a number of neutral factors, including

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[31] NYCCBL § 12-307(b) states, in pertinent part:
It is the right of the City, or any other public employer, acting through its agencies to determine the standards of service to be offered by its agencies; . . . direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization . . . .

the 1-and-3 rule, the number of vacancies, and the list number assigned to each candidate. Additionally, Director Anderson admitted that she passed over a candidate she preferred over Levitant because she could only promote two candidates.

The City also argues that HRA did not violate NYCCBL § 12-306(a)(4) because HRA's failure to respond to Levitant's grievances in a timely manner did not constitute a refusal to bargain collectively in good faith or an attempt to frustrate the collective bargaining process since the time limits provided in Step I, II and III are inserted in the Agreement for the purpose of allowing grievants to move the grievance procedure along without a response from the agency. In addition, delays in the OATH and arbitration proceedings are common due to scheduling conflicts and the delays here were not caused by any deliberate attempt to frustrate the grievance procedure.

The City further argues that HRA did not violate the other provisions of the NYCCBL. The Union failed to present sufficient evidence to prove a *prima facie* case of domination or interference with the formation or administration of any public employee organization and failed to establish a unilateral change to a mandatory subject of collective bargaining or to any term and condition of employment established in the Agreement.

DISCUSSION

Statute of Limitations

As a preliminary matter, we address the fact that the improper practice petitions in these consolidated cases allege violations of the NYCCBL committed by HRA against Levitant that date back to 2002. The City raised the affirmative defense of statute of limitations asserting that any alleged actions that predate the applicable four month statute of limitations must not be considered

by this Board. We agree because the NYCCBL requires that an improper practice charge must be filed no later than four months from the date the disputed action occurred. NYCCBL § 12-306(e); Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) § 1-07(b)(4).[32] Accordingly, the statute of limitations precludes this Board from ruling on the substantive merits of the incidents that occurred prior to the applicable four month period. Since the Union filed the First IP Petition on January 8, 2004, claims relating to events that occurred on or after September 8, 2003 are timely, while HRA's action that allegedly occurred prior to September 8, 2003 are untimely.[33]

Nevertheless, "factual allegations of events that occur outside of the four month limitations period . . . cannot be themselves treated as remediable violations of the NYCCBL," but can be "considered only as background information that may illuminate the context and motivations underlying actions that form the basis of timely claims under the NYCCBL." *Colella*, 79 OCB 27, at 49-50 (BCB 2007); *see DC* 37, 77 OCB 33, at 24 (BCB 2006). Accordingly, earlier events, such as the June 25, 2002 incident involving Director Anderson, the issuance of the August 2002 Charges,

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[32] OCB Rule § 1-07(b)(4) provides:
One or more public employees or any public employee organization acting on their behalf or a public employer may file a petition alleging that a public employer or its agents or a public employee organization 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 and shall be on a form prescribed by the Office of Collective Bargaining.

[33] OCB Rule § 1-12(f) provides, in relevant part:
In computing any period of time prescribed or allowed by these rules, or by order or direction, the day of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday or legal holiday, in which event the period shall run to the next business day.

and the October 2002 meeting involving then-Commissioner Eggleston, Levitant's refusal to sign the blank tasks and standards on July 16, 2003, Simmons' issuance of a corrective memorandum shortly thereafter, and the August 8, 2003 incident involving Deputy Director Brown are not remediable because they fall outside the applicable statute of limitations period. Yet, these incidents provide background and may illuminate the motivations for actions that are the basis of timely claims.

Furthermore, we have held that "[a] party may choose to await performance of an action and file an improper practice charge within four months after the intended action is implemented." *DC 37, AFSCME,* 47 OCB 61, at 8 (BCB 1991). Here, although some incidents predate September 8, 2003, HRA did not issue the October 2003 Charges against Levitant for these incidents until at least a month after September 8, 2003. Therefore, allegations that HRA violated the NYCCBL by levying the October 2003 Charges against Levitant arising out of events that pre-dated September 8, 2003 are proper, and, as such, are timely.

Concerning the Union's claim that HRA violated NYCCBL § 12-306(a)(4) by frustrating the collective bargaining process by failing to process Levitant's grievances, we find the claim timely as to the grievances filed after September 8, 2003, regardless of whether the events that gave rise to the grievances occurred prior to September 8, 2003.

NYCCBL § 12-306(a)(2) and (5)

With respect to the substantive allegations proffered against HRA, we find that the Union failed to provide any evidence that would support the claim in the First IP Petition that HRA violated NYCCBL § 12-306(a)(2). To demonstrate a *prima facie* case for a claim that an employer has dominated or interfered with the formation or administration of a union, one must show, *inter alia*,

that "assistance to the union was given by the employer to such an extent that the union [was] deemed the employer's creation." *SBA*, 75 OCB 22, at 20 (BCB 2005); *see Local 237, IBT*, 67 OCB 12, at 9-10 (BCB 2001). Further, "disfavoring of a union delegate by management will not constitute a violation of this provision, provided that management's actions cannot be construed as domination and does not rise to the level of interference with the actual administration of the union's internal structures." *SBA*, 75 OCB 22, at 12; *see Local 376, DC 37*, 73 OCB 6, at 12 (BCB 2004). Here, the Union failed to provide any evidence that would support a claim that HRA interfered with either Local 371 or the Union in its interactions with Levitant. Moreover, during the hearing and in the Union's Post-Hearing Brief, it did not raise this theory. Therefore, we dismiss the Union's NYCCBL § 12-306(a)(2) claim.

With respect to the Union's contention that HRA violated NYCCBL § 12-306(a)(5), we find that the Union's claim is misplaced. This subsection of the NYCCBL essentially addresses an employer's violation of the terms of the collective bargaining agreement and its failure to maintain status quo during such periods. Here, the Union's claim properly sounds as a failure to bargain in good faith, rather than a unilateral imposition of terms and conditions of employment. Thus, we dismiss the Union's NYCCBL § 12-306(a)(5) claim.

Collateral Estoppel

Before this Board examines the substantive claims on which the Union presented testimonial and documentary evidence, we must determine to what extent, if any, we are required to afford preclusive effect to, or be persuaded by, the factual findings and conclusions set forth in the September 2004 OATH Determination, the November 2006 Arbitration Award, and the February 2007 OATH Determination.

