DC 37, 1 OCB2d 6 (BCB 2008)

(IP) (Docket No. BCB-2507-05), **appeal pending.**

Summary of Decision: The Union alleged that HRA levied unwarranted disciplinary charges against an employee for the unauthorized release of confidential client information, in retaliation for the filing of numerous grievances and improper practice petitions, for his participation in an out-of-title arbitration, and for his zealous advocacy of other employees. The City claimed that the disciplinary charges against this employee were levied due to the violation of HRA's policy on client confidentiality and was not motivated by the employee's protected activity. The Board found that the Union satisfied its *prima facie* burden that the disciplinary charges against the employee were improperly motivated, and the City's proffered legitimate business reason was a pretext for disciplining the employee. Accordingly, the Board grants the Union's petition. ***(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 September 28, 2005, 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) and (3). The Union claims that HRA retaliated against Levitant by levying disciplinary charges alleging Levitant disclosed confidential information during an out-of-title arbitration. The Union claims HRA's issuance of these charges was motivated by Levitant's filing of numerous grievances and improper practice petitions, his participation in the out-of-title arbitration, and his zealous advocacy of other employees. The City maintains that Levitant's disclosure of confidential information was not protected activity, and that the disciplinary charges levied against him were not motivated by any of his protected activity. Rather, HRA had a legitimate business reason to bring charges against Levitant because he violated the explicit language set forth in HRA's policy on client confidentiality. We find that HRA's issuance of disciplinary charges against Levitant for disclosing allegedly confidential information during his out-of-title arbitration was motivated by HRA's anti-union animus, and its proffered business reason was a pretext for discipline. Accordingly, the petition is granted.

BACKGROUND

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

Procedural Background

On January 8, 2004, the Union filed an improper practice petition on behalf of Levitant, docketed by the Board of Collective Bargaining ("Board") as BCB-2375-04, alleging that HRA violated NYCCBL § 12-306(a)(1)-(5). The Union claimed that HRA interfered with Levitant's

statutorily protected rights; chilled collective activity in the work place by targeting and intimidating Levitant, who was a delegate at the time; 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 maintained 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, against HRA alleging that HRA violated NYCCBL § 12-306(a)(1), (3), and (4). The Union in this second petition claimed that HRA violated the NYCCBL by bringing additional disciplinary charges against Levitant in retaliation for his filing of grievances and by failing to promote him into a supervisory position. The Union further averred that HRA refused to bargain in good faith by failing to respond to the numerous grievances filed by Levitant. The City maintained 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 reasons set forth in the charges and specifications. The City also maintained 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 claimed that

the failure to respond to Levitant's grievances does not violate the NYCCBL, since the Agreement allows a party to advance a grievance to the subsequent step, once the other party fails to respond.

Since the first and second petitions 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 petitions.

On September 28, 2005, the Union, on behalf of Levitant, filed a third improper practice petition, which is docketed as BCB-2507-05, and is addressed in the instant decision.

Factual Background

On February 8, 1993, Levitant was hired as a Caseworker by the Child Welfare Administration, which was subsequently renamed the Administration for Children's Services. In 2000, Levitant began working for HRA in Adult Protective Services ("APS") in the same title. As a Caseworker, Levitant was responsible for ensuring that mentally and physically impaired clients who were under the care of HRA received appropriate services by making field visits to clients' homes, recording his findings, and ensuring that these clients were adhering to the mandates prescribed by the programs.

In May 2001, employees in APS elected Levitant as first alternate delegate for Social Service Employees Union, Local 371 ("Local 371"). Shortly thereafter, Levitant began filing complaints on behalf of the employees at APS with his supervisors regarding, *inter alia*, alleged health and safety issues and alleged harassing treatment of the employees at APS by their supervisors. In May 2002, APS employees elected Levitant shop steward. Over the course of the next two years, Levitant filed numerous grievances, filed the above-referenced improper practice petitions, participated in his hearings at the New York City Office of Administrative Trials and Hearings ("OATH"), and

requested the Union to file at least six requests for arbitration on his behalf.

On August 7, 2002, Charges and Specifications were levied against Levitant ("August 2002 Charges"). In these charges, HRA accused Levitant of 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, and engaging in conduct prejudicial to good order and in conduct detrimental to HRA. Specifically relevant to this action, the August 2002 Charges state, in pertinent part: "On or about June 25, 2002, when Dr. Kennedy, Supervisor III, directed you to make a field visit to participant H[],[1] because she was facing an eviction, you failed to follow this directive."[2]

On November 3, 2003, Levitant was involuntarily transferred 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 would receive certain services such as personal care assistants, registered nurses, and physical, occupational, and speech therapists ("Lombardi Program"). According to Charles Waxman, the Director of Personnel for the Medical Insurance Community Services Administration, Executive Deputy Commissioner Iris Jimenez-Hernandez made the

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[1] In order to abide by the terms of HRA's Confidentiality Policy, we abstain from using the last name of the HRA client whose last name was used, in its entirety by HRA, in the August 2002 Charges.

[2] This Board, taking administrative notice that during the hearing concerning the earlier-filed improper practice petitions, the August 2002 Charges were submitted as an exhibit, cites to this exhibit quoting Charge I, Specification III of the August 2002 Charges. By incorporation, Charge II, Specification I, Charge V, Specification I, and Charge VI, Specification I refer to Charge I, Specification III as grounds for additional disciplinary charges.

decision to transfer Levitant into the Lombardi Program.[3] The employees at the Lombardi Program work with outside vendors to ensure that their particular clients receive the services to which they are entitled because HRA does not actually provide any of these services themselves.

Levitant testified that, while working at the Lombardi Program, he 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 home 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 employees performing the same duties as Levitant held the civil service title of either Supervisor I or Supervisor II.[4]

On December 5, 2003, Levitant filed a grievance with Local 371 regarding his performance of duties that were substantially different from those performed by a Caseworker. 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 February 23, 2004, the Union filed for arbitration concerning this out-of-title grievance, and hearing dates were eventually scheduled for March 24, 2005 and April 8, 2005.

