CSTG, Local 375, 3 OCB2d 14 (BCB 2010)

(IP) (Docket No. BCB-2746-09).

Summary of Decision*:** The Union claimed that the New York City Administration for Children's Services, in violation of NYCCBL § 12-306(a)(1) and (3), discriminated and retaliated against a Union member when a superior demanded that the member withdraw an out-of-title grievance that was the subject of an Article 75 petition. The City argued that the Union has failed to establish a violation because the Union member was not restrained, coerced, or interfered with in the exercise of his rights, nor was he retaliated against. The Board found that the superior's comments were inherently destructive but that the Union member was not retaliated against. Accordingly, the Union's petition is granted, in part, and dismissed, in part. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

DECISION AND ORDER

On February 13, 2009, the Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") alleging that the New York City Administration for Children's Services ("ACS") violated the New York City Collective Bargaining Law (New York City Administrative Code, Title

12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3), when a superior of Samir El-Tahawy, a Union member, demanded that he withdraw an out-of-title grievance that he had filed against ACS, which had resulted in an arbitrator's award that the Union was seeking to enforce in a proceeding pursuant to Article 75 of the Civil Practice Law and Rules ("Article 75 Petition"). The City argues that the Union has failed to establish a violation of NYCCBL § 12-306(a)(1) or (3) because El-Tahawy was not restrained, coerced, or interfered with in the exercise of his rights, nor was he retaliated against. The Board finds that the superior's comments were inherently destructive but that the evidence did not establish retaliation against the Union member. Accordingly, the Union's petition is granted, in part, and dismissed, in part.

BACKGROUND

The Trial Examiner held a hearing and found that the totality of the record established the relevant background facts to be as follows:

Samir El-Tahawy is employed by ACS in the civil service title Construction Project Manager ("CPM"), Level II, and has been so since he was hired in 1988. Edmond Ghoughassian was the ACS Director of Architectural Services; he left the ACS in June 2009, five months before the hearing in the instant matter. El-Tahawy has alleged that on October 14, 2008, Ghoughassian told him to drop an out-of-title grievance he had filed against ACS. Although he has held different in-house titles, El-Tahawy testified that, in his 21 year career at ACS, he was "[n]ever promoted." (Tr. 56).

El-Tahawy and Ghoughassian had worked together for 15 years; El-Tahawy had, in fact, hired Ghoughassian and supervised him for almost two years. Ghoughassian was promoted over

El-Tahawy and supervised El-Tahawy when he worked on the Williamsburg Day Care Center ("DCC"), from March 2003 through at least March 2005, but no later than when the DCC received its certificate of occupancy in November 2005. By October 2008, Ghoughassian was still a superior of El-Tahawy but no longer his supervisor.

Grievance, Arbitration Award and Article 75 Petition

On March 2, 2005, the Union filed an out-of-title grievance on behalf of El-Tahawy, alleging that, while working on the DCC, and thus under Goughassian, El-Tahawy was being assigned the duties of a CPM, Level III. ACS denied El-Tahawy's grievance, which proceeded to arbitration and, in an Opinion and Award dated June 26, 2007 ("Arbitration Award"), the arbitrator sustained the grievance, in part, finding that, for part of time alleged, El-Tahawy had performed the duties of a CPM, Level III, and instructing ACS to compensate El-Tahawy accordingly. On June 24, 2008, the Union, alleging that ACS was not in compliance with the Arbitration Award, filed the Article 75 Petition in the Supreme Court of the State of New York to confirm the Arbitration Award. On October 15, 2008, in order to facilitate resolution of the dispute, the parties entered into a stipulation pursuant to which the Article 75 Petition was to be marked off calendar without prejudice and remanded to the arbitrator to clarify the Arbitration Award. The parties have appeared before the arbitrator and are awaiting the requested clarification.

October 14, 2008, Meeting

On October 14, the day before the stipulation was executed, El-Tahawy had a conversation with Ghoughassian in El-Tahawy's cubicle. El-Tahawy and Ghoughassian work on same floor; and El-Tahawy has a cubicle he describes as big, but open, with four foot high walls. The parties agree that: Ghoughassian was aware of El-Tahawy's grievance prior to the conversation; the conversation

became heated; and during it, Ghoughassian remarked that El-Tahawy should "let it go." The parties disagree as to who initiated the conversation; its subject matter; and to what Ghoughassian was referring when he stated that El-Tahawy should "let it go." The Union further alleges that Ghoughassian told El-Tahawy to "Drop this case," a statement Ghoughassian denies making.