Collateral estoppel gives preclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: "(1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal." *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2003) (internal citations omitted). This doctrine is "elastic . . . and the enumeration of these elements is intended as a framework, rather than a substitute for analysis." *Staatsburg Water Co. v. Staatsburg Fire District*, 72 N.Y.2d 147, 153 (1988).

(I) Identity of Issue

Concerning the first prong, we look to whether the issues presented before this Board are the identical issues that were presented before and necessarily decided by the other adjudicatory bodies. *See e.g.*, *Jeffreys*, 1 N.Y.3d at 41 (plaintiff's claim of assault and battery was awarded preclusive effect by the Court because the administrative board previously found defendant guilty of assault and battery); *Colon v. Coughlin*, 58 F.3d 865, 870-871 (2nd Cir. 1995) (previous administrative determination not given preclusive effect because the issue previously raised was whether defendant had reasonable grounds to search his cell, while the issue presented in court was whether defendant retaliated against plaintiff for initiating legal action against defendant).[34]

Regarding the September 2004 OATH Determination, we find that the facts and conclusions litigated before and necessarily decided by ALJ Spooner concerning whether certain conduct occurred on July 16, 2003 were identical to certain issues presented before this Board. ALJ Spooner heard testimony concerning whether Levitant acted in a discourteous manner when he refused to sign

[34] The federal courts within the State of New York apply state case law when interpreting the doctrine of collateral estoppel. *See*, *e.g.*, *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982); *see generally, Colon*, 58 F.3d at 869.

a blank tasks and standards form. He found that Levitant was presented with a blank tasks and standards form and refused to sign it, at the advice of a fellow Local 371 delegate. ALJ Spooner held that Levitant's refusal to sign this document did not constitute misconduct. With regard to the events of August 8, 2003, we similarly find that "identity of issue" exists between the acts alleged by HRA before ALJ Spooner and those presented to this Board. Although ALJ Spooner found that Levitant's actions on that day toward a HRA client and Barnes, his direct supervisor, did not rise to misconduct, he decided that Levitant did, in fact, threaten Deputy Director Brown and left the Brooklyn Field Office 45 minutes early, both of which did constitute misconduct.

Next, we find that the facts and conclusions litigated before and necessarily decided in the November 2006 Arbitration Award as to Levitant's transfer out of the Brooklyn Field Office, his permanent placement into the Lombardi Program, the docking 45 minutes of pay from Levitant, and HRA's refusal to approve requested sick leave are identical to certain issues that have been presented in the instant proceeding. Arbitrator Stein dismissed Levitant's claim that he was improperly docked 45 minutes of pay because HRA agreed pay Levitant money owed to him and appropriately subtracted time from Levitant's sick leave bank. He also found that HRA's initial decision to transfer Levitant from the Brooklyn Field Office while the October 2003 Charges were resolved did not violate the Agreement. However, Arbitrator Stein ruled that, once HRA adopted the findings and recommended penalty contained in the September 2004 OATH Determination, Levitant should have been returned to the Brooklyn Field Office, and that HRA's failure to do so violated the Agreement. These determinations were necessary to Arbitrator Stein's decision and involved questions of fact pending in this matter.

As to the February 2007 OATH Determination, we likewise find that the facts and conclusions litigated before and necessarily decided by ALJ Richard regarding the occurrence of acts alleged to constitute misconduct in the January 2004 Charges also are identical to certain issues germane to the instant matter. HRA presented OATH with a number of disciplinary charges related to Levitant's alleged misuse of Autotime, his AWOL status, his refusal to meet with supervisors, his use of obscene language, and his threatening of co-workers. ALJ Richard decided that Levitant had not misused Autotime, did not refuse to meet with supervisors, and did not act insubordinately toward his supervisors and, that, therefore, did not commit misconduct. However, ALJ Richard held that Levitant used obscene language, was AWOL, and threatened co-workers, all of which constituted misconduct. However, throughout this OATH proceeding, the existence of anti-union animus, discrimination or retaliation against Levitant was neither presented nor decided by ALJ Richard.

Accordingly, here we find that to the extent discussed above, the facts and conclusions litigated before and necessarily decided by OATH and an arbitrator satisfy the "identity of issue" requirement for collateral estoppel. *Matter of Lester*, 149 A.D.2d 880, 881 (3rd Dept. 1989).

(II) Full and Fair Opportunity

The second requirement for collateral estoppel to apply is that the party to be precluded by the first action or proceeding must have been afforded "a full and fair opportunity to litigate" the material issues that are identical to the ones in the subsequent action or proceeding. *Locurto v. Giuliani*, 447 F.3d 159, 170 (2nd Cir. 2006). This Board, in determining whether a party has been afforded this opportunity, will examine "the realities of the prior litigation, including the context and other circumstances which may have had the practical effect of discouraging or deterring a party

from fully litigating the determination which is now asserted against him." *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 501 (1984); *see also Jeffreys*, 1 N.Y.3d at 41. Specific factors considered are, *inter alia*, "the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation." *Id.*

Here, it is without question that the November 2006 Arbitration Award satisfies the second prong of the collateral estoppel standard because Levitant had a full and fair opportunity to be heard regarding the factual allegations and legal claims that were a part of that decision. In examining the realities of litigation, we find that Levitant was represented by competent counsel, appeared before the arbitrator, had an opportunity to confront the adverse party and cross-examine the adverse party's witnesses, and presented his own factual and legal contentions. *See e.g.*, *Matter of Guimarales*, 68 N.Y.2d 989, 991 (1986) (arbitration award properly afforded collateral estoppel effect where full and fair opportunity to be heard is provided).

