Feder, 4 OCB2d 46 (BCB 2011)

(IP) (Docket No. BCB-2716-08).

Summary of Decision: Petitioner alleged that NYCHA violated NYCCBL § 12-306(a)(1) and (3) when it investigated and disciplined Petitioner for his use of NYCHA's computer because he engaged in union activity. Petitioner further alleged that NYCHA's policies governing employee use of its computer, internet, and email systems unlawfully targeted union-related activity. NYCHA contended that Petitioner's claims were barred by collateral estoppel. Further, it claimed that Petitioner was not engaged in protected union activity, and that NYCHA's actions were not motivated by anti-union animus, but were motivated by legitimate business reasons. The Board held that NYCHA violated NYCCBL § 12-306(a)(1) and (3) when it investigated and disciplined Petitioner for his internet and email use and for storing documents on his computer. Further, the Board found that NYCHA established a legitimate business reason for its investigation and discipline of Petitioner for use of his NYCHA computer for campaign purposes. Accordingly, the petition is 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 Petition

-between-

MITCHELL FEDER,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On August 18, 2008, Mitchell Feder, a member of District Council 37 ("DC 37"), Local 375 ("Union" or "Local 375"), filed a verified improper practice petition against the New York City Housing Authority ("NYCHA") alleging that NYCHA violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-

306(a)(1) and (3). Petitioner claims that NYCHA's policies governing its computer, internet, and email systems (collectively, "Computer Systems") interfered with the statutory rights of its employees, thereby violating NYCCBL § 12-306(a)(1). He also claims that NYCHA investigated and disciplined him because of his activities on behalf of Chapter 25 of Local 375 ("Chapter 25"). He further alleges that NYCHA's retaliatory and discriminatory behavior focused solely on him and that other NYCHA employees who engaged in identical actions were not subjected to any investigation and/or discipline. NYCHA argues that Petitioner's claims are barred by the doctrine of collateral estoppel. In addition, NYCHA contends that Petitioner was not engaged in protected union activity and that NYCHA's actions were not motivated by anti-union animus. Further, NYCHA argues that it had legitimate business reasons to issue disciplinary charges against Petitioner. The Board does not find that collateral estoppel applies to the claims herein. We find that NYCHA discriminated against Petitioner in violation of NYCCBL § 12-306(a)(1) and (3) by investigating and disciplining him for his email and internet usage and for storage of union-related documents on his NYCHA computer. The Board further finds that the business reasons proffered by NYCHA concerning this conduct were pretextual. In addition, the Board finds that NYCHA established a legitimate business reason for its investigation and discipline of Petitioner for his use of the NYCHA computer for campaign purposes. Accordingly, the petition is granted in part and denied in part.

BACKGROUND

The Trial Examiner held 13 days of hearings over the course of eight months. In addition to nearly 1,800 pages of transcript, the record contains portions of the transcript of a 13 day NYCHA

disciplinary hearing, several thousand pages of exhibits and at least five computer discs containing additional documents. The Trial Examiner found that the totality of the record established the relevant background facts to be as follows:[1]

Prior Relevant Employment History[2]

In 1992, Petitioner was hired by NYCHA as an Associate Housing Development Specialist.[3] First, Petitioner worked in NYCHA's Department of Design and Capital Improvements. Later, he was transferred to NYCHA's Division of Capital Projects, Department of Development, and then to NYCHA's Office of Finance, Division of Receivables. Since February 1, 2007, Petitioner has worked in NYCHA's Office of Business and Revenue Development ("OBRD"). At all times relevant to the instant matter, OBRD consisted of three other employees, Deputy Director Rico Velez, Assistant Director Susan Vairo, Petitioner's immediate supervisor, and Staff Analyst Saad Seddik. Petitioner's primary duties included the promotion and development of housing-related projects. While working in OBRD, his main project was the "laundry initiative," a revenue generating project designed to expand laundry room operations within NYCHA's housing project buildings through the use of private vendors.

Petitioner never received a negative performance evaluation, or had any of his supervisors

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[1] Petitioner named NYCHA and the City of New York as Respondents in the instant action; however, Petitioner made no claim against the City of New York and/or its agencies. Moreover, the City of New York made no appearance in the instant matter. Accordingly, we dismiss any claims against the City of New York and amend the caption, *sua sponte*, to exclude the City of New York.

[2] The headings of these sections are for convenience of reference only, and are not to be considered conclusions.

[3] Petitioner began his public employment in 1983 with the New York City Department of Housing Preservation and Development and worked for several city agencies before working at NYCHA.

complain about the quality of his work during his employment with NYCHA. The record further demonstrates that prior to the events that gave rise to the instant improper practice petition, Petitioner had never been subject to disciplinary action.

Petitioner's Union Activity

Petitioner has been an active union member during his employment with NYCHA. In 1997, Petitioner became a delegate for Chapter 25, which represents "technical guild titles" within NYCHA and has approximately 300 members. (Tr. 81-83).[4] In 1999, Petitioner became Chapter 25's Treasurer. In January 2002, Petitioner was elected Chapter 25 President. As Chapter 25 President, Petitioner sits on Local 375's Executive Board, files grievances, represents employees at Step I hearings, participates in contract negotiations, responds to questions from members, organizes and conducts monthly Chapter 25 meetings, and disseminates information to these members. At the time of the hearing before this agency, in 2009, Petitioner was serving his third term as Chapter 25 President and served on Local 375's Executive Board. Additionally, Petitioner appears on behalf of Local 375 at DC 37's monthly delegate meetings and at New York City's Central Labor Council meetings. Adam Eagle, Chief of Labor Relations at NYCHA, testified that Petitioner often contacted him regarding the status of grievances, or other issues such as summer hours for capital projects staff, union release time, and time and attendance. In addition, a NYCHA HR employee referred to Petitioner as Shop Steward of the Union. (*See* Ex. QQQQ). According to Petitioner, beginning

[4] At the conclusion of the September 22, 2009 hearing date, the transcript ended on page 1104. However, at the commencement of the following hearing date on October 2, 2009, the court reporter began the transcript with page 1005. Therefore, due to this pagination error during the transcription, which continued through until the end of the hearing dates, there are two pages for any page numbered 1005 through 1104. Accordingly, it should be noted that all page citations here referencing any page in that series also specify the date of the transcript.

shortly after his election to his Union office, he became a target of NYCHA retaliation.

Petitioner explained that he conducts union business during the workday. He visits Union members, conducts membership meetings, and attends to Union-related matters. He begins his work day any time between 8:00 a.m. and 10:00 a.m., and is required to work seven hours a day, with a one hour unpaid break for lunch and two paid 15 minute breaks. Petitioner testified that he reports to work early and stays late in order to make up for time spent performing Union representative duties.[5] This practice was approved by Petitioner's supervisors. On an *ad hoc* basis, Petitioner requests release time from work to attend to Union-related matters. Although in some instances NYCHA has denied Petitioner's requests, these requests are generally granted by NYCHA, depending upon Petitioner's workload. (*See, generally, Feder*, 1 OCB2d 23 (BCB 2008)). Petitioner also admits that his supervisors have, generally, been "cooperative" in permitting him to take time to attend union-related meetings during the work day.

It is clear from the record that Petitioner was a very active union representative, often emailing or contacting persons at all levels of NYCHA to address workplace issues. It is equally clear that both Eagle and Deputy Director David Marcinek were not happy that Petitioner contacted them and persons above them in the NYCHA hierarchy about workplace issues.[6] Both Marcinek and Eagle testified that Petitioner was not designated or authorized to speak on behalf of the Local.

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[5] Throughout the course of the instant matter, both parties introduced extensive evidence addressing whether NYCHA allows employees to take breaks during the work day. A factual issue regarding permissible break times is the subject of Petitioner's claims raised in BCB-2796-08, and will be decided in a separate opinion.

[6] Marcinek, who at all times relevant to the instant matter was the Deputy Director of Labor Relations, was promoted to the position of Deputy Director for Relationship Management in 2009, while the instant matter was still being heard. At all times here, he is referred to as the Deputy Director of Human Resources.

Although they acknowledged that only the Union determined who could speak on its behalf, neither Marcinek nor Eagle testified that the Union had advised them that Petitioner was not an authorized Union representative. Instead, Eagle testified that it was his "understanding" that Petitioner "had no authority" to contact NYCHA superiors and that Petitioner failed to respect "the chain of command." (Tr. 970-917, 999-1000). Additionally, Marcinek stated that "it was a violation of protocol" for Petitioner to contact directly NYCHA's General Manager, Deputy General Managers or the Director of Human Resources regarding issues affecting Petitioner's Chapter 25 members. (Tr. 1491-92).

NYCHA's Policies Governing its Computer Systems and Employee Organizations

NYCHA has an "Internet Policy," which states that the purpose of this policy is to ensure that "the use of the internet will be limited to the support of agency business functions."[7] (Ex. 10). Inappropriate use of the internet system is defined as use "for commercial purposes, personal business or any other purpose unrelated to NYCHA business," including but not limited to "illegal, disruptive, or unethical activities, or for personal gain." (*Id.*). This policy further states that employee access to the internet is "at the discretion of NYCHA management and may be granted or rescinded at any time." (*Id.*).

Further, NYCHA's "Communications and Business Systems Policy," which amends NYCHA's Internet Policy and prohibits the same activities proscribed by the Internet Policy, provides that limited personal use of NYCHA's communications and business systems is appropriate and expected but "should be kept to a minimum." (*Id.*). This policy prohibits use of the Computer

[7] All of the policies discussed herein governing NYCHA's Computer Systems were made available to all NYCHA employees through distributed hard copies and through NYCHA intranet. Petitioner acknowledged receipt of these documents. (Tr. 694-695 and Ex. 8).

Systems that will interfere with or disrupt network services and prohibits employees from entering personal, private material or information on this system that is not related to NYCHA's business purposes. Under this policy, employees who violate the terms of this regulation are subject to discipline, including but not limited to termination. Employees are reminded that their use of NYCHA's computers is governed by this policy when they log on to the computer system. (Ex. 11).

In addition, NYCHA maintains and distributes to its employees a Human Resources Manual containing personnel rules and regulations. (*See* Ex. 33). This manual states that employees of NYCHA shall not engage in any non-NYCHA activity during working hours other than limited personal use of NYCHA's Computer Systems, or engage in any private commercial work on NYCHA premises, on NYCHA time, or with NYCHA equipment. (*Id.* at 23). The NYCHA Human Resources Manual states that "storage of information that is not related to one's job on any computer system or email account" is inappropriate. (*Id*. at 35). Furthermore, the record demonstrates that in 2004, 2005, and 2007 NYCHA issued memoranda, which reiterated its policy regarding union election campaigns. Specifically, these memoranda state that posting of campaign literature anywhere on NYCHA property is strictly prohibited and "campaign activities on Authority property must be limited to non-working hours (such as lunch times) and non-working areas." (Tr. 991; *see* Ex. 12).

NYCHA's Human Resources Manual also contains a section governing employee organizations. This section provides that all NYCHA-approved employee organizations, "including social, educational, and fraternal organizations, shall register with the Director of Human

Resources."[8] (Ex. 33 at 14). Further, this section provides that NYCHA-approved employee organizations may post materials on NYCHA property, provided that these postings have been approved by NYCHA, and may conduct organization meetings "during regularly designated working hours," as long as these meetings have been approved by NYCHA. (*Id.* at 15). On NYCHA's intranet, there is a list of approved social, educational, and fraternal organizations that include: "Asian American Association," "Batei Tsibur," "Catholic Guild," "Greek Society," "Housing Bowling League," and "Runner's Club." (Ex. FF). This list further contains a contact person for each respective organization and a contact number, which, in some instances, is a NYCHA telephone extension. There is a link to an electronic bulletin board from the NYCHA intranet homepage. Employee organizations must receive approval from NYCHA to post materials on the electronic bulletin board. (Ex. 93).