Prior to this arbitration, on May 26, 2004, Levitant appeared before OATH on a set of disciplinary charges levied against him by HRA. During this hearing, the Director of APS in

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[3] One of the contentions in the above-referenced improper practice petitions previously filed by Levitant is that HRA transferred Levitant for retaliatory reasons.

[4] This Board takes administrative notice that during the hearing concerning the earlier-filed improper practice petitions, Debora Daniel-Preudhomme, the Director of the Lombardi Program, testified that Case Manager is synonymous with the titles of Supervisor I and Supervisor II. Furthermore, HRA records corroborate the fact that Levitant was the only Caseworker assigned to the Lombardi Program as a Case Manager.

Brooklyn, Eileen Anderson, and Martha Barnes, Levitant's supervisor in APS in Brooklyn, testified. Levitant, who was present during this OATH proceeding, testified in the instant matter that HRA's witnesses at this OATH proceeding "openly discussed" clients' names and clients' financial and medical information. (Tr. 82-83).[5] In fact, according to the transcript in this OATH proceeding, Barnes and Director Anderson on six separate occasions used APS patients' names, mentioned issues that arose in a particular client's case, discussed the fact that one named client participates in a specific program, and the manner in which excess funds checks are distributed to clients at APS in Brooklyn.[6] (Union Exs. 7-12).

In March 2005, approximately two days prior to the first arbitration hearing date in Levitant's out-of-title case, he reviewed the case files on which he worked because he wanted to present documents to the arbitrator that demonstrated that he was performing the duties of a Supervisor I and/or II by acting as a Case Manager in the Lombardi Program. He found and removed at least six documents from these case files, and approached his immediate supervisor at the time, Nathan Weiner, to discuss his use of these documents at his out-of-title arbitration. Levitant testified that he said to Weiner "I need to show to the arbitrator something in order to prove my grievance. Would you mind if I bring these papers, and I showed him in particular what I needed as evidence to show that I was doing out of title jobs." (Tr. 28). According to Levitant, he showed Weiner "not real documents . . . not medical records, . . . just attachments to the hard copy [of the case file] . . . with

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

[6] Levitant, while at APS in Brooklyn, handled clients who are part of a program under which HRA pays their bills and rent out of the public assistance funds allocated to these clients and 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.

client's name and article [case/tracking] number." (Tr. 25). Levitant testified that Weiner responded "no problem, this is not a big deal." (Tr. 30). Levitant further testified that if Weiner had objected, Levitant would not have presented the documents at the out-of-title arbitration. Levitant then made photocopies of these documents because he did not want to remove the originals from the case files, and returned those case files to his desk. Moreover, Levitant testified that the only reason he was going to submit these documents was to support his out-of-title grievance and that he had no intention of distributing this information to the general public. (Tr. 31).

On March 24, 2005, Levitant appeared before the arbitrator for the first day of hearing in his out-of-title grievance. During this hearing, Levitant presented the documents which Weiner allegedly reviewed. (City Ex. 1). The first document was a Notice of Authorization, dated March 22, 2004. This notice is a form letter containing the name of the Lombardi Program client, his/her address, his/her Medicaid number, the date when approved services would commence, and the name of the provider of those services; however, the approved services are not listed on this document. (Union Ex. 2). Levitant then presented another Notice of Authorization, dated May 20, 2004, which contained the same type of information as the previous notice of authorization. (Union Ex. 3). The next document presented at the arbitration was an Internal Tracking Form for the Lombardi Program, dated June 18, 2004. According to Levitant, this document is an intake form, is completed by the intake clerk, and accompanies every case that the Lombardi Program handles. This particular intake form contains, *inter alia*, the name of the Lombardi Program patient and the Case Identification Number, and the Case Manager and staff nurse to which the case is assigned. (Union Ex. 1).

At the first day of arbitration, the Union also presented a list of clients' names, a list of services that had been denied by providers, and a request that a reassessment occur to grant these

clients such waived services. (Union Ex. 4). In addition, the Union presented a Notice of Intent to Discontinue Participation, dated November 16, 2004. This document contained the client's name and address, the Case Identification Number, the provider's name and address, and the reason for the discontinuation of services from the Lombardi Program. (Union Ex. 5). The final document presented to the arbitrator by the Union was a memorandum from Levitant to a provider, dated March 2, 2005, indicating that the assessment package from the provider was missing certain necessary information and/or documentation. This document contained the name of the client and the provider and the type of information that was missing. (Union Ex. 6).

When the Union presented these documents to the arbitrator on the first day of the arbitration, the City objected to their admissibility on various grounds, but never on the basis that these documents contained confidential information. (City Exs. 1 and 2). Furthermore, not only was Counsel for the City present during the admission of these documents in the arbitration record, the Deputy Director of the Lombardi Program, Janet Lugo, was present and testified on that first arbitration day. According to Levitant, "[n]o one raised any issues regarding confidentiality at this [first day of] hearings." (Tr. 62).

According to the Director of the Lombardi Program, Margaret Quinn, immediately prior to the second arbitration hearing, which was held on April 8, 2005, Counsel for the City presented her with the documents Levitant previously introduced into evidence on the first hearing day. Director Quinn testified that she was unaware prior to that moment that Levitant intended to use and/or did use those documents in the arbitration. She stated that, when presented with these documents she said, "these are live client records, these cannot be in evidence . . . because this is people's names, addresses, [and] personal health information." (Tr. 240). Director Quinn further testified that

Weiner was present when she made this remark.