In discussing whether the two OATH determinations satisfy the second criterion in the test for collateral estoppel, we note the existence of doubt as to whether OATH determinations, in general, may be afforded preclusive effect. In *Locurto*, a firefighter, who had been terminated for misconduct pursuant to an OATH recommendation and the fire department commissioner's adoption of the recommended findings and penalty, initiated a federal court action against the City of New York.[35] The Second Circuit, rejecting the City's collateral estoppel argument, held that the findings

[35] Under federal law, municipal agencies are not proper parties, and thus, when initiating an action against an agency, the proper party is the actual municipality. *See Johnson v. City of New York*, 2007 U.S. Dist. LEXIS 17212 (E.D.N.Y. 2007).

in the OATH determination were not entitled preclusive effect. According to the Court, the firefighter was "deprived of the opportunity to litigate his claim fully and fairly before a neutral arbitrator" because, in part, the ultimate decisionmaker was not the OATH ALJ, but rather the department's commissioner. *Locurto*, 447 F.3d at 171; *see also Colon* 58 F.3d at 871 (holding that the department of correction's hearing officer was not unbiased based, in part, upon his affiliation with the department). The New York State courts have neither adopted nor rejected these Second Circuit decisions, nor have they otherwise dealt with this matter. At this time, however, we need not determine whether to apply this broader conclusion of *Locurto* and *Colon* since the specific circumstances of this case allow us to treat the September 2004 OATH Determination as persuasive, while rejecting the February 2007 OATH Determination in its entirety.

The September 2004 OATH Determination, regardless of whether it could be deemed preclusive, is persuasive in its findings of fact and conclusions of law. In that proceeding, Levitant was represented by competent counsel, appeared before ALJ Spooner, and was afforded an opportunity to confront the adverse party, cross examine the adverse party's witnesses and present his own factual and legal contentions. Neither party, Levitant or HRA, claimed that ALJ Spooner refused to consider testimony or documents that were relevant to Levitant's claims before OATH, or has excepted to his findings of fact or challenged his reasoning. Accordingly, and because the underlying reasoning of the September 2004 OATH Determination is cogent and persuasive, we adopt ALJ Spooner's findings in the instant matter. Therefore, although *Locurto* and *Colon* may allow for the parties to ask this Board to disregard ALJ Spooner's findings concerning the October 2002 Charges and the August 2003 Charges, neither party has identified grounds for so doing, and we are persuaded to adopt them.

By contrast, we decline to adopt, or to afford preclusive effect to the February 2007 OATH Determination, because Levitant was not awarded a full and fair opportunity to be heard, under any applicable standard. First, when the parties discovered that the Union's witnesses were at OATH instead of OCB, the Trial Examiner instructed Levitant to request an adjournment from OATH and told Levitant that the scheduling conflict between OCB and OATH would be discussed by the Trial Examiner and ALJ Richard. Additionally, the Trial Examiner sent a letter to ALJ Richard memorializing Levitant's appearance at OCB after the hearing ended that day. So when Levitant went to OATH, instructed his attorney to request an adjournment, and informed ALJ Richard that he could not participate in the disciplinary proceeding because he was currently in the middle of his improper practice case at OCB, he reasonably believed that the OATH proceeding, which was scheduled and noticed more than two months after the improper practice hearing, would not continue in his absence. While Levitant may have adopted other means of seeking an adjournment or of trying to reconcile conflicting dates, the facts remain that Levitant did not disrespect OATH or its disciplinary process, and that Levitant had a reasonable expectation that the OATH proceeding would not go forward on that day.

In addition, it is without question that HRA knew of the scheduling conflict between the hearings at OATH and OCB. In an e-mail from Counsel for the City to Deputy Director Ambrose, HRA was instructed to release two witnesses for "Monday's hearing" and informed of the three additional hearing dates that had been scheduled in the improper practice hearings. (Union Ex. 37). Ambrose then relayed this email, through Middleton, to the employees who were to be released for Levitant's improper practice hearing, but these employees were directed to appear at OATH, and not at OCB. From the time the OATH hearing was scheduled, HRA knew of this conflict and made no

attempts to resolve it. Then, on October 30, 2006, HRA appeared at both forums, did not inform the Trial Examiner of the concurrent disciplinary proceeding at OATH, and did not join in Levitant's request for an adjournment at OATH. Furthermore, HRA fully participated in both forums by presenting its case in chief at OATH and cross-examining the Union's two witnesses at OCB, all of which were impossible for Levitant to do. Moreover, Deputy Director Ambrose, who was the original recipient of Counsel for the City's e-mail, attended the improper practice hearing that day but never informed the Trial Examiner of Levitant's concurrent OATH proceeding, which allowed for the improper practice hearing to be unnecessarily delayed.

Additionally, ALJ Richard denied the request for adjournment by Levitant's disciplinary counsel, which would have prevented HRA's actions from prejudicing Levitant's opportunity to proceed at OATH. Despite the telephone call from the Trial Examiner to resolve the scheduling conflict and the letter verifying Levitant's appearance at OCB, ALJ Richard proceeded with the OATH hearing *in absentia* and made credibility findings based upon hearing the testimony of only one side.

Based upon the foregoing facts, we find that the actions of HRA and ALJ Richard prejudiced Levitant's ability to obtain a full and fair opportunity at his disciplinary hearing on October 30, 2006. Therefore, we cannot find that OATH's proceeding satisfied the second criterion of the collateral estoppel test. In this case, Levitant was placed in an untenable position. Having already appeared at the hearing in this matter, he was nonetheless compelled to litigate simultaneously before OATH, which resulted in him being forced to proceed simultaneously before two tribunals. *See generally*, *Locurto*, 447 F3d at 170-171; *Johnson v. County of Nassau*, 480 F.Supp2d 581, 608-609 (E.D.N.Y. 2007). Such a choice does not constitute, by definition, intentionally absenting oneself from a

hearing. *See Mari v. Safir*, 291 A.D.2d 298 (1st Dept. 2002), *lv. denied*, 98 N.Y.2d 613 (2002) (even though the police officer was not present during his disciplinary hearing, the court upheld his termination because the officer avoided service of the notice of hearing and intentionally absented himself from the hearing); *McMillan v. Kerik*, 306 A.D.2d 17, 18 (1st Dept. 2003). Accordingly, we decline to adopt or accord any deference to the findings of fact or conclusions of law reached by ALJ Richard.