Apart from NYCHA's Human Resources Manual, Article 17(c)(I) and (ii) of the parties' collective bargaining agreement permits the Union to post notices on bulletin boards, provided that they appear on Union stationary and pertain to Union matters. The collective bargaining agreement makes no mention that NYCHA pre-approval is necessary.

Employee Use of NYCHA's Computer Systems

In general, the record demonstrates that NYCHA's Computer Systems were used by its employees to distribute numerous emails regarding events sponsored and/or administered by

[8] According to counsel for NYCHA, unions and collective bargaining representatives are not social, educational, and fraternal organizations covered under this section of the Human Resources Manual. Nevertheless, NYCHA asserts that its Computer Systems policies apply to unions in the same way as they apply to approved organizations.

NYCHA-approved employee organizations on a routine basis.[9] The NYCHA intranet contains a complete calendar of these organizations' activities and events. (Ex. 93).

On countless occasions, these NYCHA-approved employee organizations sent out emails using NYCHA's Computer Systems to hundreds of employees. The record also demonstrates that these emails and attached files were sent by employees in wide-ranging titles and various supervisory levels, including managers, directors of units, and deputy general managers, as well as rank-and-file NYCHA employees. Depending upon the size of the emails and their respective attachments, these messages could use storage capability ranging from one to 21 megabytes. Examples of attachments sent included retirement notices, pictures from the "Oslo Opera House," holiday greetings and pictures from the refurbishing of a private building from a New York Times article. (Tr. 141- 43). Joshua Barnett, Local 375 and Chapter 25 Representative, testified that he received numerous emails that involved non-NYCHA-related matters in his NYCHA-issued email account regarding "cultural events, people's retirement parties, [and] deaths in people's families." (Tr. 899). At least one NYCHA witness acknowleged that emails for retirement parties were considered business-related. Another NYCHA witness acknowledged that some of the exhibits produced by Petitioner were not approved, but also noted that although not specifically approved by Human Resources, some of the emails would have typically been approved based on their content.

In addition, the record contains numerous emails with attachments, which were widely distributed to employees throughout NYCHA, that did not relate to NYCHA business or an approved employee organization. These emails concern subjects such as employees' retirements, births of

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[9] All of these emails contained specific attachments, which varied in length and size from 600 kilobytes to 5 megabytes, to the actual email.

children, holiday and birthday parties, and other social events. For example, in several specific instances, emails involving the "Toastmasters" group, which is not on the list of approved NYCHA organizations, were sent to all employees within NYCHA's Division of Capital Projects to inform them about specific meetings and topics. With regard to emails, including those sent on behalf of both NYCHA-approved organizations and organizations that were not approved, the record demonstrates that most, if not all, of these notices, emails, or flyers had not been pre-approved by NYCHA.

NYCHA's Definition of Acceptable Limited Use of its Computer Systems

The testimony of NYCHA's witnesses concerning how NYCHA defines "limited personal use" was confusing, inconsistent and sometimes contradictory. Overall, NYCHA witnesses testified that NYCHA's Computer System policies generally prohibit employee use of these systems for non-NYCHA-related work. Eagle, however, expressly recognized, "that there is going to be some limited personal use" of these systems. (Tr. 1012). He explained that acceptable limited personal use of email and internet is determined on a case-by-case basis and depends on the frequency of use, the nature of the communication, the duration of the use, and whether the use disrupts the work environment or impairs completion of NYCHA-related duties. For example, acceptable personal use of NYCHA's equipment includes calls to schedule an occasional doctor's appointment or with a child after school; use of the fax machine to send a child's camp enrollment form or a response to a doctor's request for medical documentation; internet searches for a doctor's contact information or an occasional news article; a response to a personal email or an occasional email to the union or a co-worker.

According to Stephen Disch, Manager of Technical Services in NYCHA's Law Department

use of NYCHA's Computer Systems "for anything but NYCHA business . . . [is] expressly forbidden." (Tr. 1240). He clarified, however, that occasional personal use of the phone or email was acceptable and expected. (Tr. 1239). Disch described acceptable limited personal use as sending an email indicating "honey, I'm going to be late . . . or . . . please pick up milk on the way home." (Tr. 1322). Disch also explained that "you can't hold somebody accountable for what they receive, but you can hold them accountable for what they send." (Tr. 1325). He also noted that attachments increase the size of an email and potentially could have a deleterious effect on the Computer Systems by occupying excessive amounts of bandwidth. Further, Disch testified that, generally, emails sent to a large number of recipients place a drain on NYCHA's Computer Systems. "[I]f you address [an email] to 300 people, even though you're sending one email, you're in effect sending 300 email messages." (Tr. 1322).

Further, NYCHA's witnesses asserted that its Computer Systems policies explicitly prohibit storage of non-NYCHA related documents on its computers, either on network or local drives.[10] However, Disch explained that although employee storage of personal, non-NYCHA-related information on one's computer was strictly prohibited material related to an NYCHA-approved employee organization falls within the scope of NYCHA's limited personal use exception.

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[10] A NYCHA computer user can save material to the network drive, which is operated and monitored by NYCHA, and is backed up on regular daily intervals. In addition, a user can save material on the individual computer or local drive. Material saved to a user's local drive is not monitored by NYCHA or backed up. NYCHA had no formal policy requiring employees to save all work to the network drive. Indeed, Disch admitted that there is no rule that prohibits an employee from saving his/her work to the local drive instead of the network drive. However, it appears that NYCHA recommends that its employees use the network for storage because it allows NYCHA to ensure security of material, prevent lost work, and provides management the ability to monitor its employees work quality and productivity.

Application of Computer Systems Policies to Employee Organizations

NYCHA asserts that unions are entitled to the same use of its Computer Systems as approved employee organizations. According to Eagle, the prior approval of posted materials required by NYCHA's Human Resources Manual applies to physical bulletin boards, as well as electronic bulletin boards. If approval is not sought or approval is denied, any subsequent posting could result in discipline. Eagle noted that acceptable postings must solely be used "to notify employees of activities that are happening." (Sept. 22, 2009, Tr. 1072). Also, Eagle testified that NYCHA maintains editorial authority over all postings, based "on content," because the communication appears on NYCHA property. Moreover, Eagle asserted that NYCHA's Human Resources Manual applies to materials that can be considered issues involving union activity.

Eagle testified that prior to February 2008, NYCHA's labor relations department was not aware that any NYCHA-approved employee organizations used NYCHA's email system to send notices, flyers, and other information. Moreover, Eagle stated that such emails were "inappropriate." (Tr. 1200). In addition, Eagle testified that approved employee organization contact persons listed on NYCHA's intranet are allowed to receive phone calls regarding these organizations on their NYCHA-issued phones because such conversations do not violate NYCHA's policies regarding its communications systems. Later in his testimony, Eagle contradicted his earlier statement and indicated that receipt of such phone calls would violate NYCHA's policies.

On cross-examination, Disch was presented with several emails announcing social events that were sent from organizations not on the list of approved groups and the emails did not have any apparent pre-approval by NYCHA. At least one of these messages contained an attachment and had been sent out on a NYCHA-wide basis. Even though Disch stated that the size of the email does not,

per se, constitute a violation of NYCHA's Computer Systems policies, he stated that the content of many of these emails violated the terms of NYCHA's policies.

According to Petitioner and Barnett, the provisions of NYCHA's Human Resources Manual concerning employee organizations have not been applied to unions. Rather this section only has been applied to the multitude of cultural, social, or religious organizations within NYCHA. In addition, Barnett testified that he never sought or received permission from NYCHA to post union-related materials on the physical and/or electronic bulletin boards. Petitioner and Barnett also testified that NYCHA never denied or prohibited unions from posting such materials or instructed them that such posting required prior NYCHA approval. In addition, Petitioner recalled that, on at least two occasions, NYCHA did not require prior approval of posted materials; a retirement flier and a calendar of events for NYCHA's Jewish organization.

Use of NYCHA Email for Union Activity

Petitioner and Barnett testified that use of NYCHA email is integral to the communication between members of Local 375 or Chapter 25. Additionally, Barnett testified that he and Petitioner used NYCHA's email list and system to communicate with their membership, as well as NYCHA management, regarding union-related matters. Not all members are diligent in reading the physical and electronic bulletin boards or reviewing various Union websites for such important information regarding matters that affect their employment. As a result, Barnett stated that he would email the members regarding "informative matters, . . . like [Union] events that were coming up, information about wages, salaries, working conditions." (Tr. 897). He sent these emails regularly, with the frequency ranging from several times per day to a few times per month.

The record also shows that Petitioner regularly used email to communicate concerning union-

related matters. Petitioner testified that since 2003, he regularly emailed Eagle, Marcinek, Deputy General Manager for Administration Natalie Rivers, Director of Human Resources Dawn Pinnock, General Manager Douglas Apple, and Assistant Deputy General Manager of Development Eileen Popkin regarding union-related matters. In total, the record reflects that Petitioner sent out approximately 110 emails to NYCHA's management regarding various union-related matters over the course of three years, from 2004 to 2007. Among other things, these emails sought approval for time-off to attend to union business or to conduct union meetings, sought a response to a particular pending labor-related issue, such as layoffs or safety issues, and voiced concerns regarding contract negotiations or alleged violations of the parties' collective bargaining agreement, NYCHA Rules and Regulations, and New York City Executive Orders. In addition, Union members often responded to or initiated emails to Feder concerning workplace matters.

The record also establishes that NYCHA's management within OBRD, within the labor relations department, and within the human resources department, knew that Petitioner was using NYCHA's email systems to communicate with the Union's members and his superiors regarding labor-management issues.[11] Nothing in the record shows that prior to the OCB hearing in this matter any NYCHA managerial employee ever mentioned to Petitioner or any other employee that emails related to union matters constituted inappropriate use of NYCHA's Computer Systems.[12] To the

[11] The record contains thousands of pages of documents, composed of Petitioner's email communications that Petitioner introduced to demonstrate that he was engaged in protected activity and by NYCHA to demonstrate that Petitioner spent NYCHA-related work time to conduct union business.

[12] Eagle testified that after he heard Barnett's testimony, he contacted Local 375, informed them that Barnett's understanding of NYCHA's policies on postings "were inaccurate at best," and issued Barnett "an informational memoranda [*sic*] explaining that based on his testimony he has (continued...)

contrary, often Petitioner's superiors replied to his emails via email, as well as to other Chapter 25 members, Local 375 members, and/or all employees within Petitioner's unit.

Despite these facts, Marcinek testified that use of NYCHA's Computer Systems for union-related matters by employees is strictly prohibited because a union is an "entity that's doing business of some kind," and therefore does not qualify for the limited personal use exception in NYCHA's policies. (Tr. 1535). Further with respect to use of NYCHA's email system by Union representatives, Marcinek initially testified that officially "recognized" union representatives, such as the president and vice-presidents of Local 375, but not Petitioner, are permitted to use NYCHA's email system. (Tr. 1491-92). According to Marcinek such use should be limited to contacting NYCHA management, and only "in accordance with NYCHA rules and regulations." (Tr. 1525). However, at Petitioner's disciplinary hearing, Marcinek testified that "authorized" union representatives are permitted to use NYCHA's email system to communicate with management regarding union-related matters without limitation. When presented with his disciplinary hearing testimony, Marcinek stated that his testimony from the disciplinary hearing was correct.