On April 8, 2005, the second hearing day in the arbitration, Weiner testified with regard to the duties Levitant performed at the Lombardi Program, the providers with which he dealt, and the services that he provided to the Lombardi Program's clients and their specific providers. (City Ex. 2). On direct examination, Weiner testified regarding Levitant's issuance of the notices of authorization for services to individual clients, the internal tracking form, and the list of clients' names, and the services that one particular provider had waived with respect to those clients (*Id.*, pp. 263-264, 268 and 295). In fact, during his direct examination, he testified about some of the documents presented by Levitant at the first arbitration date during his direct examination, even though Weiner was present when Director Quinn represented that the documents were confidential.

Also on this second day of the arbitration hearing, Director Quinn testified about the providers with which Levitant worked and the particular duties Levitant had with respect to each provider. However, she did not testify about the documents and was never asked whether Levitant's introduction of these documents was improper or violative of any rule, regulation, or statute. (City's Post Hearing Brief, p. 3). During the second day of the arbitration hearing, Weiner, Director Quinn, and Counsel for the City never indicated to the arbitrator, Levitant or Counsel for the Union that these documents contained confidential information.

According to Director Quinn, upon leaving the arbitration, she contacted Assistant Deputy Commissioner Bridget Simone regarding Levitant's use of these documents in the arbitration, who informed Director Quinn to refer the matter to Director Waxman. According to Directors Quinn and Waxman, they decided that Levitant's disclosure of this information violated HRA's rules and regulations as well as state and federal statutes. Thus, they forwarded a request for the issuance of

disciplinary charges against Levitant for violating Executive Order No. 651, dated December 17, 1998 ("Code of Conduct") to HRA's Employee Discipline Unit ("EDU").[7] On June 30, 2005, HRA levied a set of disciplinary charges against Levitant ("June 2005 Charges"). Levitant testified that HRA "served" these charges upon him by placing them on his desk in view of any employee who passed his desk. (Tr. 66).

HRA Code of Conduct § II-C states: "It is the responsibility of each employee at all times to respect and safeguard the confidential nature of information concerning public assistance applicants and participants, as well as the confidential nature of information pertaining to [HRA's] employees, property and affairs as prescribed by law." Additionally, though not mentioned or referenced in the disciplinary charges, the City alleges that Levitant's use of those documents at the arbitration violated Executive Order No. 702, dated March 8, 2005 ("Confidentiality Policy"). This provision states, in pertinent part:

> ***Definition of Confidentiality***
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> A confidential document is one containing confidential information, which is defined as any information that is secret, private or not for public dissemination. For purposes to this policy, information is considered confidential when a federal state or local law or regulation, or directive memorandum judicial decree, stipulation, settlement or some type of pre-existing agreement deems it confidential. Most [HRA] records and all client records are deemed to be confidential.
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> General privacy provisions apply to the release of, and/or sharing of, certain demographic information, including, but not limited to, social security numbers,

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[7] Director Waxman's office reviews requests for the issuance of disciplinary charges and the accompanying supporting documentation, such as witness statements. If the request is determined to be valid, Director Waxman will forward the request to EDU "for whatever appropriate action they take." Upon receipt, EDU reviews the request and supporting documentation, and they decide to draft disciplinary charges or determine there is insufficient evidence to do so. Otherwise, EDU will prepare charges and send those draft charges to HRA's Employment Law Division ("ELD").

> financial and marital status.
>
> In addition, specific confidentiality laws and regulations apply to information that discloses, or might disclose:
> 1) an individual's health, including mental health, status or treatment history;
> 2) an individual's HIV status;
> 3) that the individual has been diagnosed or treated for substance and/or alcohol abuse;
> 4) domestic violence history . . .;
> 5) that a particular individual has applied for, has received or currently is a recipient of public assistance, food stamps, Medicaid or other public assistance benefits;
> 6) immigration status;
> 7) an individual's involvement with child welfare services;
> 8) any case specific information related to enforcement of child support obligations or the establishment of paternity; and/or
> 9) any information concerning an applicant of adult protective services.
>
> Disclosing confidential information is harmful to HRA's clients. It also harms [HRA] by causing the public to lose trust in [HRA's] ability to protect confidential information. Improper disclosure of confidential information is often a violation of the law, and can lead to financial liability for [HRA].
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> Additionally, any employee who improperly or illegally discloses confidential information may be subject to civil fines, a private lawsuit or criminal prosecution, and may also be subject to employee discipline or discharge. Employees and other staff are advised that the improper disclosure of confidential information will be deemed outside the employee's duties and the City of New York may refuse to legally defend or indemnify any employee found guilty or liable for violation of confidentiality or privacy laws.

(City Ex. 7).[8]

In addition, though not mentioned or referenced in the disciplinary charges, the City in the instant matter alleges that Levitant's use of those documents at the arbitration violated N.Y. Social Services Law § 473-e. This section, entitled "Confidentiality of Protective Services for Adults' Records," states, in pertinent part:

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[8] This exhibit was submitted by the City in its case in chief, and, we note that this document is incomplete, and missing pages three and six in their entirety.

2. Reports made pursuant to this article, as well as any other information obtained, including but not limited to, the names of referral sources, written reports or photographs taken concerning such reports in the possession of the department or a social services district, shall be confidential and, except to persons, officers and agencies enumerated in paragraphs (a) through (g) of this subdivision, shall only be released with the written permission of the person who is the subject of the report, or the subject's authorized representative, except to the extent that there is a basis for non-disclosure of such information pursuant to subdivision three of this section. Such reports and information may be made available to:

(a) any person who is the subject of the report or such person's authorized representative;

(b) a provider of services to a current or former protective services for adults client, where a social services official, or his or her designee determined that such information is necessary to determine the need for or to provide or to arrange for the provision of such services;

(c) a court, upon a finding that the information in the record is necessary for the use by a party in a criminal or civil action or the determination of an issue before the court;

(d) a grand jury, upon a finding that the information in the record is necessary for the determination of charges before the grand jury;

(e) a district attorney, an assistant district attorney or investigator employed in the office of a district attorney, a member of the division of state police, or a police officer employed by a city, county, town or village police department or by a county sheriff when such official requests such information stating that such information is necessary to conduct a criminal investigation or criminal prosecution of a person, that there is reasonable cause to believe that the criminal investigation or criminal prosecution involves or otherwise affects a person who is the subject of a report, and that it is reasonable to believe that due to the nature of the crime under investigation or prosecution, such records may be related to the criminal investigation or prosecution;

(f) a person named as a court-appointed evaluator or guardian in accordance with article eighty-one of the mental hygiene law, or a person named as a guardian for the mentally retarded in accordance with article seventeen-A of the surrogate's court procedure act; or

(g) any person considered entitled to such record in accordance with applicable law.