In sum, with respect to the timely acts of alleged violations of the NYCCBL addressed in the November 2006 Arbitration Award, we find that collateral estoppel applies. Levitant was improperly docked 45 minutes of pay; HRA's initial decision to transfer Levitant from the Brooklyn Field Office was not improper; but, HRA's failure to return Levitant to the Brooklyn Field Office after Levitant satisfied the adopted penalty of a 25-day suspension, violated the Agreement. (Joint Ex. 2, p. 12). With respect to the facts and conclusions set forth in the September 2004 OATH Determination, we adopt them. Levitant was not insubordinate when he refused to sign a tasks and standards form, spoke with a client on August 8, 2003, and discussed a case with Barnes on that same date. We also adopt ALJ Spooner's findings that Levitant threatened Deputy Director Brown, failed to provide notice to any of his supervisors of his early departure, and was appropriately punished with a 25-day suspension for such misconduct. *See Colella*, 79 OCB 27; s*ee also Sam v. Metro-North Commuter R.R.*, 287 A.D.2d 378, 379-380 (1st Dept. 2001). Finally, the February 2007 OATH Determination is given no preclusive effect, and we will review the factual allegations argued therein *de novo*.

NYCCBL § 12-306(a)(1)

We have found that NYCCBL §12-306(a)(1) may be independently violated by improper employer conduct when there is a demonstration that the employer interfered with an employee's

exercise of any of these [statutorily protected] rights." *Burton*, 77 OCB 15, at 23-24 (BCB 2006); *see also CEU, Local 237*, 69 OCB 12, at 8 (BCB 2002) (NYCCBL § 12-306(a)(1) "may be independently violated by such improper employer conduct such as threatening employees for exercising their rights"). In *DC 37, Local 376*, 73 OCB 6 (BCB 2004), the agency's director of labor relations, *inter alia*, discouraged employees from using a particular union representative, praised other representatives, and avoided dealing with the particular representative. We found that "the effect of [the director's] actions was to discourage and inhibit the members of [the union] from choosing . . . a [particular] representative." *Id.* at 11; *see also SBA*, 75 OCB 22, at 19-20; *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983) (targeting union officials and disciplining them more severely violates the National Labor Relations Act because it may deter qualified employees from seeking union office).

In the instant matter, we find that HRA did, in fact, interfere with and restrain the statutory rights under NYCCBL § 12-305 of Levitant and other HRA employees, as well as target Levitant due to his status as a Local 371 delegate. During the relevant time period, September 8, 2003 through June 15, 2004, HRA attempted to coerce, discourage, and inhibit Levitant from engaging in protected activity and, in doing so, interfered with the rights of other HRA employees in their attempt to exercise these same rights. We first note that the alleged timely acts of interference with exercising and participating in their statutorily protected rights must be viewed through the prism of earlier events of alleged discouragement and coercion with those protected rights. *See DC 37, Local 1113*, 77 OCB 33, at 28-29 (BCB 2006) (employer's previously lax enforcement of case deadlines changed when an employee filed a grievance, and the Board, in determining the

employer's conduct violative of the NYCCBL, decided to examine earlier events of the employer in the context of the occurrences of later events).

Alexander, a fellow Local 371 delegate, credibly testified that Deputy Director Brown and Director Anderson viewed complaints regarding working conditions as "anti-management," that these two supervisors "became punitive" toward people who raised such issues, and that these two supervisors refused to deal with either herself or Levitant. Additionally, Enwereuzoh credibly testified that Levitant was the target of HRA's harassment due to his delegate status, that Deputy Director Brown and Director Anderson "were not happy" with Levitant because of the complaints he filed, and that most employees were afraid to raise such complaints out of fear of losing their jobs. Also, Union Representative Santos testified that she was told by several of Levitant's co-workers that his supervisors wanted to intimidate him by maintaining an overbearing degree of supervision. Moultrie, a fellow delegate for Local 371, also testified that Levitant was scolded by HRA management for discussing "Local 371 issues" with other delegates and was ordered to return to his work location. Finally, Levitant's unrebutted testimony concerning the constant and overbearing supervision exhibited by, *inter alia*, Weiner, Marin, Director Anderson, Deputy Director Brown, and Director Quinn bolsters the Union's allegation that HRA's management targeted Levitant because of his status as delegate for Local 371.

We find that the March 12, 2004 memorandum from First Assistant Deputy Commissioner Simone to Levitant interfered with and restrained Levitant's exercise of protected activity, in violation of NYCCBL §12-306(a)(1). First Assistant Deputy Commissioner Simone instructed Levitant that he was "required to attend meetings [and] . . . not permitted to require a union steward to attend," and that it was "inappropriate . . . to conduct union activities with [co-workers] during

work hours." (Second IP Petition, Ex. E). Furthermore, since Levitant routinely engaged in protected activity, First Assistant Deputy Commissioner Simone informed Levitant that a record was being kept of all instances in which Levitant refused to attend meetings without a representative or conducted union activities with co-workers. First Assistant Deputy Commissioner Simone's words are a clear signal from HRA's management to Levitant that engaging in protected activity is prohibited and may result in disciplinary action. Moreover, Levitant was the only employee to receive such a memorandum, and he was the only employee instructed to conduct business in English only. Accordingly, we find that this memorandum discouraged Levitant, as well as other HRA employees, from exercising protected rights under the NYCCBL. Therefore, HRA violated NYCCBL § 12-306(a)(1).

NYCCBL § 12-306(a)(1) and (3)

We now turn our attention to the Union's claim that HRA discriminated against Levitant because of anti-union animus. Again, because of the restriction of the applicable statute of limitations, we examine only the alleged acts of retaliation and discrimination which occurred between September 8, 2003 and June 15, 2004. Further, as stated above, we credit the findings and determinations contained in the September 2004 OATH Determination and the November 2006 Arbitration Award.

When determining if 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 its progeny such as *State of New York* 36 PERB ¶ 4521 (2003). Under that test, which we adopted in *Bowman*, 39 OCB 51 (BCB 1987), 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.

Id. at 18-19; *see also Colella*, 79 OCB 27, at 53.

We have previously held if a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, "the employer may attempt to refute 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." *SBA*, 75 OCB 22, at 22; *see also CEU, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

In the instant matter, we find that Levitant's protected activity was well documented and that HRA had knowledge of such activity. Levitant began filing grievances regarding unsafe and unsanitary conditions at the Brooklyn Field Office as soon as he became an alternate delegate for Local 371 in May 2001. He continued to file grievances, some of which proceeded to arbitration, on his own behalf and on behalf of his constituents until March 2004. Additionally, Levitant's protected activity included advising and advocating on behalf his HRA co-workers at the Brooklyn Field Office, as testified to by Alexander and Enwereuzoh. We find it incongruous that, on direct examination, Director Anderson testified that she was not aware of Levitant's status as a Local 371 delegate, and whether he filed any grievances while at the Brooklyn Field Office. Similarly, on direct examination, Deputy Director Brown testified that she did not know whether Levitant filed grievances, even though she was the subject of many of Levitant's grievances. Based upon the record, we cannot credit their testimony regarding lack of knowledge of Levitant's protected activity, and, therefore find the first prong of *Salamanca* test satisfied.

