NYSNA, 4 OCB2d 20 (BCB 2011)

(IP) (Docket No. BCB-2832-10).

Summary of Decision: The Union alleged that the City and HRA violated their duty pursuant to NYCCBL § 12-306(c)(4) to furnish information related to the Union's representation of a member in a disciplinary grievance. The City and HRA contended that the duty to provide information necessary for contract administration did not encompass discovery in disciplinary cases and that the parties' collective bargaining agreement did not require the requested information be provided. The Board found that some of the information requested was reasonably necessary to contract administration, and that the City and HRA were obligated under NYCCBL § 12-306(c)(4) to provide such requested materials as were maintained in the ordinary course of business, but not to create materials or provide materials beyond the scope of that duty. Accordingly, the petition was granted in part and denied in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE NEW YORK STATE NURSES ASSOCIATION, INC.,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On February 12, 2010, the New York State Nurses Association ("NYSNA," or "Union"), filed a verified improper practice petition against the City of New York ("City") and the New York

City Human Resources Administration ("HRA"). The petition alleges that the City and HRA violated §§ 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by refusing to supply the Union with information pertaining to disciplinary charges brought against two of the Union's members. The City and HRA contend that the duty to provide information necessary for contract administration does not encompass the provision of discovery materials in a disciplinary proceeding, and that no such obligation could be found in the parties' collective bargaining agreement ("Agreement"). The Board finds that § 12-306(c)(4) of the NYCCBL, which requires that parties provide information relevant to and reasonably necessary for bargaining or contract administration, does not exempt information requests made in the context of disciplinary grievances. To the extent that the information requested is necessary for the administration of the Agreement, and is maintained by the City and/or HRA in the ordinary course of business, such information requests fall within § 12-306(c)(4), and failure to comply constitutes an improper practice under § 12-306(a) (1) and (4) of the NYCCBL. Accordingly, the improper practice petition is granted in part and denied in part.

BACKGROUND

HRA is a mayoral agency of the City which provides temporary help to individuals and families with social service and economic needs to assist them in reaching self-sufficiency, with employees working in several locations in all five boroughs. NYSNA is the certified public employee organization representing certain titles, including Head Nurse, within HRA. Andrea Anderson, RN and Akima Haile, RN, are NYSNA members, employed by HRA in the title of Head Nurse, at the same Brooklyn location.

On or about October 26, 2009, HRA charged Anderson and Haile with misconduct and/or insubordination. Anderson was alleged to have falsified her time records on multiple occasions, been absent from her work location without proper authorization, and to have lied to her supervisor, Director Ann B. Solo, about the inconsistencies in her time records. Anderson was also charged with having indicated that she reviewed several cases which had actually been reviewed by Haile. Finally, Anderson was charged with making false entries into HRA's Autotime System purporting to have worked a number of days she had been absent, and having improperly received payment for those days.

The charges against Haile alleged that she falsified her time records on numerous occasions, resulting in her having been wrongly compensated for days she did not work. Haile was further charged with lying to Director Solo when she was asked to explain the inconsistencies in her time records, and with having supplied Director Solo with falsified documents.

On December 4, 2009, NYSNA Nursing Representative Ilene Sussman sent separate letters to HRA requesting that it provide NYSNA with documentation that the Union contends was "relevant and necessary for its representation of Anderson and Haile at the Hearings on the charges." (Pet. Item 4(b)(6)). The Union made ten specific requests of HRA in Anderson's case:

> 1. A copy of the HRA Code of Conduct, Executive Order No. 651 in its entirety.
> 2. A copy of the Policy for Auto time.
> 3. A copy of the Auto time printout for the following dates: April 29, 2008; January 16, 2009; January 27, 2009; March 20, 2009; April 20, 2009; and April 24, 2009.
> 4. [A] [c]opy of the policy covering meal and lunch time breaks.
> 5. A copy of the Maximus computer search screen printout dates for the aforementioned dates.
> 6. A copy of the policy for use of Maximus.
> 7. A copy of the city records for the dates of January 27, 2009; March