(Answer, ¶ 32).

On September 28, 2005, the Union filed on behalf of Levitant the instant improper practice petition alleging HRA violated NYCCBL § 12-306(a)(1) and (3) for interfering with and discouraging employees in participating in grievance, arbitration, and improper practice proceedings by levying disciplinary charges against Levitant; and retaliating against Levitant by levying these charges against him for his filing of numerous grievances and improper practice petitions, for his participation in an out-of-title arbitration, and for his zealous advocacy of other employees. For relief, the Union seeks an order instructing HRA to cease and desist: all discriminatory actions aimed at discouraging membership and participation in Local 371 or the Union; interfering with, restraining or coercing Levitant from engaging in Union activities; and engaging in a campaign of retaliation and discrimination against Levitant. The Union also seeks rescission and expungement of Levitant's personnel records and cessation of any pending disciplinary proceedings connected with the issues addressed herein, payment of back pay, and posting of notices.

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 the Office of Collective Bargaining ("OCB") for the sixth hearing day in Levitant's two other improper practice cases, which the parties scheduled on May 19, 2006.[9] The start of the hearing, which was scheduled to begin at 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 OCB and the Union that these employees had been released and were not at their respective

[9] The events of October 30, 2006 and May 4, 2007 arose out of the litigation of Levitant's two other improper practice cases before this Board. However, since the Trial Examiner in the instant matter also presided over those two cases, we take administrative notice of the events that occurred on those dates, to the extent that they are relevant to the instant matter.

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 June 2005 Charges.[10] 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 OATH ALJ Tynia D. Richard, who was presiding over the disciplinary proceeding. 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. 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 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 not participate in the OATH proceeding due to his required attendance in the OCB hearing being held simultaneously.

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

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[10] The OATH proceeding on that day, which involved the June 2005 Charges was scheduled by OATH shortly before July 26, 2006, which was 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 disciplinary proceedings received said notice.

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 February 2, 2007, OATH ALJ Richard issued her Report and Recommendations regarding, *inter alia*, the June 2005 Charges ("February 2007 OATH Determination").[11] Regarding the relevant event and issues, ALJ Richard stated the following:

> Ms. Quinn testified that she attended an arbitration hearing at the Office of Labor Relations at which Mr. Levitant presented his grievance for out-of-title work. At the hearing, in defense of his claim, [Levitant] put in evidence documents that contained confidential client information, and he did so without the permission or authority of [HRA]. She said that documents submitted in blank, or redacted, would have accomplished Mr. Levitant's purposes.
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> Ms. Quinn produced the documents, which contain clients' personal health information and confidential identifying information such as address and Medicaid numbers. Under HRA's confidentiality rules, she explained, employees were precluded from exposing these details to anyone who does not have an absolute need to know them. Besides HRA's confidentiality rules, Ms. Quinn said he also violated HIPAA, the federal Health Insurance Portability and Accountability Act. Ms. Quinn wrote a memo describing this occurrence. She said that all employees had been instructed about the importance of upholding the confidentiality of client records and were given training on the new HIPAA law in 2002.
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> [HRA] sustained its charge that [Levitant] committed misconduct by disclosing confidential client information without permission or authority and without an absolute need to do so.

(February 2007 OATH Determination, p. 12) (internal quotation marks and transcript references omitted). ALJ Richard did not rely upon the testimony of Weiner when rendering the determination that Levitant disclosed confidential client information in violation of HRA's rules, even though he testified before ALJ Richard in that proceeding.

In addition to deciding the validity of the June 2005 Charges, ALJ Richard heard evidence

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[11] For the reasons set forth in the February 2007 OATH Determination, ALJ Richard held that the OATH proceeding would not be adjourned.

from HRA on five other sets of disciplinary charges, including Levitant being absent without leave for about a month, threatening supervisors on at least two occasions, and "excessive engagement of non-work related activities while producing minimal amounts of work." (February 2007 OATH Determination, pp. 14-15). ALJ Richard found Levitant guilty of the June 2005 Charges, as well as a majority of the others. As a result of her findings, ALJ Richard recommended termination as the appropriate penalty for the finding of all these violations.

On March 15, 2007, on the first hearing day in the instant matter, the Union introduced two memoranda from HRA supervisors to Levitant which contained his social security number on them. These memoranda addressed disciplinary issues relevant to Levitant's previously-filed improper practice petitions, which were presented by HRA in OATH proceedings as documentary support of the disciplinary charges detailed therein.[12]

On May 4, 2007, the final hearing day in Levitant's two other improper practice cases, 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 in that matter, all of which corresponded to the dates scheduled for that improper practice proceeding. Then, Deputy Director Ambrose forwarded this e-mail to Deborah Middleton, Counsel for HRA, and Director Waxman. Middleton then sent an e-mail to the employees who were to be released for Levitant's

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[12] This Board takes administrative notice that, on February 2, 2007, during one of the hearing dates in the previously-filed improper practice petitions, HRA, as part of its case in chief presented an Appointment Screening Log, dated March 24, 2004, which contained the names and social security numbers of the five candidates Director Anderson interviewed on that day for the promotional vacancies in the Supervisor I title within APS.

improper practice hearing. That e-mail informed the witnesses that they were to report, on the following Monday, October 30, 2006 to OATH for Levitant's disciplinary hearing, and gave them the address for that agency.

