DC 37, Local 375, 2 OCB2d 26 (BCB 2009)

(IP) (Docket No. BCB-2729-08).

Summary of Decision*:** The Union claimed that the City and the DPR violated NYCCBL § 12-306(a)(1) and CSL § 209-a(1)(g) when DPR supervisors continued to question a member without Union representation after the member had requested representation. The City argued that the petition should be denied as moot as the only remedy for an alleged *Weingarten* violation is the exclusion of the resulting evidence and the DPR has already expunged from the member's file the pertinent memorandum. Further, under the amended Taylor Law, the arbitrability of an alleged *Weingarten* violation under the Citywide Agreement is an affirmative defense to an improper practice charge. Substantially, the City argued that there is no *Weingarten* violation because, after the member requested Union representation, he was given the choice of ending the meeting or continuing without Union representation, and the member chose to continue. The Board found that the matter was not moot, that the affirmative defense was inapplicable, and that the DPR violated the Union member's *Weingarten* rights because he had a reasonable belief that the conference could result in discipline and did not agree to continue without Union representation. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 375, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On November 25, 2008, District Council 37, Local 375, AFSCME, AFL-CIO ("Union"), filed a verified improper practice petition against the City of New York ("City") and the New York

City Department of Parks and Recreation ("DPR"). The Union alleges that the City and the DPR violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and Article 14, Civil Service Law ("Taylor Law"), § 209-a(1)(g), when DPR supervisors continued to question a member without Union representation after the member had requested representation. The City argues that the petition should be denied as moot, on the basis that the only remedy for an alleged *Weingarten* violation is the exclusion of the resulting evidence, and the DPR has already expunged from the member's file the pertinent memorandum. Further, under the amended Taylor Law, the arbitrability of an alleged *Weingarten* violation under the Citywide Agreement is an affirmative defense to an improper practice charge. Substantively, the City argues that there is no *Weingarten* violation because, after the member requested Union representation, he was given the choice of ending the meeting or continuing without representation, and the member chose to continue. The Board finds that the matter is not moot and that the affirmative defense is not applicable. As to the merits, the Board finds that the DPR violated the member's *Weingarten* rights because the Union member had a reasonable belief that the conference with his supervisors could result in discipline, the member requested Union representation, did not agree to continue the conference without Union representation, and the DPR nevertheless continued to question him. Accordingly, the Union's petition is granted.

BACKGROUND

A hearing in the instant matter was held, and the Trial Examiner found that the totality of the record established the relevant facts as follows.

Emerson Neal Spencer is a Union member and a DPR employee in the title of Construction Project Manager. On September 3, 2008, Spencer's immediate supervisor, Oscar Urquiola, the Manhattan Borough Director, directed Spencer to attend a supervisory conference with him and two other supervisors; David Goldstone, the Deputy Chief of Construction, and Desmond Spillane, the Team Leader for Manhattan. The supervisory conference concerned Spencer's alleged unauthorized late arrival at a work site on August 19, 2008. Spencer's regular hours are 8:00 a.m. to 3:30 p.m.; on August 19, 2008, Spencer allegedly did not arrive at his work site until 10:00 a.m.

Spencer testified that when he came into work on September 3, Urquiola immediately instructed him to attend a meeting with him and the two other supervisors. At the start of the meeting, Urquiola informed Spencer that the meeting was a supervisory conference. When they sat down, Spencer noted that Urquiola had in front of him what Spencer would later learn was a completed "Supervisor's Conference With Employee" form ("Conference Memorandum").

Spencer claims that he immediately informed "Urquiola that [he] didn't want to proceed with the [supervisory] conference, unless [he] had a Union representation." (Tr. 19-20). Spencer claims that Goldstone than stated: "I am not waiting for [the Union representative] to get here. We are here now, and we are going to go through this now." (Tr. 20).

Urquiola testified at the hearing that "[Spencer] did say at one time, 'I am entitled to representation . . . . Goldstone said 'If you want us to stop, we will. . . . Spencer said, 'I am okay with you guys, we will continue." (Tr. 67). Urquiola's in person testimony differs from an earlier affidavit he provided on March 25, 2009, in which he stated that it was Goldstone who first suggested that Spencer have a Union representative present. In the affidavit, Urquiola describes the interchange as follows:

> David Goldstone suggested that [Spencer] have a Union representative. After a short period of time at the meeting on September 3, 2008, [Spencer] said that he "really should have an attorney." David Goldstone said the meeting should "end right now," and we agreed. [Spencer] then said in response, "No, it's all right . . . I trust you guys . . . let's continue."