> 20, 2009; and April 24, 2009 for the patients Estellia B.; Tremaine O.; Dawn E.; Philip H.; and Juana M.
> 8. A copy of the witness' statements who stated that Ms. Anderson was not there on those dates stated in the charges. In addition, please have those witnesses present so I may question them accordingly.
> 9. Specifically, the Association wants in writing how Ms. Anderson violated HRA Administration Code of Conduct Executive Order No. 651 Section III (#1) as stated in Charge IV, also the same for Charge V-Section III (#36), Charge III-3, Charge VII-Section III-11, Charge VIII-Section III-21, and Charge IX-Section III-2.
> 10. Please have Dr. Soto, Ms. Fahely, Supervisor and Ms. Benjamin, Supervisor present so I may question them accordingly as it relates to these charges.

(Pet., Ex. D).

The Union made seven specific requests of HRA in Haile's case:

> 1. Copy of the HRA Code of Conduct, Executive Order No. 651 in its entirety.
> 2. Copy of the printout for Auto time for the following dates: July 14, 2008; October 17, 2008; December 30, 2008; January 20, 2009; January 28, 2009; March 31, 2009 and April 21, 2009.
> 3. Copy of the Swipe documentation for each of the aforementioned days.
> 4. Copy of the record for patient Jeremy T. for April 21 and April 22, 2008.
> 5. A copy of the witness' statements, who has stated that Ms. Haile was not present at the days named in the charges. In addition, the Association is requesting to have those witnesses present, so I may question them accordingly.
> 6. Specifically, the Association wants in writing how Ms. Haile violated HRA Administration Code of Conduct Executive Order No. 651 Section III-2 as stated in Charge VII and also the same for Charge VIII and Charge IX.
> 7. Please have Dr. Soto, Ms. Fahely, Supervisor and Ms. Benjamin, Supervisor present, so I may question them accordingly as it relates to these charges.

(Pet. Ex. D).

The Union requested that the information be delivered to its office by the close of business

on December 9, 2009, five days prior to the scheduled hearing dates. HRA did not provide the requested information to the Union.

At the Step 1A hearings on December 14, 2009, NYSNA reiterated its requests to both the hearing officers and the HRA Office of Staff Resources Director, Michael Falzarano. The hearing officers acknowledged receiving NYSNA's requests, but said they did not have the information.[1] The next day, the Union sent two additional letters to HRA, reiterating their requests for the information in the cases against Anderson and Haile. Again, HRA did not provide the requested information to the Union nor did it respond to the information requests.

On December 29, 2009, Haile received a letter informing her that certain of the charges brought against her had been substantiated, and termination was recommended. On January 15, 2010, Anderson received a similar letter, indicating that termination was also recommended in her case. On January 8, 2010, and January 20, 2010, respectively, Haile and Anderson executed waivers of their rights pursuant to New York Civil Service Law § 75 ("CSL § 75"), and elected to proceed with the charges through the grievance procedure as set forth in the Agreement.

On February 16, 2010, NYSNA filed the instant improper practice proceeding, alleging that the City and HRA, by failing to provide them with the information requested in their December 4, 2009 letters, violated § 12-306 (a)(1) and (4) of the NYCCBL. NYSNA asks that the Board issue an order directing the City and HRA to immediately provide NYSNA with the requested information and to cease and desist from refusing to provide NYSNA with requested information relevant and

[1] The Union asserted that when it asked Falzarano if he had the information at the hearing, he acknowledged that he knew of the requests, but that he did not have the information for them. HRA denied knowledge or information sufficient to form a belief as to the truth of the Union's assertion here.

necessary to charges in disciplinary proceedings.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that it has demonstrated that the City and HRA violated §12-306(a)(1) and (4) of the NYCCBL by failing to provide the requested information to the Union.[2]

Section 12-306(c)(4) requires employers to provide information, upon request, to an employee's certified bargaining representative, where "the information requested is relevant to and reasonably necessary for purposes of collective negotiations or contract administration." The Union contends that the information requested was relevant to and necessary for NYSNA to represent Anderson and Haile in their respective disciplinary cases, because the information requested pertained to the possible wrongful discipline, as well as for determining whether filing a grievance related to the charges was warranted. Thus, the City and HRA violated the NYCCBL, and committed an improper practice by refusing to provide the requested information.