On June 21, 2007, the arbitrator in Levitant's out-of-title grievance issued his award finding that, although Levitant worked with employees who were in the titles of either Supervisor I or Supervisor II and performed similar duties to these other employees, "the Union failed to adduce sufficient evidence to constitute a *prima facie* out-of-title claim." (Arbitration Award in A-10408-04, p. 12). Simply, "Levitant's testimony did not prove that the duties he was assigned by [HRA] . . . fell substantially outside the scope of the responsibilities and duties outlined in the job specification for the positions of Caseworker." (*Id.* at 13).

POSITION OF THE PARTIES

Union's Position

The Union claims that HRA violated NYCCBL § 12-306(a)(1) by interfering with employees' participation in grievance, arbitration, and improper practice proceedings by bringing disciplinary charges against Levitant for presenting documentary evidence in support of his out-of-title claim.[13] Due to the disciplinary charges against Levitant, employees now fear disciplinary

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[13] 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;
* * *
(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;

(continued...)

reprisal for participation in arbitration and the presentation of evidence in support of their claim. Thus, HRA has discouraged employees' use of the grievance, arbitration, and improper practice procedures available to them, thereby violating their rights under the NYCCBL.

The Union also contends that HRA violated NYCCBL § 12-306(a)(1) and (3) by issuing disciplinary charges against Levitant in retaliation for filing numerous grievances and improper practice petitions, for his participation in an out-of-title arbitration, and for his zealous advocacy of other employees. To establish a casual connection between the protected activity and the adverse action, the Union highlights that HRA served these disciplinary charges only a month and a half after the out-of-title arbitration hearing, thereby establishing temporal proximity, and that, when given the opportunity to raise an objection at the arbitration regarding the disclosure of these allegedly confidential documents, HRA allowed them to be submitted into evidence, thereby setting a "trap" for Levitant. (Union's Post Hearing Brief, p. 14).

The Union also argues that HRA targeted Levitant and subjected him to disparate treatment. HRA was unable to demonstrate that they enforced the confidentiality policy or issued disciplinary charges for violating such policy in arbitration against any employee other than Levitant. Furthermore, HRA failed to object to the disclosure and dissemination of these allegedly confidential documents at the arbitration. Rather than uphold the Confidentiality Policy, HRA permitted Levitant to introduce these documents, thereby permitting him to incriminate himself.

Finally, the Union argues that HRA cannot establish a legitimate business reason because it

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[13](...continued)
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.

acquiesced in the disclosure and dissemination of confidential information by not objecting to Levitant's presentation of these documents. Moreover, HRA, during the out-of-title arbitration, previous OATH hearings, and previous proceedings before this Board, permitted its agents to disclose similarly confidential information, and it used the confidential information disclosed by Levitant in those respective proceedings against him. Therefore, HRA's attempt to defend its adverse actions against Levitant as motivated by legitimate business reasons is purely pretextual.

City's Position

The City contends that the Union's claims that HRA interfered with and discouraged participation in statutorily protected rights set forth in NYCCBL § 12-305 and retaliated against Levitant for such participation, are without merit. First, even though filing of grievances and improper practice petitions and participating in arbitrations are protected activities, the act of disclosing confidential information is in violation of HRA policy, as well as state and federal laws. The activity protected by this Board under the NYCCBL must be read consistent with other provisions of statutes, and, when Levitant submitted unredacted documents containing clients' confidential information at the arbitration, he violated those state and federal statutes. Accordingly, the Board cannot, in contravention of other state and federal statutes, offer protection to the act of disclosing confidential client information.

The City further argues that the issuance of disciplinary charges against Levitant was not motivated by his protected activity, but rather by his violation of the Confidentiality Policy, and state and federal law. Upon learning of Levitant's disclosure of confidential information during the first day of the arbitration, HRA sent this matter through typical supervisory channels; and, after review by Director Waxman, EDU, and ELD, disciplinary charges were issued because Levitant violated

the clear and unambiguous terms of the Confidentiality Policy. Additionally, assuming *arguendo*, that this Board decides that the Union satisfies its *prima facie* burden, HRA possessed a legitimate business reason to levy such charges, pursuant to NYCCBL § 12-307(b) for the reasons set forth in the charges.[14] HRA asserts that the June 2005 Charges were motivated by a legitimate interest in maintaining its clients' information confidential and its need to remain in compliance with state and federal laws. Therefore, HRA's decision to discipline Levitant acting in contravention of these legitimate interests is justified.

Finally, the City contends that this Board is bound by the factual findings and legal determinations set forth in the February 2007 OATH Determination. Since ALJ Richard found that Levitant disclosed confidential client information at the out-of-title arbitration, that such disclosure violated the Confidentiality Policy, and that such violation warranted the issuance of disciplinary charges against him, this Board cannot rule to the contrary because, pursuant to collateral estoppel, the issues in the instant matter have already been decided by another adjudicatory authority, and Levitant had a full and fair opportunity to litigate the issues.

DISCUSSION

The main issue presented in the instant matter is whether the levying of the June 2005 Charges against Levitant by HRA for disclosing confidential information within the context of his

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[14] 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 . . . .

out-of-title arbitration was motivated by Levitant's protected activity.

However, prior to reaching a conclusion on the merits, we must first determine to what extent, if any, our review of this matter should be guided by the February 2007 OATH Determination. Specifically, we must determine whether we are required to give this OATH determination preclusive effect. For the reasons set forth below, we decline to apply the doctrine of collateral estoppel to the February 2007 OATH Determination.