Both Eagle and Marcinek testified that NYCHA's managerial employees have an obligation to ensure that employees comply with NYCHA's rules and regulations. Nevertheless, Eagle and Marcinek admitted that they often responded to Petitioner's emails on workplace issues. Further, Marcinek and Eagle both conceded that they never informed Petitioner that these types of communications were prohibited by NYCHA's policies governing its Computer Systems. However,

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[12](...continued)
violated our posting rules." (Tr. 1069). However, Eagle affirmatively stated that this action by NYCHA was not disciplinary in nature because the memorandum was "informational" and would not be used for disciplinary purposes unless Barnett violated NYCHA's rules on postings again, "in which case that memo can be used in a disciplinary setting." (Tr. 1069).

Eagle stated that the content of Petitioners's workplace-related emails to him did not violate any NYCHA policy but would have been better addressed through the Union. Instead, Eagle and Marcinek asserted that Petitioner's emails were often inappropriate because they should have been addressed to higher union officials and not to management.[13]

Events Precipitating the Investigation of Petitioner

In December 2007, Chapter 25 conducted its internal elections. On November 28, 2007, prior to the elections, Thomas Pryor, a Deputy Director in the Capital Projects Division, sent an email to Petitioner and two other Chapter 25 members who were running for chapter president advising them that "NYCHA does not allow the posting of any campaign literature on any NYCHA property" and that such material should be removed immediately. (Ex. 12). Attached to this email were two memoranda outlining NYCHA's policies concerning union campaigns. Specifically, these memorandum stated that "campaign activities on Authority property must be limited to non-working hours (such as lunch times) and non-working areas," and posting campaign literature "on any bulletin board or any wall, window, furniture, fixture, fence, pole or other similar or different surface anywhere on [NYCHA] property is **strictly prohibited**." (*Id.*). (Emphasis in original).

In December 2007, toward the end of the Union election campaign period, Eagle received an anonymous complaint alleging that Petitioner was improperly using NYCHA's email system to conduct his reelection campaign for Chapter 25 President. Initially, Eagle decided not to act on this complaint because, given the anonymous nature of the complaint, he did not want to appear as if he

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[13] In this regard, neither Eagle nor Marcinek considered Petitioner an authorized union representative. Further, Eagle maintained that if Petitioner answered a call on his NYCHA-issued phone regarding union-related matters, this would violate NYCHA's Communication and Business Systems Policy.

was interfering or taking a side in the election. After the Chapter 25 elections results were announced, Eagle received a second complaint from someone who he believed to be a different Chapter 25 member. He referred this matter to Marcinek on December 28, 2007. According to Eagle and Marcinek, the second complainant specifically stated that Petitioner was "broadcasting" campaign material through NYCHA's email system. (Tr. 1473-74).

Although Marcinek testified that he viewed "broadcasting" campaign materials as "a serious thing," he viewed this unsupported complaint as a "low priority," in light of his other duties/concerns at that time. (Tr. 1445, 1511). Knowing, however, that he could not ignore the complaint, on January 2, 2008, Marcinek asked Eagle to obtain "samples" of Petitioner's alleged misuse of NYCHA's email system from the complainant. Marcinek also attempted to obtain samples from the complainant.

Marcinek testified that he informed Natalie Rivers, Deputy General Manager of Administration, about the campaign complaints on the afternoon of January 3, 2008. Rivers told him that the allegations were "serious enough to explore further," and agreed that obtaining samples was appropriate. (Tr. 1503). According to Marcinek, Rivers did not instruct him to conduct an investigation until sometime later.

Eagle testified that the decision to inform Rivers about Petitioner's alleged computer use was made quickly because:

> The reason why, you know, we considered this a more significant problem is because at this point in, I guess, Mr. Feder's relationship with the union, with the Housing Authority, he had become somewhat of a presence to Ms. Rivers.
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> In the last month leading up to this [decision to investigate], he brought an IP, which she would absolutely know about, the law

> department handled, about him not being permitted to go to I think a City Council event.
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> * * *
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> So this activity, you know, really there was a lot of activity going on with let's say Local 375 and Mr. Feder.

(Sept. 22, 2009, Tr. 1030-1031). According to Eagle, when he and Marcinek informed Rivers of the campaign complaints, Rivers informed them that they should refer this matter to NYCHA's Law Department and that Marcinek should commence an investigation.

Marcinek testified that samples of Petitioner's campaign activity were never received from the complainants. However, Marcinek maintained that the campaign complaints were the impetus for the investigation of Petitioner's computer use.

January 4, 2008 Email from Petitioner

On January 4, 2008, Petitioner sent an email to NYCHA's General Manager Douglas Apple and Deputy General Manager of Capital Projects Louis Rueda regarding NYCHA's then-intended realignment of the Capital Projects Division. Eagle, Marcinek, and a number of Local 375 delegates and officers were copied on the email, which stated,

> Good day gentlemen; on behalf of the rank and file employees of the Capital Projects Division that are affected by the forthcoming Realignment, I have attached Local 375, Chapter 25's list of concerns, issues and questions for the Administrations attention and response.

(Resp. Ex I.).

On January 7, 2008, Marcinek responded to Petitioner's email and informed Petitioner that questions and concerns regarding the Realignment of this division should be raised with the Union, and that the Union would be the proper entity to raise these concerns with NYCHA. (Ex. I). According to Petitioner, this was the first time a NYCHA representative commented that Petitioner

should "follow this protocol." (Tr. 188-9). On January 8, 2008, Rivers mistakenly sent Petitioner an email that was intended for Marcinek or another manager and questioned whether Petitioner should be using NYCHA's email system to raise and discuss the realignment issue.[14]

The Investigation of Petitioner

Approximately ten days after the email exchange between Marcinek and Petitioner, Marcinek commenced an investigation of Petitioner's computer use. Marcinek testified that his office regularly investigates complaints about employees. Typically complaints that potentially warrant disciplinary action arise from an employee's supervisor, who confers with the department director. The department director then files a request for an investigation with the Human Resources Director. Prior to the events herein, Marcinek had personally conducted only one investigation. Disch testified that he had conducted over 200 investigations of NYCHA employee's computers at the request of NYCHA's management, and that generally these investigations related to disciplinary matters.[15] Generally, Disch's investigations involved reviewing the content of an employee's network drive, email, telephone records and, occasionally, an employee's local drive.

On January 17, 2008, Marcinek contacted Avi Duvdevani, from IT, and asked him to make copies of all Petitioner's computer records, including emails, from September 1, 2007, to December 31, 2007, specifically the three months preceding the Chapter 25 election. Marcinek's request advised Duvdevani that,

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[14] Eagle testified that Rivers mistakenly replied to Petitioner's email instead of sending her response only to his superiors.

[15] Disch stated that, in these instances, once he completed his investigation, he passed on his findings, and made no determination regarding whether an employee violated NYCHA's policies regarding the Computer Systems.

> Human Resources is in the course of conducting an investigation into an alleged employee violation of the General Regulations of Behavior (HR Manual; Chap. 1, XII., B.17; C.4; C.7; C.8, and D.1); the Conflicts of Interest Guidelines (HR Manual, Chap. 1, XI. A.2) and HR Memos # 40/04 and 48/04 attached. This investigation will be inclusive of possible violation of the Authority's Communications and Business Systems Policy.

(Ex 99). On January 28, 2008, Marcinek received several computer disks from IT containing a copy of Petitioner's hard drive, including archives of Petitioner's internet usage obtained by using a computer program called Websense, his email, and all of the stored documents on Petitioner's computer.[16] These computer records covered a period of time much greater than Marcinek requested. Initially, he reviewed the three months he requested, but after finding what he believed were a volume of emails relating to union campaign activity, he extended his review to an 18 month period. Upon completion of his review, Marcinek recommended to his superiors, Pinnock and Rivers, that disciplinary action was warranted. On February 13, 2008, Marcinek reported his findings to NYCHA's General Counsel and its Inspector General and forwarded all of his findings to the Inspector General's office. Counsel for the Inspector General forwarded the findings to NYCHA's Law Department. (Ex. 100).

Petitioner's Email and Internet Use and Computer Storage

The record demonstrates that Petitioner's computer contained numerous emails concerning union-related matters that he sent and stored, as well as Word, WordPerfect, and PDF documents related to union matters that were stored on his network and local drives. NYCHA asserts that these records show that Petitioner's use of its Computer Systems was excessive and violated NYCHA's

[16] Websense is primarily a twofold program that monitors internet usage by tracking which websites a user potentially visits and then filters out certain delineated websites that are deemed prohibited.

Computer Systems policies.

In one exhibit, NYCHA produced 1,442 emails that Petitioner sent from September 19, 2007, to January 28, 2008, which it asserts are related to union business.[17] (Ex. 5). Some of these emails are lengthy, while some consist of only a few words. Some were emails that Petitioner initiated and some were merely responses to emails that he received from other employees. Indeed, the subject matter of these messages was union business. For the most part they are meeting notices, election nomination notices, and solicitations for election committee volunteers, and do not concern Petitioner's personal election campaign. However, there are some messages that contain Petitioner or other employee's criticisms of Union officers or the election process. In addition, there are a few emails sent from Petitioner that discuss his candidacy, and one email that apparently Petitioner sent only to himself containing an attachment of election materials that support his candidacy. (Ex. 5, p. 69, 131-135, 159-162).

According to Petitioner, of the 1,442 emails referenced by NYCHA, 75 emails actually pre-dated the period of time contained in the disciplinary charges and another 88 emails were simply documents Petitioner had scanned and sent to himself using NYCHA's printer/scanner. In addition, another 80 emails were sent to non-Chapter 25, non-Local 375 recipients. Petitioner testified that by looking for email tags, such as "Re:" and "FW," which indicate that Petitioner was responding to a message, 1,004 of the remaining emails were responses to inquiries from other Union members,

[17] In March 2008, Disch was asked to review the results of the investigation of Petitioner's computer usage. As part of his review, Disch sorted the emails using specific search terms, such as "brother," "sister," and "union," to retrieve all emails that could potentially refer to union-related matters. (Tr. 1483). This search, which he conceded was "imprecise," found 1,442 emails, dated from February 1, 2007, to January 28, 2008, that Disch believed were related to union matters. (Tr. 1420, 1426).

and were not, as Marcinek characterized, campaign solicitations for members' votes. (Tr. 214). According to Petitioner, he only initiated approximately 250 union-related emails from February 1, 2007 to January 28, 2008. Most of these emails provided members with "information about nominations, election rules and bylaws, locations, [and] ballots." (Tr. 241). Petitioner testified that although most of these emails were sent from his NYCHA-issued computer using NYCHA's email system, many of the emails were sent either before his work day started, during his designated break time, or after work hours.

Marcinek asserted that a large portion of these emails were related to Petitioner's campaign for the Local 375 and Chapter 25 office.[18] In addition, Marcinek, Eagle and Disch, all of whom reviewed Petitioner's computer files, testified that Petitioner's computer records revealed a very large number of emails that were unrelated to his NYCHA duties. Marcinek testified that the emails in evidence were only a "sample" of the total number of non-NYCHA emails on Petitioner's computer. When printed, even this sampling of Petitioner's emails total hundreds of pages. According to these witnesses, Petitioner's use of email was impermissible based on the number of emails he sent and because the content of the messages concerned union-business. In addition, some of these emails were sent to hundreds of employees, usually all within Chapter 25 or Local 375, and frequently resulted in a significant number of email responses. According to Disch, Petitioner's email and internet usage indicated that Petitioner was not dedicating a sufficient amount of time to

[18] At Petitioner's disciplinary hearing, Marcinek asserted that 100 percent of the documents in Ex. 5 were "campaign" related. (Tr. 1532). At the OCB hearing, Marcinek was asked why he only produced one campaign email, a message from Petitioner asking for votes. Marcinek responded that he only produced one email, because he was asked by Petitioner's counsel to produce "at least one." (Tr. 1529). It is clear from a review of the documents produced that NYCHA broadly considered anything relating to the Union election as campaign-related, including emails that announced the open and closing dates of nominations and the election procedure.

complete his NYCHA-related duties. Further, the total volume of email and internet usage effects NYCHA's Computer Systems because when the internet bandwidth is crowded, the system is slower. (Tr. 1246).