El-Tahawy's Testimony

According to El-Tahawy, Ghoughassian's "let it go" comment was a demand that he drop his grievance. El-Tahawy testified that the October 14, 2008, incident was initiated by Ghoughassian, who entered his cubical "in [a] very angry mood" around 10:30 a.m. asking if he could talk to him. El-Tahawy replied "go ahead Ed. Have a seat. Sit down." (Tr. 36). Ghoughassian then said: "The case with the Union. Drop it. Shame on you. You are fighting with the City for two, $3,000 and you show donation for 100,000 . . . Shame on you. Drop this case. Let it go. Let it go." (Tr. 37). The "donation of 100,000" refers to a charitable donation El-Tahawy had made.

El-Tahawy stated that he asked why, and he alleges that Ghoughassian continued: "I am involved now. They are sending me emails and I have to respond to it. Steven Deutsch [Ghoughassian's immediate supervisor], [ACS Hearing Officer] Mr. Sussman sending me emails, everything and I have to respond to it. I have no time for that. Drop this case." (*Id.*). The Union introduced into evidence an email, dated October 7–a week before the central conversation–from Deutsch to Ghoughassian telling Ghoughassian that he wanted to discuss with him an email Deutsch had received from Sussman, dated October 6, seeking information regarding El-Tahawy in order to help ACS comply with the Arbitration Award.

El-Tahawy testified that he responded to Ghoughassian that his "case is a matter of principle.

It is not a matter of money." (*Id.*). Ghoughassian then left and returned to his office. Immediately after Ghoughassian left, El-Tahawy testified, he noticed that his immediate supervisor, Robert Louis-Jacques, was standing in the next cubicle talking to another employee. El-Tahawy asked Louis-Jacques if he heard what Ghoughassian had said, and then El-Tahawy proceeded "to explain [it] to him." (Tr. 40).[1]

El-Tahawy was asked twice if he discussed the promotion of a co-worker with Ghoughassian on October 14. After establishing that El-Tahawy was aware that a co-worker had been promoted to CPM, Level III, the City asked El-Tahawy if "[y]ou discussed her promotion in October of 2008 with [] Ghoughassian on the 14th?" (Tr. 57). El-Tahawy responded: "I don't recall." (*Id.*). The second time he was asked, El-Tahawy responded: "No." (Tr. 58).

Later that evening, El-Tahawy sent the Union an email concerning the incident that reads, in pertinent part:

> Ghoughassian . . . came to me at my desk to intimidate me and with angry tone tol[d] me to drop out my Arbitration Case . . . because he is involved now . . . and he ha[s] to answer many e-mails. I tol[d] him this is matter of principles and you have no right to ask me to drop this case. . . . This is harassment and intimidation from a Director to an employee to drop his right [and] is unacceptable and I will not do it.

(Union Ex. J).

On October 15, El-Tahawy sent a similar email to Louis-Jacques that reads, in pertinent part:

> October 14, 2008, . . . Ghougassian . . . came to me at my desk to intimidate me and with angry tone tol[d] me to drop out my Arbitration Case against the city and let it go, because he is involv[ed] now in the case and he [has] to answer many e-mails, . . . I responded to him that this is a matter of principles and you have

[1] Louis-Jacques was not called to testify.

> no right to ask me to drop the case and let it go. . . . This behavior, harassment, pressure and intimidation from a Director to an employ[ee] in ACS to drop his . . . case . . . because he is unable to respond to e-mails, is unacceptable, unlawful and [an] unfair labor practice and I will not do it under any pressure from him and I don't want him to talk to me about this case at all in the future.

(Union Ex. D).

Ghoughassian's Testimony

According to Ghoughassian, there were two discussions on October 14, 2008; both initiated by El-Tahawy. The first was early in the morning when El-Tahawy went to Ghoughassian's office to complain that he believed he would never receive a promotion to CPM, Level III. Before Ghoughassian could respond, he received a phone call, terminating the first conversation.