NYSNA contends that the City's reliance on the Third Department's decision in *Matter of Pfau v. Pub. Empl. Rel. Bd.,* 69 A.D.3d 1080 (3rd Dept. 2010) is unavailing. The Union contends that *Pfau* construed Article 14 of the New York State Civil Service Law ("Taylor Law"), and not the NYCCBL, and is not directly applicable to these circumstances. NYSNA emphasizes the

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[2] NYCCBL § 12-306(a) states in relevant 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;
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;"

statutory nature of the right to information under the NYCCBL. In *Pfau*, the Third Department invalidated the ruling of the New York State Public Employment Relations Board ("PERB") finding that a duty to provide information in disciplinary proceedings is an extension of the duty to bargain. However, the clear and unequivocal language of the NYCCBL creates a duty to share information kept in the normal course of business, where the scope of the same right under the Taylor Law is less clear, and a product of judicial and administrative interpretation.

Moreover, the *Pfau* Court's reasoning does not warrant the same finding in the instant case as in that case. Where *Pfau* involved a statutory grievance procedure, outside of the collective bargaining agreement, the Agreement here includes within the definition of a grievance "a claimed wrongful disciplinary action." Because NYSNA's request for information was pursuant to the contractual grievance procedure and not part of a statutory discipline process, the rationale underlying the Court's ruling does not apply.

City and HRA's Position

The City and HRA contend that the refusal to provide NYSNA with the requested information did not violate §12-306(a)(1) or (4) of the NYCCBL because they have no duty to provide information in a disciplinary proceeding. Neither the statutory language of the NYCCBL nor the Board's prior rulings finding a duty to provide information in non-disciplinary cases support NYSNA's alleged right to receive the requested information. Additionally, the Agreement's language does not provide for discovery in a disciplinary proceeding. They further contend that NYCCBL § 12-306(a)(4) applies only in situations where the employer failed to bargain over a mandatory subject of bargaining, which was not the case here.

Although the NYCCBL requires parties to provide information to one another that is relevant

to and reasonably necessary for contract administration, this obligation does not extend to disciplinary proceedings. The statutory right to information in contractual grievances does not apply to information regarding disciplinary proceedings, as the Third Department found in *Pfau*, which the City and HRA assert is binding on the Board here. The facts of this case are indistinguishable from the facts in *Pfau*, and thus, the petition must be dismissed.

The City and HRA further argue that the Union has no contractual right to discovery in a disciplinary hearing, pursuant to the Agreement. The absence of any such right in the Agreement reflects the intent of the parties, as NYCHA has negotiated such provisions with at least one other union, whose agreement was provided. This absence constitutes a waiver of any entitlement to discovery, and NYSNA is impermissibly seeking to secure this right through an improper practice proceeding. Thus, HRA did not violate § 12-306(a)(1) or (4) by failing to supply the requested information to the Union.

NYCCBL § 12-305 does not provide for discovery in disciplinary proceedings and HRA contends that the Union has not provided evidence that HRA's conduct obstructed the ability of employees to exercise their protected rights or that HRA's actions interfered with the Union's ability to represent its members. Therefore, HRA did not violate NYCCBL § 12-306(a)(1) by failing to provide information to the Union, thus the Board should dismiss the petition.

DISCUSSION

The issue before us is whether the City and HRA's refusal to comply with a request for information alleged to be relevant to and reasonably necessary for contract administration violated NYCCBL § 12-306(c)(4) and thus constituted an improper practice under NYCCBL § 12-306(a) (1)

and (4). In resolving these issues, we must determine whether that statutory right pertains to disciplinary grievance processes, and, if so, whether the information request made falls within the scope of information relevant to and reasonably necessary for administering the contract at issue here. We find that § 12-306(c)(4) does pertain to disciplinary grievances, that certain of the information requested does fall within that duty, and that the refusal to provide such information was, accordingly, unjustified and constituted an improper practice.