With regard to Petitioner's internet usage, an internet usage report documenting Petitioner's use of NYCHA's internet system from February 13, 2007 to February 7, 2008, ("Websense report") indicates that Petitioner registered 7,501 hits. (Ex. 25). Marcinek testified that all of Petitioner's internet usage appeared to be non-NYCHA-related. The Websense report recorded "hits" on hundreds of thousands of websites. On certain days, the "hits" documented in this report indicate that these "hits" were recorded either simultaneously or in immediate succession, sometimes seconds apart. Many hits were recorded on days when Petitioner did not work, including evenings or weekend days. Further, the Websense report indicated that Petitioner was accessing websites even when he was serving on jury duty and on days that he had taken NYCHA-authorized paid leave time. It also recorded as many as twelve hits in as few as four seconds, a practical impossibility. Moreover, multiple "hits" occurred simultaneously, which is also impossible to accomplish. As a result, it is not clear that the number of hits recorded in these reports bears any relationship to the number of websites that Petitioner actually visited.

Further, the websites listed in these reports demonstrate that Petitioner visited websites for Yahoo, DC 37, Netflix, the United Federation of Teachers, Local 375, the Association for Federal, State, County, and Municipal Employees, the Chief-Leader, the New York Times, Google, the Metropolitan Transit Authority, DailyOm, the Long Island Railroad, EnergyStar, LiveScience, Speed

Queen Laundry, and Kodak Gallery.[19] Disch admitted that Websense is a "very primitive" reporting tool because it doesn't have the ability to further syphon the search results using specific terms and only general conclusions can be drawn about the search results. (Tr. 1246-7). Disch nevertheless testified that Websense "was the best shot we could do at the time with the tools we had." (Tr. 1297).

According to Petitioner, most of his internet usage was related to NYCHA-related business, specifically a project involving a laundry feasibility study. As part of this study, Petitioner testified that he used search engine websites, such as Yahoo, Google, and Alta Vista, and visited other websites, such as Ebay and Epinions, to research prices and consumer reviews of laundry machines, as well as to find a toy washer to enhance the presentation of his feasibility study. He visited the Amazon website to search for literature related to his study. In addition, Petitioner admitted that he visited certain websites for union-related matters, such as the websites for DC 37, Local 375, the New York State Public Employment Relations Board ("PERB"), the New York City Office of Collective Bargaining ("OCB"), as well as websites for local newspapers, such as the Chief-Leader. Petitioner stated that when accessing websites such as Yahoo, he never closed out of those websites and merely minimized them as he completed his NYCHA-related tasks.

Petitioner also admitted that he visited some websites for personal reasons but contended that his internet usage was typical for a NYCHA employee. In support, Petitioner submitted an internet usage report of a NYCHA employee who works in the IT Department. (Ex. DDDDD). This report, which covered approximately the same length of time as the Websense report on Petitioner's internet

[19] Although this is not a comprehensive recitation of all the individual websites visited by Petitioner during that time period, there is no indication that Petitioner visited any website which was prohibited, *per se*, by NYCHA's Computer Systems policies.

usage, indicated that the IT employee visited nearly 2,000 "different websites" over 15,000 different times. (Tr. 881-882). Although some of the websites accessed by this employee could have been related to his NYCHA duties, a large number of the websites he visited were arguably personal in nature, including, but not limited to, bank, pharmacy, retail outlet store, and news group websites, as well as private email accounts, and educational sites. There is no evidence that the IT employee was disciplined for excessive internet use.[20]

Harold Cohen, an expert witness called by Petitioner, also testified concerning the number of hits recorded in the Websense report.[21] Cohen explained that the report shows multiple simultaneous hits occur because of hyperlinks. These hyperlinks result from code that is imbedded into a single website. Websense software retrieves not only the actual searches but also the hits caused by hyperlinks and thereby greatly exaggerates a user's internet usage. Furthermore, if a website with hyperlinks is minimized and not closed out, the hyperlinks and websites will automatically refresh periodically, again leading to exaggerated usage on a Websense report. Similar to Disch, Cohen concluded that Websense is an inaccurate and imperfect tool to determine and gauge a user's internet activity and it could not be used to accurately compare usage among users.

With respect to documents that Petitioner stored on his NYCHA computer, Disch found that

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[20] Petitioner obtained the report on the IT employee's internet use report as part of an exhibit that NYCHA presented at Petitioner's disciplinary hearing. According to NYCHA, this report was mistakenly placed onto a CD which was only supposed to contain Petitioner's internet usage report.

[21] Cohen is a union member who worked for over 26 years in NYCHA's technology department on research and development and was called as an expert in computer technology by Petitioner. During his decades of employment both with NYCHA and in the private sector as a computer engineer, he worked with numerous operating systems, trained users in various computer programs, developed the "microcomputer area" for NYCHA, and taught various computer classes in computer programming. (Tr. 1653-1656). As such, and over NYCHA's objection, his testimony shall be treated as expert testimony.

most of Petitioner's files, both NYCHA-related and non-NYCHA-related, were saved to the local drive. Eagle testified that the storage of a large volume of documents on Petitioner's local drive was "inappropriate" because it involved non-NYCHA-related business. Petitioner's stored documents included memoranda to Local 375's President, fellow Union representatives, and Chapter 25 members. These memoranda addressed various union-related topics, including general membership concerns and questions, agenda from Chapter 25 meetings, and proposed negotiation points to be addressed in labor-management meetings. Also, Petitioner had stored on his local drive documents relating to NYCHA's Personnel Rules and the New York Civil Service Law, as well as New York City and NYCHA regulations. Disch further stated that Petitioner's computer contained a folder labeled "Ch 25," which contained numerous sub-folders. Specifically, there were folders entitled "375 Contracts," "AFSCME Elections," "Ch 25 NYCHA Projects," "City Council," "DC 37 Constitution," and "Election Bylaws." (Ex. 20). In each of these sub-folders, Petitioner saved anywhere from one to hundreds of Word, PDF, and Excel documents, all of which occupied various amounts of memory on Petitioner's local drive. According to Disch, the contents of the "Ch 25" folder were impermissibly stored on the local drive of Petitioner's computer and the number of files/document in this folder was "sizable." (Tr. 1305).

In addition, Disch also investigated the computer, email and internet use of union representative Barnett, another OBRD employee Saad Seddik and supervisor Susan Vairo. Disch testified that both Barnett, Seddik and Vairo's Computer Systems showed some non-NYCHA-related use, including some materials related to union matters, but not to the same extent or volume as existed on Petitioner's computer.

Disciplinary Charges Against Petitioner

On April 16, 2008, NYCHA levied disciplinary charges of incompetency and misconduct against Petitioner. Specifically, these charges alleged that Petitioner "repeatedly used and/or are continuing to use [NYCHA] equipment, supplies, or resources for [non-NYCHA] purposes or activities" and/or Petitioner has "repeatedly pursued personal or private activities during times when [Petitioner is] required to work for [NYCHA]." (Pet., Ex. C). NYCHA further asserted that Petitioner "failed to perform [Petitioner's] duties in a satisfactory manner." (*Id*). The specified misconduct is alleged to have violated the New York City Charter, Chapter 68, Conflicts of Interest, §§2604 (b)(2) and (b)(3), the Rules of the City of New York, Title 53, Rule of the Board, Conflicts of Interest, §1-13(a) and (b), and the HA Human Resources Manual, Chapter I, Part XI, Section A(2), and Part XII, C(4), C(7), C(8) and D(1). NYCHA sought to impose a penalty of termination against Petitioner on these grounds.

NYCHA issued an amended set of disciplinary charges against Petitioner on June 24, 2008, which also sought his termination. (Ex. 4). The only difference between the original and amended sets of charges is that the amended charges included a claim that from February 2007 to April 2008 Petitioner failed to perform his NYCHA work satisfactorily because he did not devote his "full time and effort to the performance of [Petitioner's] Associate Housing Development Specialist position in that [Petitioner has] repeatedly pursued personal or private activities during time when [Petitioner is] required to work for [NYCHA]," in violation of the Human Resources Manual, Chapter I, Part XII, Section B(1). (*Id.*).

Petitioner's Disciplinary Hearing and Subsequent Events

Beginning on May 30, 2008, a disciplinary hearing was initiated before a NYCHA Trial

Officer. The hearing took place over 13 days and concluded on September 24, 2009. Both sets of disciplinary charges were considered at that hearing.

On August 18, 2008, Petitioner filed the instant improper practice petition alleging that NYCHA violated NYCCBL § 12-306(a)(1) and (3). On September 14, 2009, Petitioner filed another improper practice charge against NYCHA alleging three distinct causes of action: I) NYCHA's failure to install voice mail on his NYCHA-issued telephone, ii) NYCHA's ordering Petitioner to clean out his work space of union-related materials, and iii) NYCHA's rescinding of Petitioner's ability to take breaks during work time.[22]

On March 5, 2010, the NYCHA Trial Officer issued his Report and Recommendations ("Trial Officer Report") regarding the disciplinary charges levied against Petitioner.[23] In this determination, the Trial Officer found that Petitioner repeatedly "used Authority equipment, supplies, or resources for non-Authority purposes or activities," and that such use was beyond the scope of the "limited personal use exception," in violation of Rules of the City of New York, Title 53, Rule of the Board, Conflicts of Interest, §1-13(a) and (b), and the HA Human Resources Manual, Chapter I, Part XI, Section A(2), and Part XII, C(4), C(7), C(8) and D(1). (Trial Officer Report at 30-33). Specifically, the Trial Officer found that Petitioner's use of email "for union campaigning or electioneering was a *per se* violation" of NYCHA policy. (Trial Officer Report at 33).

The Trial Officer noted that sheer volume of emails and internet hits alone was not sufficient to show more than "limited personal use." Further, he concluded that it was not made clear to

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[22] For the purpose of expediting the processing of the claims contained in BCB-2796-09, the hearing was consolidated, but the Board has decided to issue separate decisions.

[23] NYCHA's approval of the Trial Officer's recommendations and the Trial Officer's Report were received into the record over Petitioner's objection on April 20, 2010.

employees that NYCHA prohibited personal use of the internet, since the general policy on business communications systems permitted limited personal use. (Trial Officer Report at 31). Nevertheless, he found that Petitioner devoted a "significant amount of his Authority work time to union-related activity," and visited a significant number of internet websites for non-NYCHA-related purposes. Therefore, the Trial Officer concluded that Petitioner's use of NYCHA's email system and internet for union related, personal or non-work related purposes went beyond the limited use permitted. (Trial Officer Report at 32-34).