Later that morning, when Ghoughassian passed El-Tahawy's cubical, El-Tahawy stood up and said he needed to talk to Ghoughassian. Ghoughassian described El-Tahawy as "angry and screaming." (Tr. 66). A co-worker who worked near El-Tahawy had recently been promoted to CPM, Level III. El-Tahawy pointed to the recently promoted co-worker's cubicle and asked Ghoughassian if the co-worker was qualified for the promotion. Ghoughassian replied that he was not the co-worker's supervisor so he did not know if she was qualified.

Ghoughassian testified that he then stated: "Let it go, you are aggravating yourself. You have high blood pressure. Just relax. It would be dangerous to your health." (Tr. 66). Ghoughassian testified that El-Tahawy "was sick" and that he "was concerned as a friend." (Tr. 82).

Ghoughassian testified that his "let it go" comment referred to El-Tahawy's "emotional pressure, his aggravation" at not receiving a promotion for the last 21 years, and was prompted by El-Tahawy's reaction to the recent promotion of a co-worker and Ghoughassian's concerns about El-Tahawy's health, as Ghoughassian and El-Tahawy had "discuss[ed] a lot" El-Tahawy's "high

blood pressure" and that "[h]e was sick." (Tr. 82.).

When questioned as to El-Tahawy's version, Ghoughassian testified that the nature of the October 14 conversation was "[o]nly his promotion." (Tr. 78). Ghoughassian testified that he never discussed having to answer emails regarding El-Tahawy's case with El-Tahawy; he admitted receiving the October 7 email from Deutsh but testified that he did nothing in response to it. Ghoughassian testified he did not discuss with El-Tahawy his $100,000 donation to charity, but admitted being aware of it as "[e]verybody knew about that." (Tr. 80).

Relief Requested

On February 13, 2009, the Union filed the instant petition requesting an order declaring that ACS violated NYCCBL § 12-306(a)(1) and (3); ordering ACS to cease and desist interfering with Union members' right to utilize the grievance procedures; directing ACS to compensate El-Tahawy in accordance with the Arbitration Award; and order the posting of appropriate notices.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that Ghoughassian's behavior on October 14, 2008, violated NYCCBL § 12-306(a)(1), in that he ordered El-Tahawy to withdraw his grievance, and NYCCBL § 12-306(a)(3), in that he intimidated and harassed El-Tahawy because of his grievance.[2]

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[2] 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 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

The Union argues that El-Tahawy was "explicitly scolded" and "criticized, publicly, in front of other ACS employees, about having his grievance pursued by the Union." (Union Brief at 9). Such behavior supports a "finding by the Board that Respondents violated NYCCBL § 12-306(a)(1) because [] Ghoughassian's angry demands to [] El-Tahawy that he drop his [out-of-title] case were 'inherently destructive' of his employee rights." (Union Brief at 10). The Union "need not show further proof of adversity other than that [] Ghougassian's demands were inherently destructive to the rights of and penalized [] El-Tahawy, through the form of harassment." (Rep. ¶ 45).

The Union argues, in the alternative, that it has also established both prongs of the *Bowman-Salamanca* test and that it has shown that Ghoughassian's demand that El-Tahawy drop his out-of-title grievance and Ghoughassian's statements criticizing El-Tahawy were retaliation for engaging in protected Union activity, in violation of NYCCBL § 12-306(a)(1) and (3). It is undisputed that Ghougassian had knowledge of El-Tahawy's Union activity–the grievance–and the Union argues that the Union activity was a motivating factor in Ghoughassian's decision to demand that El-Tahawy withdraw his grievance. Ghoughassian's "let it go" statement, as an attempt to get El-Tahawy to drop the Article 75 Petition, is an adverse employment action. The Union argues "that it [is] the attempt, or inducement by the employer, and not the outcome itself, that form[s] the basis for finding a [NYCCBL] § 12-306(a)(3) violation." (Union Brief at 15).

The Union also claims as an adverse effect on El Tahawy's employment that he "he has not

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from any or all of such activities."

NYCCBL § 12-306(a)(3) provides, in pertinent part, that "[i]t shall be an improper practice for a public employer or its agents . . . to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization."

been compensated for his out-of-title work." (Rep. ¶ 46). Further, referring to Ghoughassian's testimony that he did nothing in response to the October 7 email, the Union argues that "one of the adverse actions was that [] Ghoughassian did not supply [his immediate supervisor] with the information he was requesting regarding the out-of-title grievance." (Union Brief at 14).