(City Ans., Ex. 1: Urquiola Affidavit, ¶¶ 7-10) (ellipses in original; paragraph numbers omitted).

After Goldstone's statement, Urquiola than read aloud the Conference Memorandum, including the following handwritten section:

> On Tuesday Aug. 19, 2008 I called your cell phone on two different occasions requesting that you call me. I left two messages on your cell phone. You did not return my call. I then called the field office to see if you were the[re]. There was no response to my call to the field office, hence you were not at the Man. Field Office. I also called both projects which you were supervising and I was advised that you had not be[en] there all morning. Therefore based on the above you were AWOL from 8:00 am-10:00 am. You finally called me at 10:00 am from J. Hood Wright [] Lot.

(Pet., Ex. A). Underneath the handwritten section quoted above, as part of the form itself, are the following sentences: "You are advised that further similar conduct on your part may necessitate formal disciplinary action against you. A copy of this memorandum will be placed in your personnel folder." (*Id.*).

According to Spencer, after reading the Conference Memorandum, Urquiola asked him "[w]hat do you have to say about this?" (Tr. 21). Spencer repeated that he "didn't want to speak without [his] Union representative." (*Id.*). Urquiola continued to question Spencer, who eventually answered that he had not received Urquiola's calls and had emailed Urquiola at approximately 8:05 a.m. on the morning in question, informing him of his whereabouts. Spencer testified that there are "problems with communications with the Nextel" network used by the DPR and that "[m]ost of the

time in the morning when I Nextel [Urquiola], I can't get him because of all the resident engineers all at one time are trying to contact [him]." (Tr. 15).[1] He testified that, because of the difficulty he had in the past in reaching Urquiola in the morning via Nextel, he decided to send him the email instead. According to Spencer, he finally reached Urquiola by phone at 10:00 a.m., at which time Urquiola informed Spencer that he had not been able to reach him that morning, to which Spencer responded that Urquiola should check his email.

The Union introduced a two page printout of emails from Urguiola's computer. On the second page, without a heading–that is, without any date or time referenced– is the following text: "On my way to[I]inwood [H]ill pk MG-107M then tot lot with UA construction, will make contact once I get settled, driving. As for your request about my various contract, I will look into it and get back to you. Have a good day. Neal." (Union Ex. B). Spencer testified that this is the email he sent the morning of August 19, and identified MG-107M as the contract number; tot lot as the construction site; and UA construction as the construction company.

---

[1] Spencer further testified that at the September 3 supervisory conference, he informed Urquiola of problems with the Nextel network, including that "there are dead spots." (Tr. 31). Urquiola did not address Spencer's claims that there are problems with the Nextel network but corroborated that his employees were instructed to contact him by Nextel in the morning:

> Q. Generally, how would your employees contact you in the morning?
>
> A. They would call in on the phone, on their Nextel, on the phone.
>
> Q. Was that the regular standard way for your employees to contact you?
>
> A. Yes. I requested that from them.

(Tr. 70).

Urquiola admitted receiving an email from Spencer the morning of August 19, 2008, but testified that the email he received had no body. The City introduced into evidence a three page printout of emails from Urquiola's computer–the second and third pages of which are identical to Union Ex. B. *See* City Ex. 6. The first page references three emails, all from August 19, 2008, the third of which is a heading indicating that Spencer sent Urquiola an email at 8:07 a.m. on August 19, 2008; however, no text follows the third heading.

Spencer testified that he did not believe that the September 3 supervisory conference should lead to discipline, because he "didn't do anything wrong," but he was concerned that it might and wanted Union representation because he "felt anything that [he] said at the table would be misconstrued." (Tr. 57; 58). Spencer admitted that the September 3 supervisory conference did not, in fact, lead to suspension or termination.

The City asked Spencer if the September 3 supervisory conference was his first such conference, to which Spencer replied: "This was the first since I have been with the Parks Department." (Tr. 45). The City then questioned Spencer about a Supervisor's Conference With Employee form from November 2001. When presented with this document, Spencer did not dispute its authenticity and admitted that he attended a supervisory conference in 2001 which did not lead to his suspension or termination and, to the best of his knowledge, did not result in a permanent memorandum being placed in his file. On redirect, Spencer explained: "I completely forgot about [the November 2001 supervisory conference]. I was provisional at the time. I wasn't a permanent New York City employee." (Tr. 50).