In addition, the Trial Officer concluded that Petitioner's storage of union-related documents on his computer violated the Rules of the City of New York, Title 53, Rule of the Board, Conflicts of Interest, §1-13(a) and (b), and the HA Human Resources Manual, Chapter I, Part XI, Section A(2), and Part XII, C(4), C(7), C(8) and D(1). This conclusion was based on the fact that Petitioner knew or should have known that NYCHA had advised its employees not to store personal items on its computers and that Petitioner's use was beyond the "limited personal use" exception. (Trial Officer Report at 32). The Trial Officer also concluded that Petitioner completed all of his assigned tasks in a timely manner and that his work product was good. Thus, the Trial Officer did not find evidence to support NYCHA's charge that Petitioner did not perform his "duties in a satisfactory manner by not devoting [his] full time and effort to the performance of [his] Associate Housing Development Specialist position." (*Id*. at 35).

Based on his conclusions, the Trial Officer recommended a penalty of a two day suspension, as opposed to termination initially sought by NYCHA. The Trial Officer reasoned that while NYCHA could reasonably expect its employees to devote their work hours and use NYCHA resources for work-related business, Petitioner did not achieve any personal gain from engaging in

union activity during the work day or utilizing NYCHA resources, and ceased the "offending conduct," when he learned of the charges. (Trial Officer Report at 36). Further, the Trial Officer found that Petitioner's testimony at the hearing had been credible, his demeanor was straightforward, and he had an excellent work record. Moreover, the Trial Officer noted that Petitioner had never been disciplined previously. Therefore, NYCHA had not followed progressive discipline by seeking Petitioner's termination of Petitioner. (*Id.*).

On April 28, 2010, NYCHA's Board, which pursuant to Section 75 of the New York State Civil Service Law has the authority to adopt, revise, or reject the hearing officer's determination, adopted *in toto* the Trial Officer's Report ("April 2010 Determination"), and imposed the two day suspension on Petitioner.

On March 10, 2010, Petitioner filed another improper practice petition, docketed as BCB-2842-10, claiming that NYCHA i) improperly denied Petitioner release time to distribute union-related materials to members of Local 375 and to testify before the New York City Council Sub-Committee on Public Housing; ii) failed to properly process Petitioner's grievance; and iii) rejected Petitioner's request for a transfer.[24]

History of Employee Discipline Relating to Misuse of NYCHA's Computer Systems

Both sides presented testimony concerning NYCHA's treatment of employees who misuse its Computer Systems. According to Petitioner, NYCHA never disciplined any other member of Local 375 or Chapter 25 for personal or union use of NYCHA's Computer Systems, prior to the

[24] A hearing is being scheduled in this matter.

charges against Petitioner.[25] Barnett testified that he knew of no employee that had been disciplined for misusing the email system, but was aware that other agencies within the City of New York had disciplined employees for such misuse. In addition, Local 375's President, Claude Fort, testified that he was unaware of any disciplinary proceeding initiated against a member of Local 375 for sending union-related emails.

NYCHA elicited testimony concerning other instances of discipline for misuse of NYCHA resources. Marcinek and Eagle both testified that an Organization of Staff Analyst representative was discharged in 1992 or 1993 because he was found to have misused NYCHA's resources by making photocopies of his campaign literature.[26] In addition, NYCHA points to the Board's decision in *Organization of Staff Analysts*, 77 OCB2d 19 (BCB 2006) (Board found arbitrable a grievance over the termination of an employee for a conflict of interest and excessive use of telephone and e-mail on behalf of a non-profit organization). In that case a NYCHA employee was disciplined for misuse of NYCHA equipment. Marcinek and Eagle also recalled that NYCHA levied disciplinary charges against an International Brotherhood of Teamsters representative in 2009 for improper

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[25] Petitioner testified that he had heard that an employee who sent emails regarding a Super Bowl betting pool had been disciplined for misuse of the email system. Allegedly this incident occurred sometime after Petitioner was served with charges, his disciplinary hearing was held and the instant improper practice proceedings began. No other evidence was presented to corroborate this incident.

[26] In addition, NYCHA submitted a spreadsheet that was created by Eagle's office by searching NYCHA's "disciplinary database" in support of its position that NYCHA employees had been disciplined in the past for violating its policies governing the Computer Systems of NYCHA. (Oct. 6, 2009, Tr. 1077-79). The spreadsheet contained employees' initials, the proffered disciplinary charges against that employee, and the resulting penalty. (Ex. 95). A review of the document shows that several employees listed therein violated NYCHA policies concerning non-computer-related NYCHA equipment/property. It should be noted that with the exception of an entry concerning use of NYCHA resources for a union campaign, none of the entries indicate that an employee had been disciplined for union-related use of NYCHA's resources.

activity, but neither witness provided any further specific facts concerning the nature of that union representative's improper activity.

Finally, Marcinek testified that he recalled having received complaints about a particular slate of candidates running for union office who were misusing NYCHA's communications system by placing "robo-calls," similar to calls received from tele-marketers, and sending mass campaign emails to NYCHA employees' email addresses. (Tr. 1424-27). Marcinek stated that employees in the International Brotherhood of Teamsters received these calls on their NYCHA-issued phones. Marcinek did not know if any callers or senders' email addresses were identified. However, he stated that no disciplinary action resulted from this complaint because NYCHA could not track down the employees responsible for these calls.

Generally, concerning violations of NYCHA's policies and procedures, Eagle acknowledged that NYCHA practices progressive discipline and that Petitioner had never been warned or disciplined for his computer use prior to the issuance of disciplinary charges. Also, Marcinek admitted that despite his interpretation of NYCHA's Computer Systems policies, he never pursued disciplinary charges against any employee who corresponded with Petitioner via email regarding union-related matters. A memorandum issued by Director of Human Resources Pinnock provides that progressive discipline should not be used when employees are in possession of non-prescription controlled substances, disruptive behavior, being under the influence of alcohol at the work place, and violent behavior at the workplace; but this memorandum makes no reference to misuse of NYCHA's Computer Systems. (Ex. GGGGG). However, Eagle testified that in extreme cases, such as Petitioner's, progressive discipline can be bypassed.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that NYCHA violated NYCCBL § 12-306(a)(1) by interfering with employees' statutory rights under NYCCBL § 12-305.[27] NYCHA's Computer Systems policies are overbroad and unlawfully target union-related activity. NYCHA's interference with union activity through the issuance of these policies restrains the statutory rights of its employees. In this regard, Petitioner asserts that NYCHA's claim that § 12-307(b) gives it the right to issue such policies is baseless because that statutory provision does not allow employers to expressly restrict union activity protected by the NYCCBL. Furthermore, the record is devoid of any evidence indicating that employees are not capable of using these systems for NYCHA-related business while also using these systems to communicate regarding union-related matters. In fact, because the use of email allows workers to contact individuals, as well as large groups of employees, through a single message, employee use of this system is more efficient than using the telephone or having face-to-face meetings. Moreover, NYCHA has not contended that allowing employees to use these systems

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[27] NYCCBL § 12-306(a)(1) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> * * *
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

NYCCBL § 12-305 provides, in relevant part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

prevents it from properly managing its workforce.

Petitioner also contends that NYCHA's enforcement of these policies target union-related use, while allowing other non-NYCHA-related use of these systems to go virtually unpunished. The record is replete with incidents, emails, and testimony of NYCHA employees using these systems to communicate regarding birthday dinners, retirement parties, holiday functions, sports-related betting pools, and other personal matters. Any attempt by NYCHA to justify the measures complained of herein is disingenuous. Although NYCHA insists that it enforces these policies, in part, to ensure proper utilization and prevent an over-taxing of its computer, internet and email systems, there are countless exhibits demonstrating that the non-NYCHA-related usage unrelated to union activity went unpunished. Therefore, NYCHA cannot claim that these policies were enforced based upon legitimate business reasons.

Additionally, Petitioner argues that NYCHA discriminated against Petitioner by disciplining him for his computer use. He was open and notorious about his affiliation with Chapter 25 and Local 375; he filed numerous grievances and several improper practice petitions prior to the instant matter; he was recognized by NYCHA management as Chapter 25's President. NYCHA routinely granted him *ad hoc* leave to address union-related matters during the work day and he communicated with NYCHA management often regarding issues that affected NYCHA's employees. Thus, Petitioner was engaged in protected union activity. The alleged bad acts upon which NYCHA relied on to levy disciplinary charges against him were specifically based upon his use of NYCHA's computer, internet and email systems to communicate with fellow members of Local 375 and/or Chapter 25.

Regarding anti-union animus, Petitioner argues that he was the only person targeted for

discipline based on his alleged violations of the Computer Systems policies, yet countless other NYCHA employees failed to abide by the same policies. Marcinek, who only conducted one investigation on his own, targeted Petitioner by scouring Petitioner's entire computer and internet/email usage. Marcinek singled out Petitioner for discipline despite his previous knowledge that Petitioner had been using NYCHA's systems to conduct union business as early as 2006. Even though Petitioner had a clean disciplinary record and had never received a deficient performance evaluation, after this investigation concluded, NYCHA levied disciplinary charges against Petitioner and sought termination as a penalty.

Petitioner asserts that NYCHA specifically targeted him because he would frequently send emails to high-ranking NYCHA officials. Since Petitioner believed his attempts to advocate for the rights of Chapter 25 members fell upon deaf ears at his immediate supervisory and department level, he began reaching out to high-level supervisors within NYCHA. Specifically, Petitioner argues that his January 4, 2008 email regarding the realignment of the Capital Projects Division, rather than an alleged complaint about his use of email for campaign purposes, motivated NYCHA to investigate and discipline him. Furthermore, according to Marcinek and Eagle, Rivers knew about the campaign complaints prior to her January 8, 2008, email where she complains about Petitioner's use of email for union activity and does not mention campaign use.

Further, Petitioner argues that union-related use of NYCHA's Computer systems is NYCHA-related work, and not personal use. The only reason NYCHA employees belong to the Union or Chapter 25 is because they are NYCHA employees. As such, communications using these systems by and between Union members is either directly or indirectly related to NYCHA. Further, nothing in NYCHA's Computer Systems policies specifically allows or denies the Union or Chapter 25 from

using NYCHA's Computer Systems in a specific manner.

Petitioner argues that it is clear that his union activity was deemed subversive, and that he was punished for these acts. Additionally, the volumes of documents that NYCHA presented at the disciplinary hearing and in the instant matter to purportedly support its actions bespeaks of anti-union animus. The documents presented were an exaggeration of Petitioner's actual usage of NYCHA Computer Systems and lack any probative value. Further, any attempt by NYCHA to argue that its actions in connection with the instant matter were motivated by legitimate business reasons lack merit. Although NYCHA contends that Petitioner was disciplined for failing to perform his duties because he spent too much time on union-related matters, the record does not support that position. Therefore, NYCHA discriminated against Petitioner because he was engaged in protected union activity in violation of NYCCBL §§12-306 (a)(1) and (3).

NYCHA's Position

NYCHA asserts that the claims contained in the instant petition are barred by the doctrine of collateral estoppel. The Trial Officer has held a full hearing on all Petitioner's claims. Therefore, the Trial Officer's Report and the April 2010 Determination should be given preclusive effect and bar any findings or conclusions herein.

Furthermore, NYCHA contends that its actions taken in connection with the instant matter are protected by its managerial rights set forth in § 12-307(b) of the NYCCBL.[28] NYCHA may limit

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[28] NYCCBL § 12-307(b) states, in pertinent part:

> It is the right of the City, or any other public employer, acting through its agencies to determine the standards of service to be offered by its agencies; . . . direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete

(continued...)

employee use of its Computer Systems because NYCHA has a right to maintain order and to control its proprietary interests. Consistent with this prerogative, NYCHA issued policies governing its Computer Systems. These policies allow limited personal use and do not ban or prohibit all union-related usage. Rather, NYCHA permits employees to utilize its Computer Systems for union-related business, provided the usage is consistent with NYCHA's policies.