Regarding the City's timeliness argument, the Union argues that the Article 75 Petition does not make the instant improper practice petition untimely. Contrary to the City's characterization, the filing of the Article 75 Petition did not start the statute of limitations to run on the claim that the failure to comply with the Arbitration Award was retaliatory conduct because "the failure to comply is an on-going violation." (Rep. ¶ 47). Nor does the parties' agreement to submit the request the arbitrator to clarify the Arbitration Award make the instant matter moot, as "'allegations of anti-union animus cannot become moot.'" (*Id.* ¶ 48) (quoting Ans. ¶ 91).

City's Position

The City argues that any claim related to the City's failure to abide by the Arbitration Award is untimely, as Petitioner must be deemed aware of any such claim at the latest when it filed the Article 75 Petition on June 23, 2008, over six months prior to the filing of the instant improper practice petition. In any event, the most appropriate forum to resolve any disputes regarding the Arbitration Award is before the arbitrator himself. As the parties have already agreed to submit to, and have already appeared again before, the arbitrator, the Board should defer "all issues deriving from Respondent's alleged to non-payment of the [Arbitration] Award." (Ans. ¶ 86). Further, any claim of retaliation derived from ACS' alleged to non-payment of the Arbitration "Award should be dismissed as moot given that the parties agreed . . . to resolve the underlying dispute by resubmitted these questions to the arbitration." (*Id.* ¶ 87). Finally, "Respondents' agreement to re-

submit the matter to [the arbitrator] for clarification refutes Petitioner's claim that Respondents have intentionally underpaid [El-Tahawy] as a retaliatory tactic." (*Id.* ¶ 91).

The City argues that the Union has failed to establish a violation of NYCCBL § 12-306(a)(1) because Ghoughassian did not restrain, coerce, or interfere with El-Tahawy's exercise of his rights. Further, the Union has failed to establish a violation of NYCCBL § 12-306(a)(3) as El-Tahawy has not been retaliated against.

The City argues that "[o]nly the most severe conduct rises to the level of inherently destructive conduct." (City Brief at 7). Ghoughassian's "let it go" comment "was an innocuous comment made in order to calm a familiar co-worker, not an act that is inherently destructive, or adversely impacts the employment relationship." (*Id.* at 8). Further, "even taking Petitioner's version of events to be true," the isolated "let it go" comment, made after Petitioner had completed the internal steps of the grievance process, partially prevailed at arbitration, and was already in court seeking to enforce the award, "was not 'inherently destructive' conduct"; it was an "isolated act that does not have the effect of discouraging or inhibiting union members from exercising their rights." (*Id.*).

The City also argues that the Union has failed to establish the second prong of the *Bowman-Salamanca* test, as "the determining factor is Respondent's motivation for making the remark, not the remark itself." (*Id.* at 10). The totality of the facts and circumstances establish that Ghoughassian's motivation was "to calm his co-worker down and encourage him to stop focusing on his frustrations stemming from his years-long pursuit of a promotion to a higher civil service title." (*Id.* at 11).

Finally, the City argues that the Union also "fails to establish the occurrence of an adverse

impact on [Petitioner's] employment" as there is no "causal or proximate relationship between . . . [the] conversation . . . on October 14 and the alleged non-payment of the award." (*Id.* at 12). As for Ghoughassian's statements, they must be viewed in context and "could not reasonably be construed as a threat intended to discourage or punish protected Union activity." (*Id.* at 13).

DISCUSSION

Timeliness and Mootness

The City argues that any claim related to the City's failure to abide by the Arbitration Award is untimely, as Petitioner must be deemed aware of any such claim at the latest when it filed the Article 75 Petition on June 23, 2008, over four months prior to the filing of the instant improper practice petition on February 13, 2009. An improper practice charge "must be filed no later then four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *aff'd*, *Raby v. Office of Coll. Barg.*, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d)).[3] *See also Mahinda*, 2 OCB2d 38 (BCB 2009).