In determining whether to afford preclusive effect, or otherwise adopt any findings contained in the February 2007 OATH Determination, we must note that the doctrine of collateral estoppel may not apply to OATH determinations in general. *See DC 37*, 1 OCB2d 5, at 56-57 (BCB 2008) citing *Locurto v. Giuliani*, 447 F.3d 159, 170-171 (2nd Cir. 2006) (refusing to apply collateral estoppel to OATH determinations because the non-binding nature of the OATH ALJ's determination on the employer "deprived [employees] of the opportunity to litigate his claim fully and fairly before a neutral arbitrator"); *see also*, *Colon v. Coughlin*, 58 F.3d 865, 870-871 (2nd Cir. 1995). As explained in more detail in *DC 37*, 1 OCB2d ??, because this state's courts have neither adopted nor rejected these Second Circuit decisions, nor otherwise resolved this issue, we decline at this time to determine whether to apply this holding. In any event, the findings of fact and conclusions of law comprising of the February 2007 OATH Determination cannot be awarded preclusive effect because Levitant was not afforded a full and fair opportunity to be heard in the proceeding that gave rise to that 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).

Concerning the first prong, we look to whether the issues presented before this Board were identical to issues that were presented before and necessarily decided by the previous adjudicatory body. *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*, 58 F.3d at 870-871 (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).[15] In *Colella*, 79 OCB 27, at 59 (BCB 2008), we applied collateral estoppel to an arbitrator's award that found an employee had not engaged in misconduct, had been wrongfully charged with discipline and had been improperly terminated. *See also Matter of Guimarales*, 68 N.Y.2d 989, 991 (1986) (court held that arbitrator's award afforded preclusive effect where arbitrator's factual findings addressed identical issues that were before the Unemployment Insurance Board).

The second criterion in the test for collateral estoppel is the determination of whether a party was afforded "a full and fair opportunity to litigate" the material issues in the previous forum. *See Locurto*, 447 F.3d at 170. To determine whether there was such an opportunity, the courts will

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[15] 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); *Colon*, 58 F.3d at 869.

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). 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." *Ryan*, 62 N.Y.2d at 501.

Here, we find that the February 2007 OATH Determination does not satisfy this two-pronged standard, thus, we refrain from applying collateral estoppel. As in *DC 37*, 1 OCB2d 5, which is Levitant's previous improper practice cases that have been decided this day, we decline to follow ALJ Richard's findings because Levitant was not awarded a full and fair opportunity to be heard, under any applicable standard. First, on October 30, 2006, we find that he acted with the reasonable belief that he would not be expected to participate in two forums, which would have been impossible for him to accomplish. Furthermore, based upon the Trial Examiner's instructions to Levitant to request for an adjournment, Levitant's instruction to his counsel to do so, and the communications by the Trial Examiner to ALJ Richard, Levitant had a reasonable expectation that the OATH proceeding would not go forward in his absence. *See Mari v. Safir*, 291 A.D.2d 298 (1st Dept. 2002), *lv. den*, 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 office avoided service of the notice of hearing and intentionally absented himself from the hearing). Additionally, even though Levitant could have acted differently on that day, the facts remain that Levitant did not disrespect OATH or its disciplinary process.

Furthermore, from the time the OATH hearing was scheduled, HRA knew of this conflict and made no attempts to resolve it. On October 30, 2006, HRA appeared at both forums and did not inform the Trial Examiner of the concurrent disciplinary proceeding at OATH, even though Deputy Director Ambrose, who was the original recipient of Counsel for the City's e-mail, attended the improper practice hearing that day and never informed the Trial Examiner of Levitant's concurrent OATH proceeding. Furthermore, HRA attempted to benefit from the scheduling conflict by not joining in Levitant's request for an adjournment at OATH and by fully participated in both forums.

Levitant's ability to obtain a full and fair opportunity to litigate the June 2005 Charges before OATH was further compromised by ALJ Richard's denial of the request for an 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.

As in *DC 37*, 1 OCB2d 5, 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. *See id.*, 1 OCB2d ??, at __ (employee was placed in an untenable position, when, having already appeared at an improper practice hearing, he was nonetheless compelled to litigate before OATH, which resulted in him being forced to proceed simultaneously before two tribunals); *see also Locurto*, 447 F3d at 170-171 (finding that an OATH determination is not given preclusive effect because this determination could not satisfy the second criterion of the test for collateral estoppel); *Johnson v. County of Nassau*, 480 F.Supp2d 581, 608-

609 (E.D.N.Y. 2007).

Though our decision not to apply collateral estoppel in the instant matter does not require us to decide whether the February 2007 OATH Determination satisfies the "identity of issue" prong of the collateral estoppel standard, we are nonetheless compelled to discuss this criterion. This OATH determination dealt with many of the same factual questions that are currently before this Board in this improper practice case, such as whether the documents used by Levitant at his out-of-title grievance contained confidential information, whether his disclosure of these documents violated HRA's policies, and whether Levitant's actions constituted misconduct. However, here, the question presented before this Board addresses a distinct legal issue, and, thus, our determination in the instant matter goes beyond the scope of the February 2007 OATH Determination.

In cases such as this one, where the union raises the issue of retaliatory motive, we have held that questions of retaliatory motive are under the exclusive jurisdiction of this Board, pursuant to the NYCCBL. *See Local 376, DC*, 73 OCB 15, at 12 (BCB 2004); *see also Civil Serv. Employees Ass'n, Local 1000 v. New York State Pub. Employment Bd.*, 276 A.D.2d 967, 969 (3d Dept. 2000), *citing Matter of City of Albany v. New York Pub. Employment Bd.*, 57 A.D.2d 374, 375 (3d Dept. 1977), *aff'd*, 43 N.Y.2d 954 (1978). In fact, in deciding a disciplinary action, OATH will not hear defenses of disparate or discriminatory enforcement or selective prosecution. *See Local 376, DC 37*, 73 OCB 15, at 12, *citing Off. of the Comptroller v. Frazier-Lee*, OATH Index No. 1199/03 (Dec. 4, 2003); *Dept. of Sanitation v. Yovino*, OATH Index No. 1209/96 (Oct. 9, 1996), *rev'd in part on other grounds*, N.Y.C. Civ. Serv. Comm'n Item No. CD 97-109-0 (Dec. 4, 1997).