NYCHA further argues that Petitioner is unable to enunciate a *prima facie* claim for discrimination against NYCHA. Although NYCHA concedes that it had knowledge of Petitioner's involvement with Local 375 and Chapter 25, Petitioner was not disciplined for engaging in protected union activity, and therefore the first prong of the Board's standard is not satisfied. Petitioner's actions regarding his union-related computer use took time away from his performance of his NYCHA-related duties. NYCHA asserts that it was the volume of Petitioner's union-related emails that was clearly inappropriate. Further, NYCHA argues that Petitioner's actions distracted other NYCHA employees from their respective work because they had to read, respond to, ignore, and/or pass along his countless union-related communications. Therefore, NYCHA's disciplinary actions taken against Petitioner were not motivated by protected activity or anti-union animus. Rather, Petitioner clearly violated NYCHA's Computer Systems policies.

Additionally, NYCHA asserts that Petitioner's claim that he was unfairly targeted is unsubstantiated. NYCHA's investigation against Petitioner for misuse of its Computer Systems was commenced after Marcinek and Eagle received complaints from employees that Petitioner was misusing NYCHA's property. Prompted by the managerial responsibility to ensure that employees

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[28](...continued)
control and discretion over its organization . . . .

comply with NYCHA's policies, Marcinek began reviewing Petitioner's computer, including his email files, stored documents, and internet usage and found a voluminous amount of non-NYCHA related work. Simply, Petitioner violated NYCHA's rules and regulations. Moreover, any attempt by Petitioner to contend that he was the only union representative to be disciplined is factually untrue. NYCHA demonstrated that it disciplined another union official and in several other instances, NYCHA disciplined other employees for violating its Computer Systems policies.

Further, NYCHA asserts that it was not improperly motivated. In contrast, both parties admit that Petitioner, on many occasions, was granted special requests for *ad hoc* leave time and allowed to adjust his work schedule to address union-related matters. As a result, it is clear that NYCHA accommodated Petitioner's union-related activities. NYCHA further contends that all actions taken against Petitioner were motivated by legitimate business reasons and not anti-union animus. The record contains volumes of documents demonstrating that Petitioner spent an inordinate amount of time using NYCHA's Computer Systems to engage in union-related matters. NYCHA's policies governing these systems set forth neutral standards that permit limited personal use and restrict certain inappropriate uses. Additionally, despite Petitioner's assertions to the contrary, Petitioner spent countless hours on the internet, using this system for personal, non-NYCHA-related, non-union-related matters, which constitutes grounds for NYCHA to discipline Petitioner. Therefore, Petitioner's activities regarding these systems clearly violate the prohibition contained in NYCHA's policies and justify the disciplinary charges levied against Petitioner.

DISCUSSION

Collateral Estoppel

Before examining the substantive claims, this Board must determine to what extent, if any, it must afford collateral estoppel effect to the factual findings and conclusions set forth in the April 2010 Determination. NYCHA argues that this Board should be bound by NYCHA's quasi-judicial disciplinary process, and/or the April 2010 Determination. We do not find that the April 2010 Determination has collateral estoppel effect on the issues before the Board.

Collateral estoppel applies where an issue in a second action was "raised, necessarily decided and material in the first action, and if the party had a full and fair opportunity to litigate the issue in the earlier action." *Howe*, 79 OCB 19 (BCB 2007) (quoting *Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.*, 94 N.Y.2d 426, 432 (2000)). Where, as here, the first action consists of an administrative agency's quasi-judicial determination, two basic conditions must be met: "(1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal." *DC 37*, 1 OCB2d 5, at 52 (BCB 2008) (quoting *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2003)) (internal citations omitted).

The NYCHA disciplinary process addressed the issues of whether Petitioner failed to perform his NYCHA-related duties in a satisfactory manner and whether Petitioner misused NYCHA's Computer Systems. The NYCHA Trial Officer found that Petitioner performed his NYCHA-related duties satisfactorily, but determined that Petitioner misused the Computer Systems. On this basis, the Trial Officer recommended a penalty of a two-day suspension. In the April 2010 Determination NYCHA's General Manager adopted the Trial Officer's findings and recommendation in total.

Here, Petitioner alleges that NYCHA investigated and disciplined him in retaliation for his union activity. This Board has exclusive jurisdiction to consider this question and to determine whether anti-union animus was the motivation for the discipline and therefore an improper practice in violation of NYCCBL § 12-306(a)(1) and (3). *See Local 376, DC 37*, 73 OCB 15, at 11-12 (BCB 2004) (citing *Civil Serv. Empl. Assn., Local 1000 v. New York State Pub. Empl. Rel. Bd.*, 276 A.D.2d 967, 969 (3d Dept 2000)); *Matter of City of Albany v. New York State Pub. Empl. Rel. Bd.*, 57 A.D.2d 374, 375 (3d Dept. 1977), *affd.* 43 N.Y.2d 954 (1978) (concerning PERB's jurisdiction). The relevant inquiry in an improper practice proceeding before this Board is different from that engaged in at a hearing to determine whether an employee was disciplined for good cause, as is done in disciplinary proceedings pursuant to Civil Service Law § 75. *Local 376, supra*, 73 OCB 15, at 12. When a petitioner alleges retaliation and/or disparate treatment and establishes anti-union animus at an OCB hearing, "it is irrelevant . . . whether or not cause for the employers' action in terminating [the employee] actually existed." *Civil Serv. Empl. Assn., supra,* 276 A.D.2d at 969; *City of Albany, supra*, 57 A.D.2d at 375.

The parties did not raise the issues of retaliation or improper motivation before the NYCHA Trial Officer, nor did the Trial Officer decide this issue. Indeed, in deciding a discipline action, the New York City Office of Administrative Trials and Hearings ("OATH"), the City counterpart to NYCHA's Trial Officers, will not hear defenses of disparate treatment or selective prosecution. *See Off. of the Comptroller v. Frazier-Lee*, OATH Index No. 1199/03 (Dec. 4, 2003); *Dept. of Sanitation v. Yovino*, OATH Index No. 1209/96 (Oct. 9, 1996), *rev'd in part on other grounds*, N.Y.C. Civ. Serv. Comm'n Item No. CD 97-109-0 (Dec. 4, 1997). Therefore, the determination made in such forum cannot be dispositive of the improper practice claim raised before this Board. *DC 37*, 1

OCB2d 5, at 53; s*ee Colon v. Coughlin*, 58 F.3d 865, 870-71 (2d Cir. 1995) (holding that a previous administrative determination was not preclusive because the issue raised was whether defendant had reasonable grounds to search plaintiff's cell, while the subsequent issue was whether defendant retaliated against plaintiff for initiating legal action against defendant). As noted in many instances below, we agree essentially with the Trial Officer's factual findings. Nevertheless, the April 2010 Determination is not entitled to collateral estoppel effect.[29]

Discrimination Claim

Initially, we are not persuaded that NYCHA's managerial rights to formulate policies or its proprietary interests shield it from Petitioner's discrimination and/or retaliation claim here. NYCHA's assertion that it was authorized by NYCCBL § 12-307(b) to institute computer policies does not provide NYCHA unlimited protection from claims that its application of the policy violates the NYCCBL. *See DC 37*, 3 OCB2d 56, at 14 (noting a rule that is neutral on its face can be applied in a manner that is inimical to the NYCCBL). Rather, this Board has held that the statutory authority to create a policy does not render such policy immune from scrutiny under the NYCCBL because such a policy can be applied in a discriminatory manner. *See SSEU, L. 371*, 3 OCB2d 47, at 15-16 (BCB 2010) (finding that the mere application of the one-in-three rule does not insulate promotions

[29] Moreover we note that although the April 2010 Determination was adopted without revision or alteration, the ultimate decision maker on the discipline was the General Manager of NYCHA and not a neutral adjudicatory body. In *District Council 37*, 1 OCB2d 5 (BCB 2008), the Board declined to afford collateral estoppel effect to a post-hearing determination by OATH, in part, because "the ultimate decision maker" was the department's commissioner and not an assigned neutral. In doing so, we acknowledged the Second Circuit's decision in *Locurto v. Giuliani*, 447 F.3d 159, 170 (2nd Cir. 2006), denying collateral estoppel effect to the Police Commissioner's final disciplinary determination despite the fact that an administrative hearing was held prior to the Commissioner's determination. *See also, Colon*, 58 F.3d at 871 (2nd Cir. 1995). However, the Board noted that *Locurto* and *Colon* have not been adopted or rejected by the New York State courts.

from claimed violations of the NYCCBL because the rule permits the agency to exercise discretion in its selection of promotional appointees). Thus, we now consider Petitioner's discrimination claim.

To establish discrimination under the NYCCBL, we apply the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985) and its progeny, such as *State of New York (Division of State Police)*, 36 PERB ¶ 4521 (2003), adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). Pursuant to the test, a petitioner must demonstrate that:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also DC* 37, 1 OCB2d 6, at 27 (BCB 2008).

Here, it is undisputed that Petitioner engaged in protected union activity. He was an elected official of Chapter 25; he had several positions within Local 375 and DC 37. At all relevant times, Petitioner was in regular contact with NYCHA regarding issues affecting employees' rights and participated in numerous union matters that constituted protected union activity. Many of Petitioner's union-related emails were directed to NYCHA's managerial employees, including Eagle, Marcinek, Rivers, Pinnock, Rueda and Apple. NYCHA, itself, admits that it was aware of Petitioner's involvement with the Union.

More specifically, Petitioner's January 4, 2008 email was protected union activity. Activity that the Board deems to fall within the protection of NYCCBL § 12-305 must be related, if only indirectly, to the employment relationship between the City and bargaining unit employees. *See SSEU*, 79 OCB 34, at 9 (BCB 2007); *COBA*, 53 OCB 17, at 11 (BCB 1994). Here, Petitioner's union activity that most closely preceded NYCHA's investigation of his computer use was his

January 4, 2008 email concerning the Capital Projects Division Realignment. This email was addressed directly to NYCHA's General Manager Apple and Deputy General Manager Rueda. Petitioner sent the email explicitly on behalf of all the employees in OBRD and asked the administration to address attached questions regarding the Realignment. Among others, Eagle and Marcinek were copied on the email. The evidence shows that at the time the message was sent to management, Petitioner was the Chapter president and the content of the email explicitly states that he is seeking information on behalf of all the employees in the Division. Therefore, Petitioner's communication to NYCHA management, whether made orally, on paper or by email was union activity that is protected by the NYCCBL. *See e.g., Brown,* 3 OCB2d 49 (BCB 2010) (employees were engaged in protected activity when, acting in their official capacity as Union Executive Board members, they met with members to discuss union benefits and labor relations). Despite NYCHA's suggestion that this email was not authorized by the Union, express authorization by the Chapter, Local 375 or any other department of the collective bargaining representative is not required to make the conduct protected union activity. Therefore, we find that Petitioner has satisfied the first prong of the *Bowman/Salamanca* standard.[30]

Regarding the motivation behind the employment action in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26; *see also CEU, L. 237*, 67 OCB 13, at 9 (BCB 2001); *CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). However, to establish motive, "a petitioner must offer more than speculative or

[31] We reject NYCHA's argument that this prong cannot be satisfied because NYCHA disciplined Petitioner for activity that was unprotected. This argument combines or collapses the first and second prongs of the *Bowman/Salamanca* test. The union activity prong is distinct from the second "causal connection" prong.

conclusory allegations." *SBA*, 75 OCB 22, at 22. Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001)); Kaplin, 3 OCB2d 28 (BCB 2010). In addition, while temporal proximity alone is not sufficient to establish causation, the temporal proximity between the protected union activity and the allegedly retaliatory action, in conjunction with other facts supporting a finding of improper motivation, is sufficient to satisfy the second element of the *Bowman/Salamanca* test. *See Colella*, 79 OCB 27, at 55 (BCB 2008) (citing *SSEU, L. 371*, 77 OCB 35, at 15-16 (BCB 2006)).