Regarding the second prong of the *Salamanca* test, which addresses the motivation behind the employment action in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26; *see also CEU, Local 237,* 67 OCB 13, at 9 (BCB 2001); *CWA, Local 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, at 22. Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001). If a *prima facie* case is established, "then the employer may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU*, 77 OCB 35, at 18 (BCB 2006); *see also Lamberti*, 77 OCB 21, at 17 (BCB 2006).

In the instant case, we recognize that Levitant's claims of discrimination are factually sensitive and depend upon credibility determinations by this Board to determine which of the conflicting views is most accurate. Accordingly, we preface our discussion of the alleged NYCCBL § 12-306(1) and (3) violations by discussing the credibility of the key witnesses.

First, Levitant's testimony consists of "recounting second and third hand statements told to him by colleagues and supervisors, his perception of the motivation of his supervisors' actions," and particular statements made directly to him, which, if credible, form the basis of a finding of anti-union animus. *Colella*, 79 OCB 27, at 55. We further recognize that the testimony provided by Levitant is "filtered through the lense of his strongly held conviction" that he is a target of a grand conspiracy by HRA and a victim. *Id*. Though this conviction may be heartfelt, it may also tend to be exaggerated. (Tr. 436-437, 461-465). With respect to the hearsay statements recounted to

Levitant by others, such comments lack indicia of reliability, and some are uncorroborated by the alleged auditors who reported them to Levitant. Accordingly, "we decline to give weight to such unreliable hearsay accounts." *Colella*, 79 OCB 27, at 55; s*ee also Jones v. Maples*, 1999 N.Y. Misc. LEXIS 605, at *9-10 (Sup. Ct. N.Y. Co. 1999) (citing *Fisch on New York Evidence* (2d Ed.) § 758 and 2 Strong, *McCormack on Evidence* (4th Ed.) § 324.1).

With respect to Levitant's conviction that HRA's disciplinary measures against him were a result of a grand conspiracy, we note that ALJ Spooner, in the September 2004 OATH Determination, described Levitant's demeanor in the work environment as follows:

> The hearing evidence in this case made it clear that [Levitant] is an arrogant and highly excitable employee who is himself the source of much friction in the work place. He frequently challenges or disobeys most of his supervisors. If he feels slighted in some way or is upset, he sees nothing wrong with walking off the job, without notifying anyone. . . . He can also be insolent and cruel . . . [and has] a propensity for intimidation and bullying which should not be condoned in any work environment.

(Joint Ex. 1, p. 21).

However, we also recognize that, as lacking in credibility as Levitant's testimony was on certain issues, and as distasteful as some of his behavior was, we found that the City's witnesses were equally incredible at times and their behavior equally inappropriate. We find that Deputy Director Brown's testimony, in particular, was unworthy of credence. Her testimony was rarely consistent with any version proffered by either the Union or the City and, at times, was contradicted by her own statements. One flagrant instance was Deputy Director Brown's denial that she knew of or was deposed in Levitant's federal discrimination, however, this testimony was belied when Counsel for the Union subsequently presented the two-hour transcript of Deputy Director Brown's deposition in Levitant's federal court action.

Director Anderson's testimony was undermined by her combative manner with Counsel for the Union and seeming attempt to frustrate legitimate inquiries by claiming not to know certain facts that the director of an entire unit in one borough should reasonably be expected to know, such as the resolution of the employees' numerous complaints regarding the health and safety of the workplace. Given her level of command, we find incredible her claims that third parties, not her, had knowledge of and responsibility for HRA's actions toward Levitant. Examples of this include blaming the "union rep" and the "1 to 3 rule" for Levitant's lack of promotion to Supervisor I vacancy and stating that Local 371 dictates the amount of field visits required of a Caseworker in APS, not HRA management. Additionally, Director Anderson, like her deputy director, offered inconsistent testimony. An example of this includes her admission on cross-examination that she had knowledge of "plumbing problems" at the Brooklyn Field Office, when she had testified on direct examination that she was not aware of any issues regarding the unsanitary conditions of the bathrooms in that work location. (Tr. 1114).

In contrast, we find the overall testimony of Director Daniel-Preudhomme was concise and informative, and her inability to recall certain matters was not probative of malicious or other improper motivation. We also find that the testimony of Director Waxman to be credible, though most of his testimony concerned hearsay accounts that he received from other employees, and, as such, his testimony must be carefully scrutinized in determining its reliability.

With respect to the first timely alleged act of discrimination and retaliation against Levitant by HRA, the transfer of Levitant out of the Brooklyn Field Office into the MAP Personnel Department, we find this transfer was not motivated by anti-union animus and thus, not violative of the NYCCBL. HRA transferred Levitant out of the Brooklyn Field Office following an incident

involving Deputy Director Brown in which she testified that he stated "you don't know who you are messing with. I will hurt you." (Tr. 1153). The September 2004 OATH Determination credited the deputy director's version of the events, found that Levitant threatened Deputy Director Brown, and determined that disciplining Levitant for this act was appropriate. Later, the November 2006 Arbitration Award held that, while the initial decision to transfer Levitant out of the Brooklyn Field Office was proper, Levitant should have been returned to the Brooklyn Field Office once ALJ Spooner's recommendation of a 25-day suspension was accepted by HRA's Commissioner and Levitant served his suspension.

Since we have credited the findings of the November 2006 Arbitration Award and the findings in the September 2004 OATH Determination, we find that the August 8, 2003 incident occurred as Deputy Director Brown stated and that the initial determination to move Levitant out of the Brooklyn Field Office did not violate the NYCCBL. In addition, we agree with Arbitrator Stein that Levitant should have been returned to the Brooklyn Field Office once Levitant served his 25-day suspension. As Arbitrator Stein noted, no compelling reason existed to keep Levitant out of the Brooklyn Field Office.