Here, the issue is whether HRA levied the June 2005 Charges against Levitant because HRA intended to punish Levitant for his exercise of protected rights in pursuing an out-of-title arbitration,

thereby violating NYCCBL § 12-306(a)(1) and (3). This issue is different from that which is decided in a hearing at OATH to determine whether an employee committed acts constituting good cause for discipline, as was necessarily decided in the February 2007 OATH Determination. In fact, the Union could not submit their claim that HRA was motivated by anti-union animus when it levied the June 2005 Charges against Levitant, before OATH. *Local 376, DC 37*, 73 OCB 15, at 12*; see*, *e.g.*, *England v. Louisiana State Bd. of Med. Exam'r*, 375 U.S. 411, 416 (1964) (federal claimant not required to litigate federal claims before a state law forum where claimant took actions to bring such claims before the appropriate forum). Therefore, "identity of issue" does not exist between this Board's decision in the instant matter and the February 2007 OATH Determination, and, as stated above, collateral estoppel does not apply.

We now turn our attention to the substantive claim of whether the levying of the June 2005 Charges against Levitant violated NYCCBL § 12-306(a)(1) and (3) because it was motivated by anti-union animus. In such instances, 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), which was adopted by this Board 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.

Bowman, 39 OCB 51, at 18-19; *see also Colella*, 79 OCB 27, at 53.

"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 (BCB 2005); *see also CEU, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

We find that Levitant's protected activity was well documented and was known throughout HRA. Aside from the grievances and the improper practice petitions previously filed, Levitant filed an out-of-title grievance and attended the resulting arbitration. HRA, through appearances by its managerial staff and various counsels, participated in these proceedings. Thus, the first prong of the *Salamanca* test is 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 (BCB 2006); *see also CEU, Local 237,* 67 OCB 13, at 9 (BCB 2001); *CWA, Local 1180*, 43 OCB 17, at 13 (BCB 1989). "At the same time, 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 matter, as evidence of anti-union animus, we focus on the circumstantial evidence surrounding this particular event in Levitant's work history, while not ignoring the long and contentious relationship between Levitant and HRA's management. Levitant was transferred involuntarily to the Lombardi Program, which, according to him, was improper since he was required to perform tasks for which he was not trained. Levitant, in his numerous grievances and OATH

proceedings, testified about a number of his supervisors who engaged in conduct that he believed violated HRA regulations, the Agreement, and the NYCCBL. Finally, the June 2005 Charges levied against Levitant arose from an incident that occurred during Levitant's participation in an arbitration proceeding, which we find, based upon the facts of this case, is protected activity. *DC 37, Local 1113*, 79 OCB 33, at 25 (BCB 2007) (disciplinary charges levied against shop steward for representing an employee in the grievance procedure was found to be a *prima facie* violation of the NYCCBL in that instance).

According to Levitant's uncontroverted testimony, prior to his out-of-title grievance, he approached his immediate supervisor, Weiner, and showed the documents he intended to use at the arbitration to demonstrate his performance of out-of-title work.[16] Weiner, knowing of Levitant's upcoming arbitration, reviewed the documents and told Levitant that using such documents was "no problem, . . . not a big deal." (Tr. 30). Based upon Weiner's comments and Levitant's intention to use such documents only to prove his out-of-title grievance, Levitant presented these documents at his arbitration. For HRA to levy disciplinary charges against Levitant for using these documents, after Levitant consulted with Weiner, who did not object, is indicative of a questionable motive on HRA's part. Moreover, the City's failure to call Weiner to refute Levitant's testimony is telling, and it enhances Levitant's credibility, especially since Weiner testified in the OATH proceeding before ALJ Richard. *See, e.g., Schwartz v. New York City Dept. of Educ.*, 22 A.D.3d 672, 673 (2d Dept.

[16] During Levitant's testimony, he also stated that HRA never disciplined another employee for disclosing the information he used at his out-of-title grievance, and that the only reason HRA disciplined him for using such information was for retaliatory purposes. However, even though Levitant raises the specter of disparate treatment, the Union has not carried its burden of proof by demonstrating that other HRA employees divulged potentially confidential information and did not face disciplinary charges, as Levitant claims. Accordingly, we do not decide the instant matter on this ground.

2005); *Brown v. Village Mobil Serv. Station, Inc.*, 167 A.D.2d 158, 159 (1st Dept. 1990). Therefore, considering Levitant's history of protected activity, his relationship with HRA, and the conversation with Weiner concerning the use of such documents, we find these facts suffice, taken as a whole, to establish a *prima facie* case that HRA acted with anti-union animus in levying the June 2005 Charges against Levitant.

The burden in the instant matter now shifts to the City to demonstrate that HRA's decision to discipline Levitant was motivated by legitimate business reasons, and not anti-union animus. Here, the City argues that HRA levied the June 2005 Charges against Levitant because he violated provisions of the Confidentiality Policy and N.Y. Social Services Law § 473-e. According to this policy and this statute, HRA must ensure that its employees comply with these confidentiality mandates and prevent dissemination of its clients' confidential information. Based upon the arguments proffered by the City, we find that ensuring compliance with state statutes and departmental regulations is a valid employer interest, and levying disciplinary charges in good faith aimed at ensuring such compliance may constitute a legitimate business reason.