Although the Union seeks, as relief, that the ACS be ordered to compensate El-Tahawy in accordance with the Arbitration Award, and also describes the ACS' failure to abide by the Arbitration Award as an adverse impact, the claims pled in the instant improper practice petition and argued in the Union's brief stem solely from the October 14, 2008, incident. As the instant petition

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[3] NYCCBL § 12-306(e) provides, in pertinent part: "a petition alleging . . . [an] improper practice . . . may be filed . . . within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . ." OCB Rule § 1-07(d) provides, in pertinent part: "A petition alleging . . . an improper practice . . . may be filed with the Board within four (4) months thereof . . ."

was filed within four months of that date, these alleged claims are timely. As to any incidental claims that ACS committed an improper practice by its alleged refusal to comply with the Arbitration Award, we note that this Board does not have jurisdiction over matters raised in or subject to review *via* an Article 75 proceeding or submitted to an arbitrator. *D'Onofrio*, 1 OCB2d 38, at 7 (BCB 2008) (citing *Hodge*, 77 OCB 36, at 20-21 (BCB 2006), *aff'd, Hodge v.Office of Collective Bargaining*, Index No. 104531/07 (Sup. Ct. N.Y. Co. Dec. 3, 2007)(York, J.)); *see also Ziegler*, 59 OCB 13, at 4 (BCB 1997).

The City also argues that, since the parties have re-submitted the issue of remedy to the arbitrator, the matter is moot or, alternatively, that the Board should defer all issues regarding the Arbitration Award to the arbitrator. The claims raised in the instant petition are not properly deferrable as the gravamen of the Union's allegations is that ACS took subsequent action retaliating against El-Tahawy, and interfering with his pursuing a grievance through arbitration. Such retaliation and interference, if proven, may constitute interference and discrimination under NYCCBL § 12-306(a)(1) and (3), and these "statutory claims are committed to adjudication under the NYCCBL rather than the arbitral forum." *SSEU, Local 371 (Abualroub)*, 79 OCB 24, at 8 (BCB 2007); *see also DC 37, Local 1322*, 1 OCB2d 4, at 8-10 (2008) (in depth discussion of deferral to arbitration). The Union's claims are not moot, as, should they be established, the question of a proper remedy remains. *DC 37, Local 1457*, 1 OCB2d 32, at 22-23 (BCB 2008); *Cosentino*, 29 OCB 44, at 11 (BCB 1982) (same); *Southold Union Free Sch. Dist.*, 36 PERB ¶ 4508 (2003) (in depth discussion of mootness doctrine).

Claimed Independent Violation of NYCCBL § 12-306(a)(1)

NYCCBL § 12-306(a)(1) provides that it is 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 [§] 12-305 of this chapter. . . ." In *Assistant Deputy Wardens' Association*, 55 OCB 19 (BCB 1995), this Board adopted the test enunciated in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), to determine if an independent violation of § 12-306(a)(1) has been established, to wit:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

55 OCB 19, at 27 (quoting *Great Dane Trailers, Inc.*, 388 U.S. at 34). *See also Feder*, 1 OCB2d 27, at 12-14 (BCB 2008) (explaining the inherently destructive standard for an independent NYCCBL § 12-306(a)(1) violation); *Local 2627, DC 37*, 71 OCB 27, at 7-8 (BCB 2003).

The Union alleges that Ghoughassian's comments were inherently destructive and thereby violated NYCCBL § 12-306(a)(1). We, therefore, must first make a factual finding as to what Ghoughassian said, and in what context it was said. The Union claims that Ghoughassian said: "Drop it. Shame on you. You are fighting with the City for $2,000, $3,000 and you show donation for $100,000. Drop this case. Let it go. Let it go. . . . I am involved now. They are sending me emails and I have to respond to them. I have no time for that." (Union Brief at 5) (citing Tr. 37). Ghoughassian testified that he said, in reference to El-Tahaway's agitation over his failure to be promoted: "Let it go, you are aggravating yourself. You have high blood pressure. Just relax. It would be dangerous to your health." (Tr. 66) (*see* City Brief at 4).

The totality of the record and the testimony before us establishes that while Ghoughassian may have sincerely intended, as he testified, only to counsel El-Tahawy in his own best interests, a reasonable employee situated as was El-Tahawy would have reasonably understood Ghoughassian's statements to be an implicit threat, as in fact El-Tahawy did, a conclusion buttressed by El-Tahawy's contemporaneous emails.