Based upon these determinations as illuminated further by testimony in this matter, we find that HRA's failure to return Levitant to the Brooklyn Field Office was motivated by anti-union animus. *See Colella*, 79 OCB 27, at 58; *see also Local 376, DC 37*, 73 OCB 15, at 12 (BCB 2004) (Board has exclusive jurisdiction to consider the question of retaliatory motive under the NYCCBL). Even though Levitant worked at HRA until September 2005, almost one year after HRA's Commissioner accepted the OATH-levied penalty, Levitant was not returned to the Brooklyn Field Office. Given the amount of confrontation that existed between Levitant and HRA management and

the credible witness accounts describing that Levitant was targeted by HRA due to his status as a delegate, we find that HRA's refusal to return Levitant to the Brooklyn Field Office was motivated by anti-union animus. Moreover, HRA offered no credible explanation for its failure to return Levitant to the Brooklyn Field Office after his 25 day suspension, and by doing so, violated NYCCBL § 12-306(a)(1) and (3).

With respect to HRA's levying of the October 2003 Charges against Levitant, except for the two disciplinary charges that ALJ Spooner substantiated, we find that this action also was motivated by anti-union animus and that HRA failed to demonstrate a legitimate business reason for the issuance of these disciplinary charges. Here, the record demonstrates that a request for the issuance of disciplinary charges against Levitant came from the Brooklyn Field Office, most likely authored by Levitant's direct supervisor and approved by Director Anderson, as per her testimony. Furthermore, the record is replete with examples of animosity between Levitant and his supervisors. Specifically, Enwereuzoh, Moultrie, Alexander, Local 371 Organizer Turner and Union Representative Santos all credibly detailed the "hostile" environment toward delegates created by Director Anderson and Deputy Director Brown. Levitant was the target of their ire because he led a letter writing campaign concerning the unsafe work conditions at the Brooklyn Field Office, had heated confrontations with both Director Anderson and Deputy Director Brown, and named both of them in a number grievances. Thus, these two supervisors used the issuance of the disciplinary charges to retaliate against Levitant for his previous actions, and, accordingly, forwarded a request that Levitant be brought up on charges.

The City contends that the issuance of the October 2003 Charges was based upon a good faith belief that these allegations were truthful, that Levitant engaged in the behavior described therein,

and that Levitant should face punishment for his behavior. The September 2004 OATH Determination found most of these disciplinary charges to be unsubstantiated and stated:

> There can be little question that [HRA's] decision to move forward with multiple charges which could not be proven prolonged the disciplinary process considerably . . . . Had [HRA] *more carefully drafted and reviewed its charges and initiated disciplinary action only upon factual allegations for which it was clear prima facie proof existed*, both the employer and the employee would have been afforded a more expeditious, and hence fairer, disciplinary process.

(Joint Ex. 1, p.19) (emphasis added). ALJ Spooner found that there was no reason to issue most of the October 2003 Charges, and there was no credible evidence introduced by HRA before this Board to rebut the Union's *prima facie* case that the issuance of these disciplinary charges against Levitant was motivated by anti-union animus. Therefore, we find that HRA violated § 12-306(a)(1) and (3) of the NYCCBL.

Concerning the issuance of the January 2004 Charges and the events referenced therein, we find that HRA violated the NYCCBL. First, the January 2004 Charges were preceded by a flurry of protected activity by Levitant. Levitant filed five grievances between November 5, 2003 and December 16, 2003, some of which proceeded to arbitration prior to the issuance of the January 2004 Charges. Additionally, on December 3, 2003, he received a memorandum from Director Daniel-Preudhomme that criticized his job performance, stated that he would receive one-on-one close supervision, that he was not the duly elected recognized delegate for Local 371 in the Lombardi Program, that his use of the telephone for personal and Local 371 business was prohibited, and that he was not entitled to smoke breaks. Also preceding the issuance of the January 2004 Charges, Levitant had the incident with Brome, a Supervisor II in the Lombardi Program.

It is well established that "petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence." *Colella*, 79 OCB 27, at 54 (quoting *CWA, Local 1180*, 77 OCB 20, at 14 (BCB 2006)). Here, as in the *Colella* case, the timing of events is suspicious. While temporal proximity alone does not suffice to establish the causation prong of the *prima facie* case, here, "the repeated, suspicious, temporal proximity between use of the grievance process and the retaliatory action is consistent with other facts supporting a finding of improper motivation." *Id*. at 55.

Levitant was disciplined, pursuant to the January 2004 Charges, for unauthorized distribution of personal passwords and for making false entries on Autotime to enter sick leave requests; failing to abide by HRA time and leave rules since Levitant was AWOL from September 10, 2003 to October 3, 2003; acting insubordinate when he refused to attend supervisory conferences with Director Waxman, refusing to discuss his AWOL status with Director Waxman, and refusing to discuss the Autotime entries made while Levitant was AWOL; using obscene and inappropriate language towards Marin; and acting in a threatening and intimidating manner towards Brome.

With regard to the incidents involving Marin, where Levitant was accused of using obscene and profane language to Marin, and with regard to incident involving Brome, where Levitant threatened Brome, we credit the testimony of Levitant, as he was a participant in the incident and Marin and Brome did not testify at these proceedings. The City presented only documentary evidence summarizing the events after the fact, which was then supported by hearsay testimony by Director Waxman and Director Daniel-Preudhomme, neither of which witnessed either event. Without more credible evidence than hearsay testimony, we credit Levitant's testimony. *See e.g.*, *Colella*, 79 OCB at 63 (an adverse inference may be drawn when, a party fails to produce evidence

which is within its control and which it is naturally expected to produce); *see also CWA, Local 1180*, 77 OCB 20, at 16. Accordingly, in the absence of any other explanation proffered by the City and no credible first-hand account of the incident on the record to support the City's position, we find that the issuance of disciplinary charges against Levitant for using obscene language toward Marin and acting in a threatening manner toward Brome was improperly motivated and must be deemed a violation of NYCCBL § 12-306(a)(1) and (3).