Pursuant to NYCCBL § 12-306(c)(4), this Board has repeatedly held that the duty to bargain in good faith includes the obligation "to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." *DC 37, L. 376,* 1 OCB2d 37, at 4 (BCB 2008); *see SSEU, L. 371*, 1 OCB2d 11, at 9-10 (BCB 2008); *COBA*, 63 OCB 9, at 12 (BCB 1999). The Board has held that this duty applies where "the information requested is relevant to and reasonably necessary for purposes of collective negotiations or contract administration." *CIR,* 35 OCB 8, at 14 (BCB 1985). We have also held that "a failure to supply information within the scope of that subdivision, whether for purposes of collective bargaining or contract administration, necessarily constitutes a violation of the duty to bargain in good faith pursuant to NYCCBL § 12-306(a)(4)." *COBA*, 75 OCB 17, at 8 (BCB 2005). Further, "since the denial of information to which the Union is entitled renders the Union less able effectively to represent the interests of the employees in the unit, the employer's failure to supply the information also interferes with the statutory right of employees to be represented, in violation of NYCCBL § 12-306(a)(1)." *Id., see also PBA*, 79 OCB 6, at 17 (BCB 2007) (citations omitted). Thus, a violation of the duty to provide information relevant to and reasonably necessary to contract

administration violates both § 12-306(c)(4) and 12-306(a)(1).

We have held that "[t]his duty extends to information relevant to and reasonably necessary to the administration of the parties' agreements, such as processing grievances." *PBA,* 79 OCB 6, 14 (citing *L. 371, DC 37*, 77 OCB 23, at 13-14 (BCB 2006); *CEA*, 77 OCB 22, at 12-13 (BCB 2006)). In *SSEU*, the Board again found that the Union had the right to request information that is relevant to and reasonably necessary for consideration of a potential grievance, or to determine if an improper practice occurred, as a matter of contract administration. *SSEU, L. 371,* 1 OCB2d 11, 7-10 (BCB 2008).

Although we have not had occasion to rule on such a request in the context of a disciplinary grievance, PERB has consistently upheld the right of a union to seek information for contract administration in the context of disciplinary grievances, a conclusion which has been soundly and repeatedly endorsed by the courts. *See, e.g., Matter of Hampton Bays Union Free Sch. Dist*., 62 A.D.3d 1066, 1068 (3d Dept.), *lv. den*., 13 N.Y. 711 (2009) (affirming PERB's finding in context of disciplinary grievance that "failure to provide an employee organization with information relevant and material to the investigation or prosecution of a potential grievance constitutes an improper practice"); *Matter of CSEA v. New York State Pub. Empl. Rel. Bd.,* 46 A.D.3d 1037, 1038 (3d Dept. 2007) (*confirming State of New York (OMRDD),* 38 PERB ¶ 3036 (2005)); *Matter of County of Erie v. New York State Pub. Empl. Rel. Bd.*, 14 A.D.3d 14, 18-19 (3d Dept. 2004) (*confirming County of Erie (Erie County Sheriff),* 36 PERB ¶ 3021 (2003)); *State of New York (Dept. of Mental Health),* 26 PERB ¶ 3072, at 3137 (1993). Indeed, we have, in our own cases, approvingly cited this line of PERB decisions, expressly noting its applicability to disciplinary grievances. *See DC 37, L. 1508*, 77 OCB 23, at 15-16 (BCB 2006) (summarizing cases, including *County of Erie (Sheriff)*, 36 PERB

¶ 3021 (2003), *affd.*, 14 A.D.3d 14 (3d Dept. 2004), *enforced*, 789 N.Y.S.2d 453 (3d Dept. 2005)); *Town of Evans*, 37 PERB ¶ 3016 (2004) (similar duty under Taylor Law required provision of information to enable union to investigate disciplinary grievance)). Accordingly, we hold that the obligation to provide information reasonably necessary for contract administration applies to requests made in the context of disciplinary grievances, and that failure to provide such materials upon request violates § 12-306(a)(1) and (4).