Urquiola testified that supervisory conferences are not disciplinary in nature. In the last ten years, Urquiola has held approximately five supervisory conferences, none of which led to

suspension or termination, and he is unaware of any supervisory conference resulting in suspension, termination, or other discipline. Urquiola testified that he does not have the authority to discipline any employee and that he has never recommended that any employee be disciplined. Urquiola claims to have no knowledge as to how an employee gets disciplined, that such authority resides with the Advocate's Office, and that he has "no idea what they think and what they do." (Tr. 76).[2] However, Urquiola admitted that he was aware that the first step in the disciplinary process is the supervisory conference: "All I know is at the supervisory conference, if the person is AWOL, I pass it on to the Advocate, to the Deputy Chief, to all the cc list. They will determine how to discipline." (Tr. 77). Urquiola further admitted that the September 3 Conference Memorandum was forwarded to the Advocate's Office.

Urquiola testified that the Conference Memorandum was filled out prior to the start of the September 3 supervisory conference, and that nothing from the supervisory conference was incorporated into it.[3] Indeed, Urquiola testified that "nothing [Spencer] could have said" in the supervisory conference would have altered his opinion that Spencer was not at work for the two hours between 8:00 a.m. and 10:00 a.m. on August 19, 2008. (Tr. 79). Even if Spencer could produce a contractor to verify that he was at work, Urquiola testified, such would not be sufficient

---

[2] *See also* Tr. 76-77:

> Q. As Manhattan Borough Director, do you know how someone does get disciplined at [the DPR]?
>
> A. By the Advocate's Office. I don't know what their procedure is or how they discipline.

[3] Spencer testified that "[a] far as I know, [the Conference Memorandum] was filled out before I got there." (Tr. 59-60). After reviewing the Conference Memorandum, Spencer agreed that nothing he said in the September 3 supervisory conference was incorporated into it.

to alter his conclusion because "a contractor could say anything." (Tr. 80). As for the email Spencer sent the morning of August 19, Urquiola stated that it did not prove Spencer was at work, as he could have sent it from anywhere.

Spencer testified that approximately two weeks after the supervisory conference he received an email from Urquiola informing him "that as a result of [him] being AWOL for two hours, two hours will be taken out of [his] pay." (Tr. 35). No mention of deducting pay occurred in the supervisory conference. Spencer claims that the two hours were deducted, and that these hours have not been returned to him. Urquiola testified that nothing that occurred in the supervisory conference impacted on his decision to dock Spencer's pay; that the only thing that would have prevented Urquiola from docking Spencer's pay was if a DPR supervisor vouched that Spencer was at work for those two hours.

The City alleges that the Conference Memorandum has been removed from Spencer's file and that it has never been used in any disciplinary proceeding. A letter dated March 26, 2009, was sent to Spencer notifying him of the expungement.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Respondents violated NYCCBL § 12-306(a)(1) and Taylor Law § 209-a(1)(g) by continuing to question Spencer after he requested Union representation.[4] Section

[4] NYCCBL § 12-306(a)(1) provides, in pertinent part, that "[i]t shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter."

NYCCBL § 12-305 provides, in pertinent part, that "[p]ublic employees shall have the right

§ 209-a(1)(g) codified *Weingarten* rights in the Taylor Law and the Board has recognized that *Weingarten* rights exists in the NYCCBL. Spencer requested Union representation, his request was denied, the questioning continued, and disciplinary action resulted.

The Union requests that the Board order that the Respondents cease and desist from refusing members' request for representation during disciplinary interviews; rescind the September 3 Conference Memorandum; order Respondents not to utilize any information obtained in the September 3, 2008, supervisory conference for any disciplinary purpose; order the posting of appropriate notices; and any other relief the Board deems proper. Although not raised in its petition, in its Closing Brief the Union requests that the Board order the restoration of the docked pay.