We find that the disciplinary charges arising out of Levitant's refusal to meet with Director Waxman relating to the Autotime entries for leave requests to be specious at best. Although the January 2004 Charges indicated that on October 20, 2003 Levitant refused a notice for a supervisory conference with Director Waxman and refused a directive from Director Waxman, the record demonstrates that Levitant was not present at MAP Personnel Department on October 20, 2003 because, according to Levitant, he was out on medical leave and, according to the City, he was suspended until October 22, 2003. Since all the evidence presented indicates that Levitant was not present at MAP Personnel Department on October 20, 2003, it would have been impossible for Levitant to attend a meeting and/or act insubordinate toward Director Waxman that day. Thus, we find that this disciplinary charge is without foundation, and taken in context with HRA's previous anti-union actions, the statements of third-party witness statements of such animus, and the absence of evidence to rebut the Union's *prima facie* case, we conclude that the Union has carried its burden of proof. *See*, *e.g.*, *Hayut v. State University of New York*, 352 F.3d 733, 747 (2nd Cir. 2003) (perceivably innocuous acts, when taken in context, can raise to an actionably discriminatory level). Therefore, we find that HRA violated § 12-306(a)(1) and (3) of the NYCCBL.

Concerning the disciplinary charges relating to Levitant's AWOL status from September 10, 2003 to October 3, 2003, we find these charges also to be motivated by anti-union animus. Levitant, prior to his departure from the Brooklyn Field Office, scheduled a vacation from August 18, 2003 to September 9, 2003. Then, on the day he was supposed to return to work, he requested sick leave usage and provided medical documentation regarding the nature of the illness and the medical recommendation that he be allowed to miss work during the requested time period. This request was approved. We find it suspect that Levitant face disciplinary charges stemming from a sick leave request that was approved. Again, based upon the credible testimony of Moultrie, Alexander, Union Representative Santos, and Local 371 Organizer Turner that Levitant was targeted by HRA, that the sick leave request was approved and that the City has failed to rebut the Union's *prima facie* case, we find that these disciplinary charges violated NYCCBL § 12-306(a)(1) and (3) as well.

Turning to the decision not to promote Levitant on March 24, 2004, we find that this decision was not motivated by anti-union animus. The Union argues that having Director Anderson and Deputy Director Holt-Knight and/or Deputy Director Brown conduct the interviews and make the appointments to Supervisor I indicated that HRA had no intention on promoting Levitant. However, the record is clear that Director Anderson was the director of the Brooklyn Field Office, and she would have been the most logical person to interview candidates applying for a vacancy in that office. Additionally, in order to combat any allegation or appearance of impropriety, Director Anderson conducted the interviews with at least one other person. Even though Deputy Director Holt-Knight and Deputy Director Brown experienced problems with Levitant in the past, both served as the deputy directors of the Brooklyn Field Office and were the next most logical choices to interview candidates applying for a vacancy in that office. Therefore, in this instance, the mere fact

that Director Anderson and Deputy Directors Holt-Knight and Brown conducted Levitant's interview does not, *per se*, establish unlawful motivation under the NYCCBL.

The Union emphasized that HRA distributed a job vacancy notice indicating that there were four vacancies in the Brooklyn Field Office and that Levitant was, according to the documentary evidence, ranked third on the eligible list. However, the record is clear that only two candidates were hired that day. The Union also contends that another candidate, who had a lower ranked list number than Levitant but was "friends" with Director Anderson and Deputy Director Brown, was later hired to fill one of the two remaining vacancies. However, this allegation was unsupported by reliable evidence, and Levitant's recollection of hearsay is nothing more than conjecture and speculation and therefore is insufficient to sustain this claim of discriminatory action.

Based upon the fact that only two candidates were hired that day and both had higher ranked list numbers than Levitant and no past or pending disciplinary charges against them, we find that the Union did not carry its burden of proving that the decision not to promote Levitant into the Supervisor I vacancy at the Brooklyn Field Office was motivated by anti-union animus. Although we find Director Anderson's testimony regarding the incident vague, the documents provided and the Union's failure to present sufficient evidence calling into question the objective criteria used in making this decision, are not sufficient to establish that anti-union animus was the motivation for passing over Levitant. Thus, we dismiss this claim.

In sum, with the exception of the failure to promote Levitant into the Supervisor I title and HRA's initial decision to transfer Levitant out of the Brooklyn Field Office, we find that the weight of the uncontested evidence of anti-union animus, including the testimony of disinterested third party witnesses, the lack of proof that Levitant engaged in most of the charged misconduct, the

questionable credibility of Director Anderson and Deputy Director Brown, and other related inconsistencies, as well as the City's failure to proffer legitimate business reasons to explain HRA's actions, in total, support a finding that Levitant was discriminated because of his protected activity. *See Colella*, 79 OCB 27, at 61; *DC 37, AFSCME*, 77 OCB 33, at 35 (noting that "when a public employer offers, as a legitimate business defense, a reason that is unsupported by or inconsistent with the record, the defense will not be credited by this Board").

NYCCBL 12-306(a)(4)

We now shift our focus to the Union's allegation that HRA violated NYCCBL § 12-306(a)(4) when, in an attempt to undermine the negotiated grievance procedures set forth in the Agreement, HRA refused to respond to the various grievances and requests for arbitrations filed by either Levitant, Local 371, or the Union. We have held that "systematically disregarding a quintessential aspect of the parties' collective bargaining agreement, such as the grievance procedure, constitutes a deliberate interference with employees rights and amounts to a failure to bargain in good faith." *SSEU, Local 371*, 77 OCB 35, at 21; s*ee also DC 37, Local 1508*, 67 OCB 11, at 6 (BCB 2001), citing *Addison Central School District*, 17 PERB ¶ 3076 (1984) (repudiation of the grievance procedure, through a pattern of behavior, constitutes a breach of the duty to bargain). In other words, for a violation to be found, there must be "an ongoing course of behavior that essentially *de facto* carves out a provision of a collective bargaining agreement for willful non-enforcement." *SSEU, Local 371*, 77 OCB 35, at 21.