The City argues, however, that the decision of the Appellate Division, Third Department in *Matter of Pfau v. Pub. Empl. Rel. Bd.*, 69 A.D.3d 1080 (3rd Dept. 2010), requires us to find a categorical exclusion from the duty to provide information relating to contractual grievance administration for disciplinary grievances. We are not persuaded by that contention.

In *Pfau*, the Third Department had before it a hybrid disciplinary process–created by the Rules of the Chief Judge (the "Rules"), and supplemented by additional procedures agreed upon by the parties. As a result, PERB had found, according to the Third Department's opinion, that "the disciplinary procedures should be considered as negotiated ones rather than arising from statutory or regulatory provisions." *Pfau*, 69 A.D.3d at 1082. The Appellate Division found PERB's analysis imported additional rights into the collective bargaining agreement not among those deviations from the Rules explicitly provided for in that agreement, and at variance with the longstanding practice of the UCS. *Pfau*, 69 A.D.3d at 1082-1083. The Court found that, under these facts, the longstanding practice under the Rules that no discovery was available had not been displaced. *Id.*[3]

[3] Pursuant to CSL § 76 (4), the statutory disciplinary procedures created by, *inter alia*, CSL § 75, are not the exclusive means through which a public employer may adjudicate disciplinary cases. Rather, "such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to" the Taylor Law or, as here, the NYCCBL. *Id.*; *see Patel v. New York City Housing Auth.*, 26 A.D.3d 172,

Notably, the Third Department did not preclude UCS from agreeing to more extensive discovery rights in disciplinary cases. Rather, the Appellate Division reasoned that the text of the agreement supplementing the Rules did not establish such an agreement. The court further found that the parties' contrary prior practice and the practical difficulties posed by the opinion reading such a right into the agreement further undermined any contention that such a change had been agreed upon by the parties.[4]

The *Pfau* Court approvingly cited its own prior cases confirming PERB's decisions holding that the obligation to provide information can extend to information requested in relation to contractually-defined disciplinary procedures. *Pfau*, 69 A.D.3d at 1082; *see also Matter of Hampton Bays Union Free Sch. Dist. v. Pub. Empl. Rel. Bd.*, 62 A.D.3d at 1068-1069. These cases are consistent with and support our ruling here.[5]

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174 (1st Dept. 2006) (citing cases); s*ee generally NYS Office of Children and Family Svcs. v. Lanterman*, 14 N.Y.3d 275, 282-283 (2010) (collectively bargained arbitration described in agreement as "in lieu of the procedure specified in Sections 75 and 76 of the Civil Service Law" compelled holding that "sections 75 and 76 are inapplicable to" the disciplinary process created by the agreement).

The Third Department's ruling was consistent with long-standing PERB decisional law; in *County of Ulster*, 26 PERB ¶ 3008 (1993), PERB differentiated between information requests pursuant to contract grievance procedures and statutory disciplinary procedures under CSL § 75, finding that the duty to provide information for contract administration did not apply to the latter. *Id*. at 3015-3016.

[4] The Court specifically referenced as problematic the finding that the availability of the right to disclosure turned on whether the employee charged with misconduct used union counsel, in which case the right pertained, or private counsel, in which case it did not. *Matter of Pfau*, 69 A.D.3d at 1083.

[5] We are not persuaded by the dissent that the Third Department's opinion in *Matter of Pfau* can be read as categorically finding that "the Taylor Law does not afford a union the right to disclosure with respect to a grievance concerning that concerns the alleged misconduct of an employee." Such a reading of *Pfau* would require the overruling by the Third Department of

Here, the parties' Agreement does not explicitly obligate the parties to provide requested information in conjunction with the disciplinary process. However, as PERB has held, and the Third Department has endorsed, such an absence of a separate contractual obligation to provide information in a disciplinary grievance procedure does not waive the statutory duty to provide such information. See *Matter of County of Erie v. New York State Pub. Empl. Rel. Bd.*, 14 A.D.3d at 18. We agree.