City's Position

The City argues that the petition is moot, as the DPR has already expunged the Conference Memorandum from Spencer's file and there is no evidence to suggest that the DPR "acted with any [anti-]union animus or intent to interfere with union operations or protected rights." (Ans. ¶ 41). The Conference Memorandum was not used in any disciplinary proceeding, was only in Spencer's file for seven months, and it did not "affect [Spencer's] schedule or standing as a Construction Project Manager in any way." (*Id.* at ¶ 44). There is no past harm left to remedy, there is nothing

---

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."

Taylor Law § 209-a(1)(g) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents deliberately . . . to fail to permit . . . a public employee the right, upon the employee's demand, to representation by a representative of the employee organization . . .[if] it reasonably appears that he or she may be the subject of a potential disciplinary action.

establishing anti-union animus, and there is nothing establishing that it is the practice of the DPR to deny union representation. Therefore, there is nothing to remedy or future occurrence to deter.

The City argues that, at present, there are no recognized *Weingarten* rights under the NYCCBL. The Board had recognized *Weingarten* rights under the NYCCBL in 2003, but that recognition was based upon caselaw of the New York State Public Employee Relations Board ("PERB"), which was subsequently overturned by the New York State Court of Appeals in 2007. The New York State Legislature than amended the Taylor Law to include *Weingarten* rights, but did not amend the NYCCBL. PERB has not yet interpreted the newly amended Taylor Law. Therefore, "[s]ince there is no reason to adopt this new provision of the Taylor Law before PERB has interpreted [it], the Union's petition should be dismissed." (City Brief at 7-8).

Further, the only remedy provided in the amended Taylor Law for an alleged *Weingarten* violation for an employee whose collective bargaining agreement contains a right to arbitration "is exclusion of the resulting evidence **and not** an improper practice charge."[5] (*Id.* at 8) (emphasis in original). Spencer is covered by the Citywide Agreement, which provides for the right to arbitrate an alleged *Weingarten* violation.[6] Therefore, an improper practice petition is not an appropriate

---

[5] Taylor Law § 209-a(1)(g) provides, in pertinent part:

> It shall be an affirmative defense to any improper practice charge . . . that the employee has the right, pursuant to . . . collectively negotiated agreement . . . to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure.

[6] Article IX, § 19, of the Citywide Agreement reads, 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 of the normal supervisory chain of command, . . . the employee shall be entitled to be accompanied by a Union representative . . ."

remedy, and the petition should be dismissed. The City argues that the matter should not be deferred to arbitration as the sole remedy available in arbitration is the exclusion of the resulting evidence, and such has already been expunged from Spencer's file. As such "there is no underlying grievance or controversy ripe for arbitration, [and] deferral is not proper." (Ans. ¶ 68, n. 2).

As to the merits, the City argues that there is no *Weingarten* violation because Spencer was never disciplined and could not reasonably expect that the supervisory conference would result in discipline, as it was neither a disciplinary nor an investigatory interview. The Conference Memorandum, which itself was drafted prior to the supervisory conference, is not a form of discipline. The supervisors who conducted the conference "did not have the authority to discipline [] Spencer [as] all discipline within [the DPR] is handled by the Advocate's Office." (City Brief at 11). As for the docking of pay, "it was not disciplinary in nature" and was unrelated to the supervisory conference. (*Id.* at 13).

Further, after Spencer requested Union representation, he was given the choice of ending the meeting or continuing without Union representation, and he chose to continue. While recognizing "a clear factual divergence between the recollections of [] Spencer and [] Urquiola," the City argues that the burden is upon the Union and that the Board should find Urquiola more credible than Spencer. (*Id.* at 14). Urquiola has a 21 year "unquestionably solid record" and "has nothing to gain or lose from the resolution of the Union's petition." (*Id.* at 15). Spencer "has a greater incentive to lie" and showed "convenient lapses in memory" when he initially denied that the September 3 supervisory conference was not his first supervisory conference. (*Id.*).

DISCUSSION

Mootness

The City argues that, because the Conference Memorandum has been expunged from Spencer's file, the case is moot. We disagree. First, we have repeatedly stated that an "improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remain open to consideration." *DC 37*, *Local 1457*, 1 OCB2d 32, at 22 (BCB 2008); *see also Cosentino*, 29 OCB 44, at 11 (BCB 1982) (same, first case using quoted language); *Plainedge Union Free Sch. Dist.*, 31 PERB ¶ 3063 (1998) (corrective action may affect remedy but "does not render moot the District's violation.").