In this case, we find however that the evidence demonstrates that the legitimate business reason proffered by HRA is a pretext for discipline. When proffered reasons which appear to be legitimate "are unsupported and/or inconsistent with the record, this Board will find that the public employer committed an improper practice." *SBA*, 75 OCB 22, at 24; *see also PBA*, 71 OCB 25, at 13 (BCB 2003). Also, a party's prior inconsistent conduct may be used to impeach that party's explanation of events. *See State of New York v. Dawson*, 50 N.Y.2d 311, 318 (1980) (witness's previous conduct was inconsistent with the witness's contemporaneous statement, and such inconsistent conduct may be used to impeach the credibility of those statements); *see also Coinmach*

Corp. v. Fordham Hill Owners Corp., 3 A.D.3d 312, 314-315 (1st Dept. 2004). Furthermore, "[t]he offering of shifting and inconsistent rationales for challenged behavior strongly raises the question that [the] explanation [offered] constitutes a self-serving *post hoc* justification for retaliatory conduct, and does not warrant belief." *SSEU*, 77 OCB 35, at 20, *citing Branham v. Lowes Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 324-325 (1st Dept. 2006) ("The reason proffered before this Board to justify the service of disciplinary charges against [petitioner] . . . is different from, and inconsistent with, that proffered by [the agency] earlier in the grievance process, and these shifting rationales are, in conjunction with the other facts adduced, indicative of their pretextual nature.").

Here, we find that HRA's legitimate business reason for disciplining Levitant was pretextual, and, thus, HRA's issuance of disciplinary charges against Levitant violated NYCCBL § 12-306(a)(1) and (3). HRA engaged in similar, if not identical, conduct for which it disciplined Levitant. According to Levitant's uncontroverted testimony, which is supported by documentary evidence, his former supervisor and his former director both "openly discussed" client's names, financial circumstances, and medical information at Levitant's May 26, 2004 OATH proceeding. Then, at the actual out-of-title arbitration, neither Counsel for the City nor the deputy director present at the hearing raised the issue of confidentiality. Even after Director Quinn allegedly informed Counsel for the City, HRA never raised any objection that the documents contained potentially confidential information, and that disclosure of these documents could violate the Confidentiality Policy, N.Y. Social Service law, or HIPAA. In fact, Weiner, who was present during Director Quinn's alleged warning to Counsel for the City, testified at the arbitration and used some of the documents introduced by Levitant. Finally, Director Quinn, who allegedly raised the issue of confidentiality as it relates to those documents, testified at the out-of-title arbitration, but did not comment on these

documents at all.

HRA's actions described above are inconsistent with the rationale stated for disciplining Levitant in the instant matter, and, thus, we do not find this proffered business reason to be the true impetus for the issuance of the June 2005 Charges. Accordingly, we find that Weiner's authorization for Levitant to use the documents at the arbitration, HRA's own use of client names at OATH, its failure to object on confidentiality grounds to these documents' initial introduction by the Union at the arbitration, its subsequent failure to object prior to the second day of arbitration, and its own use of such documents after the allegedly confidential nature of the documents was disclosed by Director Quinn, belie HRA's business reason for disciplining Levitant. To hold the contrary would allow HRA to charge employees with the violation of this policy, meanwhile, they could violate this policy when it benefitted its needs, as in the prosecution of disciplinary charges. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391-392 (1992).

Therefore, we find that HRA's issuance of the June 2005 Charges against Levitant for disclosing allegedly confidential information during his out-of-title arbitration was motivated by HRA's anti-union animus and, specifically, by its own desire to penalize Levitant for his protected activity. Accordingly, its proffered business reason, though legitimate on its face, was actually a pretext for discrimination based upon anti-union animus.

We need not decide whether Levitant's actions at the out-of-title grievance violated the N.Y. Social Services Law § 473-e and/or HIPAA because "this Board has no jurisdiction over the administration or enforcement of statutes other than the NYCCBL." *DelRio*, 75 OCB 6, at 15 (BCB 2005); *see also Doctors Council*, 69 OCB 31 (BCB 2002); *Centero*, 59 OCB 7 (BCB 1997).

With regard to remedy, the Union requested an order instructing HRA to cease and desist:

all discriminatory actions aimed at discouraging membership and participation in Local 371 or the Union; interfering with, restraining or coercing Levitant from engaging in Union activities; and engaging in a campaign of retaliation and discrimination against Levitant. The Union also sought rescission and expungement of Levitant's personnel records and cessation of any pending disciplinary proceedings connected with the issues addressed herein, payment of back pay, and posting of notices. However, OATH had proper jurisdiction over the disciplinary matter before it, memorialized in the February 2007 OATH Determination, which incorporated six sets of disciplinary charges against Levitant, only one of which was the June 2005 Charges. OATH found that Levitant was guilty of a majority of these charges. Therefore, despite our decision in the instant matter, as well as in *DC 37*, 1 OCB2d 5, there is no basis to order rescission and expungement of the overall disciplinary penalty imposed on Levitant. However, we can and do order HRA to cease and desist from issuing disciplinary charges against its employees for participating in the grievance procedures, and order HRA to post the attached notice to that effect.

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, docketed as BCB-2507-05, be, and the same hereby is granted in its entirety; and it is further

ORDERED, that HRA 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; interfering with, restraining and/or coercing Zinovy Levitant and other HRA employees from engaging in protected activity; and engaging in a campaign of retaliation and discrimination; and it is further

ORDERED, that the New York City Human Resources Administration post of notices indicating its violation of New York City Collective Bargaining Law 12-306(a)(1) and (3) in the instant matter

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 6 (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, docketed as BCB-2507-05, be, and the same hereby is granted in its entirety; and it is further

ORDERED, that the New York City Human Resources Administration 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; interfering with, restraining and/or coercing Zinovy Levitant and other HRA employees from engaging in protected activity; and engaging in a campaign of retaliation and discrimination; and it is further

ORDERED, that the New York City Human Resources Administration post of notices indicating its violation of New York City Collective Bargaining Law 12-306(a)(1) and (3) in the instant matter

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.