The Union's right to request information pursuant to NYCCBL § 12-306(c)(4), while applicable to the grievance here, is not unlimited. Rather, the Union is entitled to "data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." *Id*. As we have recently had occasion to reaffirm, "[r]equests that seek documents that are irrelevant, burdensome to provide, available elsewhere, confidential, or do not exist, are deemed to fall outside the scope of the duty by the public employer to disclose." *NYSNA*, 3 OCB2d 36, at 14 (BCB 2010)

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several of its own decisions, cited by us above, and explicitly reaffirmed by the Appellate Division in *Pfau*. *See Matter of Hampton Bays Union Free Sch. Dist*., 62 A.D.3d at 1068; *Matter of CSEA v. New York State Pub. Empl. Rel. Bd.,* 46 A.D.3d at 1038; and *Matter of County of Erie v. New York State Pub. Empl. Rel. Bd.*, 14 A.D.3d at18-19. Nor do we distinguish *Pfau* on its facts, as the dissent suggests. Rather, the opinion itself asserts its consistency with these decisions, which are comparable to the entirely contractual nature of the grievance procedure at issue here, as opposed to the hybrid procedure at issue in *Pfau*.

Similarly, the dissent's concern that our application of our long-standing precedents respecting the right to obtain information for purposes of contract administration to the context of disciplinary grievances provides an additional avenue of obtaining information than that available under CSL § 75 does not persuade us that our conclusion, consistent with that of PERB and the courts, is incorrect. The duty to provide information in the context of a statutory disciplinary procedure serves purposes distinct from that of discovery, in that it assists the Union in the "investigation or prosecution of a potential grievance," so it can determine how and in what forum to proceed. *Hampton Bay Union Free School District*, 62 A.D.3d at 1068.

(citing, *inter alia*, *State of New York (Office of the State Comptroller)*, 35 PERB ¶ 4565, at 4717 (2002)). Further, "public employers are not under a duty to respond to requests for specific reasons why an employer engaged in a particular action because these types of requests are not for documents which contain information that will enable the union to negotiate more effectively, but are more in the nature of conclusions to be drawn by the employer." *Id*. (editing and quotation marks omitted) (quoting *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 42 PERB ¶ 4570, at 4774 (2009)).

In the instant case, the Union has requested information in the following forms:

(A) the agency policies at issue (Anderson requests 1, 2, 4, and 6; Haile request 1);

(B) the "Autotime/Maximus" computer records allegedly supporting the charges (Anderson requests 3 and 5; Haile requests 2 and 3);

(C) copies of witness statements (Anderson request 8; Haile request 5);

(D) copies of the City's records on specified dates for specific named patients (Anderson request 7; Haile request 4);

(E) an explanation of specific alleged violations by the grievants (Anderson request 9; Haile request 6); and

(F) production of witnesses for questioning by the Union (Anderson requests 8, 10, Haile requests 5, 7).

Under our prior decisions, the requests for agency policies, time records supporting the charges, and witness statements which are in the possession of the City fall within the duty to provide information. Such requests "seek[] documentation, if it exists, that is relevant to the instant matter, is reasonably necessary to contract administration, aids NYSNA in its duty to respond to its membership, and assists the Union in carrying out its statutory responsibilities." *NYSNA*, 3 OCB2d

36, at 17 (citing *COBA*, 75 OCB 17, at 7 (BCB 2005)). Moreover, the City "has not demonstrated that the information sought in this request is irrelevant, contains confidential information that [it] cannot disclose, can be found elsewhere, does not exist, or that responding to these requests would be unduly burdensome." *NYSNA*, 3 OCB2d 36, at 17.