Here, we find that Petitioner established a *prima facie* violation of the NYCCBL by demonstrating a causal connection between Petitioner's protected union activity and NYCHA's investigation of his computer use and issuance of the June 24, 2008 disciplinary charges. NYCHA's own witness testified that the impetus for the investigation of Petitioner was his union activity and his filing of an improper practice. Eagle testified that the reason NYCHA began investigating Petitioner was because of "Mr. Feder's relationship with the union, with the Housing Authority, he had become somewhat of a presence to Ms. Rivers. In the last month leading up to this, he brought an IP, which she would absolutely know about . . . ." (Tr. 1030-31).

Indeed, the evidence shows that almost two weeks before Marcinek began his investigation, Petitioner sent his January 4, 2008 email concerning union matters to Apple and Rueda. It was clear from both Marcinek and Eagle's testimonies that they did not approve of the email because they did not consider Petitioner "authorized" to communicate with their superiors concerning union matters. This is reflected in Marcinek's response instructing Petitioner to direct his questions to the Union and not directly to management. In addition, in the email Petitioner mistakenly received from Rivers, Rivers questioned whether Petitioner was allowed to raise union-related issues using

NYCHA's email system.

Further, although Marcinek's request for copies of Petitioner's computer records from NYCHA's IT Department was limited to the campaign period, September 2007 through December 2007, ultimately his investigation went beyond this time period and was not limited to campaign literature. Marcinek reviewed records dating back as far as February 2007 and through April 2008, and the materials he collected concerned any union-related material and not just Petitioner's election campaign. Accordingly, we conclude that Petitioner established *a prima facie* violation of NYCCBL § 12-306(a)(1) and (3).[31]

Proffered Legitimate Business Reasons

Once a petitioner establishes a *prima facie* violation of NYCCBL § 12-306(a)(3), the burden then shifts to the employer who may attempt to refute petitioner's showing on one or both elements or to demonstrate that a legitimate business reason would have caused the employer to take the action complained of even in the absence of protected conduct. *See DC 37*, 1 OCB2d 5, at 64 (BCB 2008) (citing *SBA*, 75 OCB 22, at 22 (BCB 2005)); *see also CEU, L. 237*, 77 OCB 24, at 18-19 (BCB 2006); *SSEU, L. 371*, 77 OCB 35, at 18; *Lamberti*, 77 OCB 21, at 17 (BCB 2006).

NYCHA asserts that regardless of his protected activity, it would have disciplined Petitioner because his computer use violated its Computer Systems policies because his usage was excessive and/or outside what is permissible. In this regard, it alleges that Petitioner's misconduct concerned

[31] In reaching this conclusion, we acknowledge that the complaints NYCHA received concerning Petitioner's use of email for his election campaign in late December 2007 may have been a legitimate basis upon which to commence an investigation. Indeed, employees, were on notice that campaigning for union office on NYCHA property was prohibited during work hours and in work areas. Nevertheless, based on the facts discussed above, Petitioner's campaigning was not the only motivating factor in the investigation. Accordingly, Petitioner established evidence of retaliation based on his protected union activity.

excessive use of email, internet, and storage of union-related documents on his NYCHA computer. In addition, NYCHA claims that he violated its rules by his use of email to campaign for union office.

A. Email and Internet Usage

While we acknowledge that an employer has the right to promulgate rules and restrictions regarding use of its facilities and resources, rules and/or enforcement of those rules cannot discriminate based on union activity. *See, DC 37*, 3 OCB2d 56 (BCB 2010) (employer's policy prohibiting use of equipment for union activity while permitting other non-work related usage was discriminatory in violation of NYCCBL § 12-306 (a)(1)); *Town of Henrietta*, 25 PERB 3040 (1992); *Guard Publishing Co.*, 351 NLRB 1110, 1118 (2007), *enf'd in part*, 571 F.3d 53 (DC. Cir. 2009).

For the reasons set forth below, we find that the legitimate business reasons offered by NYCHA to investigate and discipline Petitioner for his use of email were pretextual. The record established that employees used NYCHA's computers to regularly email concerning union-related business and other non-NYCHA related matters and that NYCHA's investigation and discipline towards Petitioner was disparate. *See DC 37, L. 1113*, 77 OCB 33, at 29 (BCB 2006) (disparate enforcement of an agency's policies against an employee who outperformed expectations but had recently filed a grievance indicates that "anti-union animus is at play"); *see also, COBA*, 2 OCB2d 7 (BCB 2009) (proffered legitimate business reasons for discipline of union representative were found to be pretext); *DC 37*, 1 OCB2d 6 (BCB 2008) (disciplinary charges were improperly motivated, and the City's proffered legitimate business reason was a pretext for disciplining the employee).

NYCHA's Computer Systems policies do not contain any broad prohibition specifically for

union business or even mention union-related business. NYCHA asserts that the Union is not an approved employee organization under its policies, but it treated unions the same as approved employee organizations and therefore entitled them to "limited personal use." In other words, NYCHA does not view union-related use as NYCHA business, and therefore under its policies, it considered use for union business to fall under the rubric of "personal" use.[32] NYCHA's Computer Systems policies, however, do not expressly state this interpretation. On the record herein, it is clear that employees did not necessarily understand that NYCHA considered union use and personal use to be synonymous. Indeed, NYCHA's Trial Officer correctly noted that NYCHA's policy on personal internet use was not clear. Although the Internet Policy prohibited use for anything other than NYCHA business, this prohibition was contradicted by NYCHA's overall Business Systems and Communications Policy, which provides for limited personal use. (Trial Officer's Report at 32).

NYCHA argues that it demonstrated that Petitioner's use of email and internet was so voluminous that it went well beyond the limited use exception to its Computer Systems policies. It maintains that the record reflects only a portion of the non-NYCHA related emails that the Petitioner sent. Presumably, however, NYCHA produced the most persuasive or probative examples of Petitioner's impermissible use. However, some of these messages were very short, only a few words and/or their printed length was largely due to the number of recipients or the capture of earlier email strings. Many similar messages were replies to emails initiated by other employees. Further, NYCHA's Trial Officer correctly noted that the "sheer volume" of emails or internet "hits" is insufficient to establish excessive use because of the nature of computer technology. (Trial Officer

[32] The Board does not here determine whether personal use and use for union business are properly considered the same type of non-NYCHA usage. We merely describe the evidence of how NYCHA applied its Computer Systems policies.

Report at 31). Because one keystroke can be recorded as multiple hits and an email can be sent so quickly, it is impossible to conclude solely from the number of emails or internet sites visited that an employee's use was more than limited.[33] Therefore, standing alone, the mere fact that Petitioner used NYCHA's Computer Systems for non-NYCHA business does not establish that his use violated NYCHA's policies.

Further, the evidence establishes that NYCHA's enforcement of its Computer Systems policies against Petitioner for his use of email and internet was disparate. First, the evidence supports the conclusion that union-related use of the NYCHA email system was widely permitted and not limited. Both Petitioner and Barnett regularly used the NYCHA computer for email communication with members and with NYCHA management. Numerous emails in evidence establish that Petitioner, as well as other Union representatives, openly communicated with NYCHA management for years using email without reprimand or notice that such communication was prohibited or should be limited. It is clear from Eagle and Marcinek's email responses to Petitioner, Barnett and others on union-related subjects prior to January 2008, that use of email for union-related business communication was not being limited or restricted. Therefore, by its actions prior to 2008, NYCHA management apparently permitted unlimited employee use of the Computer Systems for union-related matters other than union election campaigns.[34]

Similarly, the record shows that employees regularly used NYCHA's Computer Systems to

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[33] We also note that there is no evidence that Petitioner's email usage interfered with his assigned duties or the duties of others. Nor was there evidence that NYCHA's Computer System was impaired by Petitioner's use.

[34] As will be discussed later, there was no evidence that other NYCHA employees had been disciplined for similar use. The only evidence was that NYCHA had enforced is Computer Systems policies to prohibit use for profit or non-for-profit businesses or union campaigning.

proliferate various personal, non-NYCHA-related announcements and information. Emails concerning retirement parties, deaths in families and religious events were all frequently disseminated using these systems. In addition, the record also includes hundreds of pages of documents demonstrating that employees regularly and consistently utilized NYCHA computers to send emails on behalf of NYCHA-approved employee organizations. There is no evidence that NYCHA enforced any limitations on these types of personal use or on use on behalf of NYCHA-approved employee organizations. Often these emails were sent to management representatives as well as other employees, and sometimes these emails were initiated by supervisors or management representatives.

With respect to internet use, NYCHA has also not established a legitimate business reason for its investigation and discipline of Petitioner. Like NYCHA's Trial Officer, we find that the internet use report alone was not a reliable basis to determine if Petitioner engaged in more than limited personal use. (Trial Officer Report at 31). NYCHA's IT representative, Disch, conceded that the tools he used to analyze Petitioner's internet usage were "primitive." In addition, Petitioner's internet usage report shows that he visited personal websites on dates and during times that it is undisputed Petitioner was not physically present in the office. The number of websites reported is also not reliable in that it appears to reflect hits, which are conducted automatically, in addition to actual searches performed by a user.

Petitioner acknowledged that he used the internet on his NYCHA computer for union or personal and NYCHA-related use. However, the evidence shows that NYCHA did not consistently monitor or enforce limited personal use of the internet. Instead, an internet usage report of an IT employee provided by NYCHA covers a similar period of time to Petitioner's internet usage report

and shows a similar volume of use in addition to regular visits to sites not related to NYCHA business. There is no evidence that this employee was disciplined for his internet use.[35] Therefore, we find that NYCHA's proffered legitimate business reason to discipline Petitioner for his use of the internet was pretextual.

In reaching this conclusion, the Board finds that the testimony of NYCHA's witnesses offered to establish that its Computer Systems policies were consistently applied and enforced was not compelling. In particular, Marcinek's testimony concerning appropriate use of email for union-related matters was confusing and inconsistent. Initially, he indicated that use of these systems in connection with union-related matters was strictly prohibited. This position, however, contradicted the position articulated by NYCHA's counsel. Later, Marcinek clarified that only officially "recognized" union officials were permitted to use the Computer Systems to communicate with NYCHA management. However, none of the policies explicitly state this limitation, and Marcinek failed to define what constituted an officially "recognized" union official, other than stating that he was certain that Petitioner was not one.

Likewise, NYCHA witnesses' testimony concerning prohibited uses or scope of the limited personal use exception was also inconsistent. Disch testified that any use of the Computer Systems for non-NYCHA business violates the policies, but later cited specific examples of emergency personal use of phones or email that was considered permissible. Eagle testified that any use of the Computer Systems in connection with union-related matters violated NYCHA policies, but cited an

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[35] The Trial Officer found that Petitioner's use of the internet exceeded "limited personal use," because about 17% of the total number of sites he visited were either personal or union-related. (Trial Officer's Report at 34). However, we note that the issue of disparate enforcement of NYCHA's policy was not before NYCHA's Trial Officer, and therefore evidence concerning other employees internet use was not presented to the Trial Officer.

occasional email to the union as an example of acceptable personal use.