Second, merely expunging the Conference Memorandum does not prohibit the DPR from utilizing evidence acquired in the September 3 supervisory conference in the future. The issue, therefore, is not moot.

Weingarten

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975), the United States Supreme Court held that the National Labor Relations Act accords private sector employees the right to refuse to submit to an employer's investigatory interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary measures, and the employee requests such representation. In *New York City Transit Authority*, 35 PERB ¶ 3029 (2002), *aff'd*, 27 A.D.3d 11 (2d Dept. 2005), *rev'd*, 8 N.Y.3d 226 (2007), PERB adopted the *Weingarten* rationale and recognized the right under the Taylor Law of an employee to a union representative at a meeting where the employee reasonably believes that the interview could result

in disciplinary measures. This Board adopted PERB's rationale and recognized *Weingarten* rights under the NYCCBL in *Assistant Deputy Wardens' Association*, 71 OCB 9 (BCB 2003).

In 2007, the Court of Appeals ruled that the Taylor Law did not provide for *Weingarten* rights. *See New York City Transit Auth. v. Pub. Employment Relations Bd.*, 8 N.Y.3d 226 (2007) ("*NYCTA*"). In response, the New York State Legislature amended the Taylor Law by adding subsection (g) to § 209-a(1) ("2007 Amendment"), providing that it shall be an improper practice:

> to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation. It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure. Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation.

Id. The 2007 Amendment effectively overturned *NYCTA*. *See Village of Tarrytown*, 40 PERB ¶ 3024 (2007) ("the Senate sponsor's memorandum in support of the [2007 A]mendment states that it was specifically aimed at overturning *NYCTA*.") (citing Bill Jacket, L 2007, c 244).[7]

---

[7] In *Village of Tarrytown*, the Tarrytown Patrolmen's Benevolent Association, Inc.,argued that the 2007 Amendment overturned *Patrolmen's Benevolent Association of the City of New York v. Public Employment Relations Board*, 6 N.Y.3d 563 (2006) ("*NYCPBA*"), which held that a local law vesting authority related to police discipline to a village board of trustees made employee representation at the interrogation of an employee a prohibited subject of bargaining. PERB explicitly rejected this argument, holding that the "2007 [A]mendment . . . was solely aimed at

The 2007 Amendment represents the public policy of the State that public employees should have *Weingarten* rights, and we construe our law in accordance with the public policy enunciated by the Legislature. *See*, *e.g.*, *Patrolmen's Benevolent Ass'n v. Pub. Employment Relations Bd.*, 6 N.Y.3d 563, 575 (2006) (favorably quoting *City of New York v. MacDonald*, 201 A.D.2d 258, 259 (1st Dept. 1994), that "legislation 'discloses a legislative intent and public policy'").

Section 212 of the Taylor Law permits the enactment of local public sector labor laws, including the NYCCBL, providing that the local laws are in substantial equivalence with certain enumerated sections of the Taylor Law; § 209-a is one such section. Therefore, we adhere to our prior rulings under which the failure to provide requested union representation when an employee is questioned in a matter that the employee reasonably believes may lead to discipline is an improper practice under NYCCBL § 12-306(a)(1).[8]

Affirmative Defense

The 2007 Amendment includes an affirmative defense which had not previously existed under the case law of this Board or of PERB; specifically, that if the employer can establish that the employee has the right to arbitrate an alleged *Weingarten* violation, and that the arbitrator has the power to require the exclusion of any evidence garnered from such an alleged violation, the improper

---

overturning the Court's decision in *NYCTA* and not the *NYCPBA* decsion."). 40 PERB ¶ 3024. As of August 2009, *Village of Tarrytown* is the only PERB opinion to date to substantively address the effect of the 2007 Amendment on prior caselaw.

[8] In light of the clearly enunciated public policy and requirements of Taylor Law § 212, we need not decide whether *NYCTA* had the effect of overturning our prior decisions, but note that, assuming, *arguendo*, it had, the 2007 Amendment effective requires our finding *Weingarten* rights in the NYCCBL. We have, to date, only addressed a possible violation of the 2007 Amendment once. In *Edwards*, 1 OCB2d 22 (2008), we found no violation of Taylor Law § 209-a(1)(g), *i.e.* no *Weingarten* violation, because, on the facts of that case, the petitioner "objectively could not reasonably believe that she would be subjected to discipline." *Id.* at 19-20.

practice shall be dismissed. The City argues that the improper practice petition should be dismissed because Article IX, § 19, of the Citywide Agreement provides for the right to arbitrate an alleged *Weingarten* violation.