The following facts are undisputed: when the October 14 incident occurred, El-Tahawy was in the midst of prosecuting a grievance stemming from his having performed out-of-title work under Ghoughassian's supervision; Ghoughassian was aware of El-Tahawy's grievance, and that at the heart of that grievance was El-Tahawy's belief that he was performing the duties of a CPM, Level III–a title El-Tahawy had unsuccessfully sought promotion to for years; a week before the incident, Ghoughassian received an email from his immediate supervisor asking to discuss the case with him; Ghoughassian was still a superior of El-Tahawy; their conversation was loud and heated and in an open cubicle; and, in that conversation, Ghoughassian stated that El-Tahawy should "let it go." In addition, we note that immediately after the conversation, El-Tahawy complained to his supervisor about Ghoughassian's behavior, sent an email to the Union the same day, and followed the next day with an email to his supervisor.

We need not find that Ghoughassian's intention was to threaten and intimidate El-Tahawy in the exercise of his protected union activity to find that his comments constitute interference, in view of our conclusion that they were inherently destructive of protected rights. *See DC 37, Local 376*, 73 OCB 6, at 11 (BCB 2004) (manager's conduct found to be inherently destructive "[r]egardless of what [the manager's] intentions may have been, [because] the effect of her actions was to 'discourage and inhibit' the members" in the exercise of their rights.); *Asst. Deputy Wardens*

Assn., 55 OCB 19, at 40 ("action contain[ing] an innate element of coercion, irrespective of motive, [] constituted conduct which, because of its potentially chilling effect . . ., is inherently destructive."). We have previously "found employers to have violated of NYCCBL § 12-306(a)(1) through their handling of grievances." *See Nardiello*, 2 OCB2d 5, at 29-30 (BCB 2009) (citing *Committee of Interns and Residents*, 51 OCB 26, at 42-43 (BCB 1993), *enforced sub nom. Committee of Interns and Residents v. Dinkins*, No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993)).[4] *See also DC 37, Local 376*, 73 OCB 6, at 10-11 (discussing cases finding interference in the grievance process to be inherently destructive).

In the instant case, based on record herein, we find that El-Tahawy reasonably viewed his discussion with Ghoughassian, culminating in the latter's instruction to "let it go," as an implicit threat and a demand that he drop his grievance. Such conduct is inherently destructive of employee rights, cannot be considered "comparatively slight," and thus constitutes a violation of NYCCBL § 12-306(a)(1).

Claimed Violation of NYCCBL § 12-306(a)(3) and Derivatively of NYCCBL § 12-306(a)(1)

NYCCBL § 12-306(a)(3) provides that it shall be an improper practice for a public employer or its agents "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization." In determining if an action violates NYCCBL § 12-306(a)(3) and derivatively NYCCBL §

[4] In *Committee of Interns and Residents*, a department chair made a rare appearance at a residents' meeting where he distributed copies of a grievance and advised other residents of management's opinion of the grievance. The Board found these acts constituted inherently destructive conduct on behalf of the employer as "[i]t sent a clear message to the residents that filing grievances would have a deleterious effect on their standing in the program." *Committee of Interns and Residents*, 51 OCB 26, at 47 (citations omitted).

12-306(a)(1), the Board applies the *Bowman/Salamanca* test, which requires a petitioner to 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 (BCB 1987), applying *City of Salamanca*, 18 PERB ¶ 3012 (1985). The first prong is not in dispute; Ghoughassian admitted being aware of El-Tahawy's grievance.

However, the petitioner must establish adverse consequence to prove a NYCCBL § 12-306(a)(3) claim. *See Andreani*, 2 OCB2d 40, at 28 (2009) ("crucial determination in [NYCCBL § 12-306(a)(3)] claims [is] whether a petitioner has alleged an adverse employment action taken by an employer."); *Moriates*, 1 OCB2d 34, at 13 (BCB 2008) (failure to allege adverse action fatal to NYCCBL § 12-306(a)(3) claim); *PBA*, 73 OCB 13, at 12 (BCB 2004).