Further, we do not find evidence that other employees were disciplined for similar use or abuse of NYCHA's email or internet systems in the past. There were only two instances of discipline that Eagle, Marcinek, and Disch clearly described that involved employee misuse of NYCHA's Computer Systems. In one instance, the employee was conducting a private commercial business; in the other, the employee had been using NYCHA resources for union campaign purposes. Both of these activities are expressly prohibited by NYCHA's rules, and neither case involved the issue of more than limited use of NYCHA's computer systems for non-campaign-related union matters.[36] The remainder of the evidence presented by NYCHA concerning discipline for alleged misuse of its computer systems was inconsistent and inconclusive. As noted earlier, the document NYCHA presented to show the number of employees that NYCHA disciplined in the past for breaching its computer, internet, and email policies was unreliable inasmuch as it was incomplete and contained unidentified employees, and many of the individuals listed violated policies unrelated to the Computer Systems at issue here.

For these reasons, the Board concludes that had Petitioner not engaged in protected activity, particularly sending his email to Apple and others on January 4, 2008, NYCHA would not have conducted its investigation and disciplined Petitioner for excessive email and internet use.

B. Storage of Documents on Computer

With respect to Petitioner's use of his NYCHA computer to store union-related documents and his use of the computer to campaign for Union office, the Board finds that NYCHA has not

[36] Indeed, NYCHA Counsel conceded that these employees were disciplined for conduct that was different than the conduct for which Petitioner was disciplined. (Tr. 1661).

established legitimate business reasons for its investigation and discipline of Petitioner. We agree with the NYCHA Trial Officer that NYCHA permitted some limited storage of non-NYCHA information under its Computer Systems policies and reject NYCHA's asserted legitimate business reason that all computer storage was prohibited. Although NYCHA employees were generally on notice that NYCHA's equipment and resources should not be used for non-NYCHA purposes and the NYCHA Human Resources Manual states that "storage of information that is not related to one's job on any computer system or email account" is inappropriate, (Ex. 33 at 35), NYCHA's Trial Officer interpreted its Computer Systems policies to uniformly permit limited personal use, whether addressing email, internet or computer storage. (Trial Officer Report at 32). In the instant matter, the testimony concerning storage of non-NYCHA related documents on the computer was inconsistent.[37] If, as NYCHA asserts, unions are accorded the same treatment as approved employee organizations, then some limited storage of union material must be permissible.

There is no dispute that Petitioner stored numerous documents related to union business in a folder labeled "Ch25" on his NYCHA computer's "C" drive. However, there is no evidence that any other employee had been previously disciplined for storing union-related materials on a NYCHA computer. In addition, we note that NYCHA did not assert that Petitioner's storage of union-related documents in any way interfered with the operation of NYCHA's computers or its business process. Accordingly, we find that NYCHA has not shown a legitimate business reason for its enforcement of its policy on computer storage against Petitioner. It appears that absent Petitioner's protected

[37] Both Eagle and Marcinek testified that storage of any personal documents was prohibited. Similarly, Disch testified that the material stored on Petitioner's computer relating to union business was inappropriate and impermissible. However, at another point in his testimony, Disch stated that storage of material relating to NYCHA-approved employee organizations falls within the limited personal use exception to the Computer Systems policies and is permissible.

activity, he would not have been disciplined for using his NYCHA computer to store union-related documents. Accordingly, we find that NYCHA's proffered legitimate business reason to discipline Petitioner for storage of union materials on his NYCHA computer was pretextual.

C. Campaign Materials

With respect to Petitioner's use of NYCHA's Computer Systems for his campaign for union office, we find that NYCHA established a legitimate business reason for disciplining Petitioner. There is no dispute that Petitioner used his NYCHA computer to send two emails that discussed his candidacy for Union office, and one email that contained an attachment of election materials in support of his candidacy. Further, there is evidence that NYCHA has consistently prohibited the use of NYCHA resources for campaign purposes. In November 2007, Petitioner and other candidates for union office received an email reminding them of the campaign rules. In addition, Marcinek and Eagle's testimonies that NYCHA has disciplined other employees for violating the prohibition on use of its resources for campaigning was unrefuted. Accordingly, we find that NYCHA had a legitimate business reason to discipline Petitioner based on his use of his NYCHA computer for campaign purposes and that absent his protected activity, he would have been disciplined for this conduct.[38]

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

Finally, Petitioner argued that generally NYCHA's policies governing the Computer Systems were overly broad and interfered with employees' statutory rights under NYCCBL § 12-305.

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[38] The New York City Conflicts of Interest Board has found that use of City resources for union campaign purposes is a violation of Chapter 68 of the New York City Charter. *In the Matter of Patricia Nerich*, COIB Case No. 2009-445a (April 13, 2010); *In the Matter of Mark Maliaros*, COIB Case No. 2009-445 (February 18, 2010).

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. . . ." Actions which are inherently destructive of important employee rights may constitute unlawful interference even in the absence of proof of improper motive. *Local 1180, CWA*, 71 OCB 28, at 9-10 (BCB 2003); *Assistant Deputy Wardens Assn.*, 55 OCB 19, at 27 (BCB 1995). *See also, Committee of Interns and Residents*, 51 OCB 26 (BCB 1993), *aff'd sub nom. Committee of Interns and Residents v. Dinkins*, Index No. 127406/93, slip op. at 47 (Sup. Ct. N.Y. Co., Nov. 29, 1993). Similarly, the New York State Public Employment Relations Board ("PERB") has stated:

> The Taylor Act guarantees to public employees in this State the right to participate in an employee organization and to be represented by an employee organization in the negotiation of their terms and conditions of employment. Conduct of an employer or one acting in his behalf which has a predictably chilling effect on such employee organization's activities clearly discourages membership in or participation in the activities of the employee organization. Thus, conduct of an employer which is inherently destructive of such employee rights is a violation of § 209.a-l (c) even in the absence of proof of any intention to weaken the employee organization.

United Federation of College Teachers, Local 1460, 5 PERB ¶ 3018 (1972), *rev'd on other grounds*, *sub nom. Fashion Institute of Technology v. Helsby*, 44 A.D.2d 550 (1st Dept. 1974). Further, a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions. *Local 1180, CWA*, 71 OCB 28, at 10.

Recently, the Board held that an agency's "prohibition of the use of its office, communication, and/or computer equipment, property or technology for purpose of union activity while permitting other non-work related usage explicitly treats union activity in a disparate manner

and thereby constitutes interference with the statutory rights memorialized in NYCCBL § 12-305." *DC 37*, 3 OCB2d 56, at 13 (BCB 2010); *see also, Town of Henrietta*, 25 PERB ¶3040 (1992) (town engaged in interference by discontinuing union use of fax machine and telephone while permitting other personal use).

Here, we do not find that NYCHA's Computer Systems policies expressly prohibit, restrict or interfere with employees' right to engage in union activity. On their face, NYCHA's Computer Systems policies are not clear or consistent. As noted earlier, the Internet policy prohibits any non-NYCHA use, while the later issued Communications and Business Systems Policy allows for some limited personal use of all NYCHA's communications and business systems. Nevertheless, in the instant matter, NYCHA took the position that union activity or union-related business is not considered NYCHA-related business. The Computer Systems policies describe three categories of usage: NYCHA-related, personal and prohibited. As a result, although it may not have been clearly articulated to its employees, NYCHA considered union-related use to fall within the category of personal use, and therefore, its policies permit some limited use for union-related business. This interpretation, if it were fairly applied, would be reasonable in that it treats union use the same as other non-NYCHA related business and allows some limited use of NYCHA resources for union activity.

However, as stated above, we find that NYCHA's enforcement of its Computer Systems policies when it disciplined Petitioner for his internet and email use and for storing documents on his computer was disparate and discriminatory. As noted earlier in our discussion, discriminatory enforcement of a facially neutral policy is a violation of the NYCCBL. *See DC 37*, 3 OCB2d 56, at 14 (a neutral rule can be applied in a manner that is inimical to the NYCCBL); *SSEU, L. 371*, 3

OCB2d 47, at 15-16 (BCB 2010) (application of the one-in-three rule does not insulate promotions from claimed violations of the NYCCBL because the rule permits the agency to exercise discretion in its selection of promotional appointees and can be applied in a discriminatory manner). Accordingly, NYCHA restrained and interfered with employees' exercise of their rights set forth in NYCCBL § 12-305 by its discriminatory enforcement of its Computer Systems policies.

Based upon the foregoing, we find that Petitioner carried his burden of persuasion by demonstrating that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by enforcing its Computer Systems policies in a discriminatory manner and proffering amended disciplinary charges against Petitioner on June 24, 2008, regarding his use of email and internet for other than union campaining and for storage of documents on his NYCHA computer. In this regard, we grant the improper practice petition, in part, and order NYCHA to rescind its disciplinary charges issued against Petitioner for his use of email and internet and storage of documents on his NYCHA computer. We dismiss Petitioner's claims that NYCHA's discipline of Petitioner for use of its computer for campaign purposes was discriminatory. Since NYCHA has shown legitimate business reasons for its discipline of Petitioner for use of his computer for campaign purposes, we will not order NYCHA to rescind the two-day suspension it imposed in its April 2010 Determination.

ORDER

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

ORDERED, that the improper practice petition filed by Mitchell Feder, docketed as BCB-2716-08 be, and the same hereby is, granted in part, regarding the violation of NYCCBL § 12-306(a)(1) and (3) that concerns discipline imposed for misuse of NYCHA email and internet other than for union campaigning and for storage of union-related documents on his NYCHA computer; it is further

ORDERED, that the New York City Housing Authority cease and desist in engaging in discriminatory enforcement of internet, email and computer storage policies against Mitchell Feder; it is further

ORDERED, that the New York City Housing Authority rescind the amended disciplinary charges issued to Mitchell Feder on June 24, 2008, concerning his use of internet and email systems other than for union campaigning, and for storage of union-related documents on his NYCHA computer; it is further

ORDERED that the New York City Housing Authority post appropriate notices detailing the above-stated violations of the NYCCBL; and it is further

ORDERED, that the improper practice petition filed by Mitchell Feder, docketed as BCB-2716-08 be, and the same hereby is, denied in part, regarding the claim that NYCHA violated NYCCBL § 12-306(a)(1) and (3) that by its discipline of Petitioner for using the NYCHA computer for union campaigning.

Dated: New York, New York
August 18, 2011

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES MOERDLER
MEMBER

PETER B. PEPPER
MEMBER

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

We hereby notify:

That the Board of Collective Bargaining has issued 4 OCB2d 46 (BCB 2011), determining an improper practice petition between Mitchell Feder and the New York City Housing Authority.

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

ORDERED, that the improper practice petition filed by Mitchell Feder, docketed as BCB-2716-08 be, and the same hereby is, granted in part, regarding the violation of NYCCBL § 12-306(a)(1) and (3) that concerns discipline imposed for misuse of NYCHA email and internet other than for union campaigning and for storage of union-related documents on his NYCHA computer; it is further

ORDERED, that the New York City Housing Authority rescind the amended disciplinary charges issued to Mitchell Feder on June 24, 2008, in part, as they relate to email and internet mis-use other than for union campaigning and storage of documents on his NYCHA computer; it is further

ORDERED, that the New York City Housing Authority cease and desist in engaging in discriminatory enforcement of its policies regarding its email and internet systems and computer storage against Mitchell Feder; it is further

ORDERED that the New York City Housing Authority post appropriate notices detailing the above-stated violations of the NYCCBL; and it is further

ORDERED, that the improper practice petition filed by Mitchell Feder, docketed as BCB-2716-08 be, and the same hereby is, denied in part, regarding the claim that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by its discipline of Petitioner for using the NYCHA computer for union campaigning.

The New York City Housing Authority
(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.