We need not decide if the 2007 Amendment requires we find such an affirmative defense under the NYCCBL, because, assuming, *arguendo*, the general applicability of the affirmative defense, it is not applicable on the facts of this case.[9] The provision of the Citywide Agreement relied upon by the City allows for arbitration only "when a permanent employee is summoned to an interview which may lead to a disciplinary action and which is conducted by someone outside of the normal supervisory chain of command." (Article IX, § 19). In the instant case, the petitioner was interviewed by those within the normal supervisory chain of command. Therefore, assuming, *arguendo*, the applicability of the affirmative defense to proceedings before this Board, in the instant case, Spencer has no right to arbitrate the underlying controversy under the contractual provision cited by the City and the affirmative defense under Taylor Law § 209-a(1)(g) is not applicable.[10]

Merits

It is undisputed that Spencer requested representation. Therefore, as to the merits of Petitioner's *Weingarten* argument, we must decide if Spencer reasonably believed that the supervisory conference could result in discipline and if, after having his request for representation

---

[9] That is, we do not determine at this time whether our pre-2007 Amendment law, including our waiver doctrine which prevents a petitioner from litigating an alleged *Weingarten* vioaltion both as an improper practice and in an arbitration, effects substantial equivalence with Taylor Law § 209-a such that the affirmative defense enunciated in Taylor Law § 209-a(g) need not be engrafted upon the NYCBBL.

[10] As we find the affirmative defense inapplicable, on the facts of this case, we need not address the City's argument that deferral to arbitration is not proper as the expungement of the Conference Memorandum effectively eliminated the underlying grievance.

denied, he agree to continue without representation.

As to the first, the City argues that the September 3 supervisory conference and the Conference Memorandum were not discipline and did not, in fact, lead to discipline. The City argues that Spencer should be deemed aware that supervisory conferences, in general, do not lead to discipline, as this was his second supervisory conference. Also, the Conference Memorandum was drafted prior to the start of the supervisory conference and, therefore, not influenced by the supervisory conference. The City concludes that it was not reasonable for Spencer to believe that the supervisory conference could result in discipline.

That the September 3 supervisory conference did not lead to discipline is not determinative; the issue is whether Spencer reasonably believed that it could have. Urquiola testified that after the supervisory conference, the Conference Memorandum was sent to the Advocate's Office, who had the authority to institute discipline. Urquiola's choice to complete the Conference Memorandum prior to the supervisory conference did not restrict his ability to amend it during or after the supervisory conference, and Spencer had no way of knowing prior to the end of the supervisory conference that nothing he said would impact upon the Conference Memorandum. Therefore, while in this case the supervisory conference did not lead to discipline, Spencer's concerns that it could have were reasonable. We note that, while the City's witness testified that the Advocate's Office determines if disciplinary action is to be taken and that the Advocate's Office always receives copies of the conference memoranda, the City chose not to present any evidence as to the circumstances under which the Advocate's Office would, in fact, institute discipline. We find that, on the record of this case, it was reasonable for Spencer to believe that a supervisory conference with three of his supervisors, of which the Advocate's Office would be advised, may lead to discipline.

The second question "depend[s] upon credibility determinations by this Board to determine which of the conflicting views is most accurate." *DC 37*, 1 OCB2d 5, at 65 (BCB 2008). Spencer testified that he requested Union representation at the start of the supervisory conference, repeated that request, and never agreed to continue without representation. Urquiola testified that Spencer requested Union representation, was offered the opportunity to end the meeting, and stated he would continue without Union representation.