In our most recent decision addressing this issue, *SSEU, Local 371*, 77 OCB 35, we held that the employer engaged in a pattern of behavior designed to frustrate the contractually-mandated arbitral process component of the grievance procedure. In that case, the employer terminated an

employee, who then filed a grievance. Over the course of the next couple of years, while the grievance proceeded to arbitration, the parties, upon the direction of arbitrator presiding over the matter, entered into a stipulation to reinstate the employee while the grievance was being resolved. However, the agency refused to reinstate the employee, and, when the arbitrator ordered the employee be reinstated, the agency again refused. Then, in order to render moot the arbitration award, the agency issued dubious disciplinary charges against the employee and terminated the employee on different grounds. There, we found that the agency deliberately acted to frustrate the stipulation, knowingly ignored the arbitrator's award, and then issued additional disciplinary charges to ensure that the employee remained terminated. As such, we held that the agency "engaged in a pattern of behavior that was designed to set at naught and systematically frustrate the grievance procedure set forth in the [parties' collective bargaining] agreement, and interfered with the rights of its employees and breached its duty to bargain in good faith." *Id*. at 22.

The instant matter is distinguishable from the above-cited decision. The Union contends that the lack of responses to Levitant's grievances indicates that HRA attempted to frustrate the grievance procedures set forth in the Agreement. However, as the City correctly argues, these provisions contain deadlines by which an employee or a union can proceed to the next step without a determination from the agency. Thus, Levitant, Local 371, and/or the Union was not administratively prevented from initiating the next step in the grievance procedure.

Furthermore, the time delay between the initiation of the grievances and their resolution was not caused by HRA's intent to frustrate the collective bargaining process, but by the various scheduling conflicts created when attempting to coordinate cases in three distinct forums. At various times during the instant matter, Levitant has had two cases before OATH, approximately six cases

before an arbitrator, and three improper practice petitions before this Board. In this case alone, ten hearing days were required, which spanned from March 31, 2006 to May 4, 2007. While most of Levitant's timely grievances against HRA were filed in November and December 2003, the records in these arbitrations were closed in 2006, more than two years after the filing of the grievances. Therefore, the sheer volume of material and the scope of Levitant's disputes with HRA tended to slow down the various forums that have been chosen to resolve these matters. As such, the Union's contention that HRA deliberately frustrated the grievance procedure by engaging in unnecessary delay is unfounded.

Remedies

With regard to remedies in the instant matter, we order that, due to the independent violation of NYCCBL § 12-306(a)(1), HRA and its management shall cease and desist from interfering with, restraining, and/or coercing Levitant or other HRA employees from invoking their statutory rights. Due to HRA's violation of NYCCBL § 12-306(a)(1) and (3), HRA and its management shall cease and desist from engaging in all discriminatory actions aimed at discouraging membership and participation in Local 371 or the Union and engaging in a campaign of retaliation and discrimination. Furthermore, HRA shall post the attached notice detailing its violations of the NYCCBL. HRA must also expunge the disciplinary charges levied upon Levitant in October 2003 and January 2004 that were discussed herein and were found to have been motivated by HRA's anti-union animus.[36]

[36] Despite our decision in the instant matter, as well as in *DC 37*, 1 OCB2d 6 (BCB 2008), which is a companion case involving Levitant, there is no basis to order rescission and expungement of the overall disciplinary penalty imposed, Levitant's termination, because OATH had proper jurisdiction over the disciplinary matters before it, and found Levitant guilty of a majority of the specifications set forth in six sets of disciplinary charges.

Throughout the hearing, Levitant made requests for various other remedies that are outside the scope of this Board to order, such as the levying of disciplinary charges against Director Anderson, Deputy Director Brown, Martha Barnes, Martin Brome, and every other HRA supervisor by which he felt slighted, the reinstatement of his health insurance, which was suspended due to his termination, the issuance of a restraining order against HRA to prevent them from retaliating against the witnesses who testified on Levitant's behalf, an order of protection from HRA for Levitant, and an acknowledgment of wrongdoing and formal apology in the various New York City newspapers. The NYCCBL did not grant this Board plenary authority to award such remedies, and therefore, we decline to do so. *See e.g.*, *Colella*, 79 OCB 27.

ORDER

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

ORDERED, that the improper practice petition filed by District Council 37, on behalf of Zinovy Levitant, docketed as BCB-2375-04 and BCB-2391-04, be, and the same hereby is granted in part; and it is further

ORDERED, that the improper practice petition filed by District Council 37, on behalf of Zinovy Levitant, docketed as BCB-2375-04 and BCB-2391-04, be, and the same hereby is denied in part; and it is further

ORDERED, that HRA and its management cease and desist from interfering with, restraining, and/or coercing Zinovy Levitant or other HRA employees from invoking their statutory rights under NYCCBL § 12-305; and it is further

ORDERED, that HRA and its management cease and desist from engaging in all discriminatory actions aimed at discouraging membership and participation in Social Service Employees Union, Local 371 or District Council 37 and engaging in a campaign of retaliation and discrimination; and it is further

ORDERED that HRA expunge the disciplinary charges levied upon Zinovy Levitant in October 2003 and January 2004 that were discussed herein and were found to have been motivated by anti-union animus, if they have not done so already; and it is further

ORDERED that HRA post appropriate notices detailing the above-stated violations of the NYCCBL.

Dated: New York, New York
January 23, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued Decision No. 1 OCB2d 5 (BCB 2008), determining an improper practice petition between District Council 37, and the City of New York and the New York City Human Resources Administration.

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

ORDERED, that the improper practice petition filed by District Council 37, on behalf of Zinovy Levitant, docketed as BCB-2375-04 and BCB-2391-04, be, and the same hereby is granted in part; and it is further

ORDERED, that the improper practice petition filed by District Council 37, on behalf of Zinovy Levitant, docketed as BCB-2375-04 and BCB-2391-04, be, and the same hereby is denied in part; and it is further

ORDERED, that HRA and its management cease and desist from interfering with, restraining, and/or coercing Zinovy Levitant or other HRA employees from invoking their statutory rights under NYCCBL § 12-305; and it is further

ORDERED, that HRA and its management cease and desist from engaging in all discriminatory actions aimed at discouraging membership and participation in Social Service Employees Union, Local 371 or District Council 37 and engaging in a campaign of retaliation and discrimination; and it is further

ORDERED that HRA expunge the disciplinary charges levied upon Zinovy Levitant in October 2003 and January 2004 that were discussed herein and were found to have been motivated by anti-union animus, if they have not done so already; and it is further

ORDERED that HRA post appropriate notices detailing the above-stated violations of the NYCCBL.

The New York City Human Resources Administration
(Department)

Dated: _____

(Posted By)
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.