The Union's request that the City and HRA provide copies of the patient records as to which the grievants are charged with making false statements is likewise proper. The request is limited to the specific patients as to whose files the grievants are charged with making false statements regarding, and further limited to the dates at issue in the charges. Thus, these records are relevant to the charges of having "submitted false action[s] on City records." (Pet., Ex. B at 2, Spec. II (Anderson); Pet., Ex. C at 2, Spec. II (Haile)). In view of the limited scope of the request, the clear relevance of the documents, and lack of any ground for withholding these specific documents, we find that the Union has established that the request is for information which is "reasonably necessary" for collective bargaining purposes. *NYSNA*, 3 OCB2d 36, at 15-16, 17.[6]

By contrast, the requests for the employer to create documents explaining its decisions to bring specific charges fall outside of that duty. We have previously explained that "public employers are not under a duty to respond to requests for specific reasons why an employer engaged in a particular action," because such requests seek not data but the employer's reasoning. *NYSNA*, 3 OCB2d 36, at 14 (quoting *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 42 PERB ¶ 4570, at 4774 (2009)); *see also County of Ulster*, 43 PERB ¶ 4502 (2010). Moreover, such a request goes beyond

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[6] This finding does not, of course, preclude redaction of the patient records at issue to comply with Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. § 1320d, *et seq.*) ("HIPAA"), the Public Health Law, or any other applicable law or regulation governing medical records and patient confidentiality.

the statutory requirement of providing "data normally maintained in the ordinary course of business." § 12-306(c)(4). The request that HRA produce witnesses for questioning by the Union likewise goes beyond the scope of information properly requested under § 12-306(c)(4). *Id*. at 16.

To the extent set forth above, the refusal to comply with the requests for information in these letters constituted improper practices under §12-306(a)(1) and (4).[7] Accordingly, the petition is granted in part and denied in part.

[7] As noted in *PBA*, 79 OCB 6, at 17 (BCB 2007), the commission of an improper practice under § 12-306(a)(4) by failing to provide requested information in accordance with § 12-306(c)(4), also violates § 12-306(a)(1).

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 claims contained in the improper practice petition filed by New York State Nurses Association, docketed as BCB-2832-10, is granted in part and denied in part; it is further

ORDERED, that the City and/or HRA produce, within 60 days of the date of this order, documents responsive to the requests for the agency policies at issue, the employee time records which are alleged to support the disciplinary charges giving rise to the instant case, any witness statements relating to those charges in the possession, custody or control of the City or HRA, and the patient records for the specific patients requested and limited to the specific dates set forth in the requests; and it is further

ORDERED, that to the extent not granted above, the improper practice charge herein is dismissed.

Dated: April 28, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

Dissent per opinion. M. DAVID ZURNDORFER
MEMBER

I dissent per opinion. PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

DISSENT OF M. DAVID ZURNDORFER IN WHICH PAMELA S. SILVERBLATT CONCURS

I dissent. In my view, the previously-recognized right of a union to obtain information relevant to a contract interpretation grievance should not be extended to employee disciplinary proceedings.

I reach that conclusion largely based upon the reasoning of the Third Department in Matter of Pfau v. Public Employment Relation Board (69 A.D.3d 1080 (2010)). The Board majority's attempt to distinguish Pfau based upon its facts is unpersuasive. The Third Department plainly concluded as a matter of law that the Taylor Law does not afford a union the right to disclosure with respect to a grievance that concerns the alleged misconduct of an employee.

In addition, in those cases where employees elect to have their discipline submitted to OATH pursuant to Section 75 of the Civil Service Law, the majority's decision will both undermine the discovery scheme promulgated by OATH and give represented employees an unwarranted advantage over those who are not represented. In this case, for example, the information at issue was requested by the Union on December 4, 2009, and the two employees, Haile and Anderson, made their elections to waive their Section 75 rights in favor of the grievance procedure on January 8 and 20, 2010 respectively.

Had one or both employees elected to have their discipline heard by OATH, the effect of the Board's decision would be to make two separate and independent systems of discovery applicable at different stages of their cases. Prior to the employee's electing of OATH in January, he or she would be entitled to discovery pursuant to the New York City Collective Bargaining Law. Once the election was made and thereafter, discovery would be in accordance with OATH's Rules of Practice (12 RCNY Title 48, Sec. 1-33).

For these reasons, I would dismiss the Union's improper practice petition in its entirety.