The Union alleges that the attempt by Ghoughassian to get El-Tahawy to drop his grievance itself constitutes an adverse employment action. In support, the Union cites *CEU, Local 237*, 77 OCB 3 (BCB 2006), in which a union won an arbitration award on behalf of three grievants finding that the grievants were not required to drive as part of their job. Subsequent to winning that award, a supervisor tried to get one of the grievants to drive by threatening him with poor work assignments. The grievant refused, and a driver was provided for him. The Board found that "[e]ven though [the grievant] was subsequently provided with a driver, we conclude that [the supervisor] was motivated by anti-union animus when he tried to induce [the grievant] to drive in contravention to the Award." 77 OCB 3, at 14. The Union argues that *CEU, Local 237*, holds "that it was the attempt, or inducement by the employer, and not the outcome itself, that formed the basis of a NYCCBL § 12-306(a)(3) violation." (Union Brief at 15). The Union's reliance on *CEU, Local*

237, is misplaced.

CEU, Local 237, does not stand for the premise that there need not be an adverse action proved to establish a self-standing retaliation claim.

In the instant case, the Union has not demonstrated any adverse consequences to El-Tahawy stemming from Ghoughassian's comments. *See Andreani*, 2 OCB2d 40, at 28; *Moriates*, 1 OCB2d 34, at 13; *PBA*, 73 OCB 13, at 12.

The Union alleges as adverse employment actions ACS' failure to compensate El-Tahawy for his out-of-title work and Ghoughassian's admission that he did nothing in response to the October 7 email. As a matter of proof, acts that antedate the October 14 incident cannot be causally linked to the October 14 incident. *See DEA*, 79 OCB 40 at 22 (BCB 2007); *CEU, Local 237*, 69 OCB 12, at 8 (BCB 2002); *see, generally, Wilson v. New York City Housing Auth.*, 2007 U.S. Dist. LEXIS 25258 at *30 (S.D.N.Y. April 2, 2007). We also note that the Union has not alleged that Ghoughassian is involved in ACS' decisions as to how to respond to the Arbitration Award, nor has it been shown how Ghoughassian's inaction regarding the October 7 email adversely effected El-Tahawy.

As the Union has not demonstrated any adverse employment action, no retaliation has been established, and the NYCCBL § 12-306(a)(3) claim in the instant petition is dismissed.

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-2746-09, filed by the Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO, against the New York City Office of Labor Relations be, and the same hereby is, granted to the extent that the New York City Administration for Children's Services has violated New York City Collective Bargaining Law § 12-306(a)(1); and it is further

ORDERED, that the improper practice petition, Docket No. BCB-2746-09, filed by the Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO, against the New York City Office of Labor Relations be, and the same hereby is, dismissed to the extent that the New York City Administration for Children's Services did not violated New York City Collective Bargaining Law § 12-306(a)(3); and it is further

ORDERED, that the New York City Administration for Children's Services cease and desist from discouraging Union members from utilize the grievance procedures; and it is further

ORDERED, that the New York City Administration for Children's Services post the attached Notice to Employees for no less that thirty days at all locations used by the New York City Administration for Children's Services for written communications with the bargaining unit employees.

Dated: February 25, 2010
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
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 3 OCB 2d 14 (BCB 2010), determining an improper practice petition between the Civil Service Technical Guild, Local 375, District Council 37, Local 1549, AFSCME, AFL-CIO, and the City of New York and the New York City Administration for Children's Services.

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-2746-09, filed by the Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO, against the New York City Office of Labor Relations be, and the same hereby is, granted to the extent that the New York City Administration for Children's Services has violated New York City Collective Bargaining Law § 12-306(a)(1); and it is further

ORDERED, that the improper practice petition, Docket No. BCB-2746-09, filed by the Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO, against the New York City Office of Labor Relations be, and the same hereby is, dismissed to the extent that the New York City Administration for Children's Services did not violated New York City Collective Bargaining Law § 12-306(a)(3); and it is further

ORDERED, that the New York City Administration for Children's Services cease and

desist from discouraging Union members from utilizing the grievance procedures; and it is further

ORDERED, that the New York City Administration for Children's Services post the attached Notice to Employees for no less that thirty days at all locations used by the New York City Administration for Children's Services for written communications with the bargaining unit employees.

New York City Administration for Children's Services
(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.