In weighing the credibility of Spencer and Urquiola on this issue, we find Spencer more credible. The City did not refute much of Spencer's testimony regarding the incident–such as Spencer's claims that there are problems with the Nextel network, including dead spots, which would explain his failure to respond to Urquiola's phone calls–despite presenting a witness (Urquiola) competent to so testify. *See COBA*, 2 OCB2d 7, at 52 (BCB 2009) (failure of respondent to rebut part of petitioner's testimony when witnesses were available to respondent to do so favors petitioner in credibility determination) (citing *Colella*, 79 OCB 27, at 57 (BCB 2007)). To the contrary, Urquiola corroborated part of Spencer's testimony–such as that employees who report to Urquiola call him in the morning. *See COBA*, 2 OCB2d 7, at 52 (corroboration strengthens credibility). As for Spencer's failure to initially recall the earlier November 2001 supervisory conference, we find that his "inability to recall certain matters was not probative of malicious or other improper motivation." *DC 37*, 1 OCB2d 5, at 67. We find Spencer's explanation–that he did not initially recall a conference that occurred over seven years ago before he was a permanent DPR employee which did not, to his knowledge, have any significant repercussions–to be credible. In fact, we find Spencer's immediate acknowledgment of his error bolsters his credibility. *See COBA*, 2 OCB2d 7, at 52 (petitioner's admission of potentially damaging information strengthens

petitioner's credibility).

Aspects of Urquiola's testimony, on the other hand, are incredible, such as his assertion that, despite his position as Manhattan Borough Director, he is completely ignorant of how an employee under his supervision would be disciplined. *See DC 37*, 1 OCB2d 5, at 67 (credibility undermined "by claiming not to know certain facts that the director of an entire unit in one borough should reasonably be expected to know"). There are also inconsistences between Urquiola's live testimony and his affidavit that go to the heart of the instant case. *See DC 37, Local 376*, 79 OCB 38, at 22 (BCB 2007) (inconsistencies strain credibility); *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 324 (1st Dept. 2006) (inconsistencies between plaintiffs testimony and a subsequent witness affidavit submitted by the plaintiff raise questions about the credibility of the later.). At the hearing, Urquiola testified that Spencer first raised the issue of representation; in his affidavit, he testified that it was Goldstone who first raised the issue; that "Goldstone suggested that [Spencer] have a Union representative." (City Ans., Ex. 1). In his live testimony, Urquiola testified that when Spencer requested representation, Goldstone offered "[i]f you want to stop we will." (Tr. 67). In his affidavit, Urquiola testified that when Spencer requested representation, Goldstone advised that the supervisory conference "should 'end right now.'" (City Ans., Ex. 1). Despite the above inconsistencies, the City choose not to call Goldstone or Spillane to corroborate, or clarify, Urquiola's testimony. *See COBA*, 2 OCB2d 7, at 52.

We underscore that in finding Spencer to be more credible, we are finding his version to be more accurate, and are not finding Urquiola to have been willfully deceptive. *See SSEU, L. 371 (Abualroub)*,79 OCB 34, at 11 (BCB 2007) (credibility findings relate to accuracy, and do not equate to finding that the "testimony [] is wilfully deceptive, intended to subvert the process."); *Smith v.*

Lehigh Valley Railroad Co., 170 N.Y. 394, 400 (1902) (factual falsity of testimony does not, of itself, establish intent to deceive as the "relation of a fact from memory may be false, with no intention to deceive, and positive testimony by a witness may be unreliable, without willful perjury being attributable to him."). Rather, we recognize that Urquiola's testimony was "filtered through the lens of his strongly held conviction" that Spencer was in the wrong–that Spencer did not arrive at work on August 19 until 10:00 a.m. and that Spencer failed to properly advise Urquiola of his whereabouts. *DC 37*, 1 OCB2d 5, at 65 (quoting *Colella*, 79 OCB 27, at 55).

Accordingly, we grant the Union's petition on the grounds that the DPR's continuation of the supervisory conference over Spencer's clear request for Union representation was in violation of the NYCCBL. As the Conference Memorandum has already been expunged from Spencer's file, we need not order its expungement; however, we do order that the DPR not retain or utilize any information obtained in the September 3, 2008, supervisory conference for any disciplinary purpose. We do not order the restoration of the two hours of Spencer's pay, as, in addition to not having been raised in the petition, the evidence established that the decision to dock Spencer's pay was not influenced by the supervisory conference.

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, Docket No. BCB-2729-09, filed by Local 375, District Council 37, AFSCME, AFL-CIO, against the New York City Department of Parks and Recreation be, and the same hereby is, granted; and it is further

ORDERED, that the New York City Department of Parks and Recreation cease and desist from interfering with employees' right to request union representation during investigatory interviews that may reasonably lead to their discipline; and it is further

ORDERED, that the New York City Department of Parks and Recreation not utilize any information obtained in the September 3, 2008, supervisory conference for any disciplinary purpose.

Dated: September 24, 2009
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER