CSTG, L. 375, 4 OCB2d 61 (BCB 2011)

(IP) (Docket No. BCB-2796-09).

Summary of Decision: The Union alleged that NYCHA discriminated against Petitioner, a Union representative, in violation of NYCCBL § 12-306(a)(1) and (3), by refusing to provide Petitioner with voicemail, rescinding daily breaks for employees in his unit, and instructing him to remove all Union-related material from his work space. NYCHA contended that the voicemail claim is untimely, and further argued that each claim fails to set forth a *prima facie* case. In the alternative, NYCHA asserted that its actions were motivated by legitimate business reasons, and not by anti-union animus. The Board found that Petitioner's voicemail claim was timely, but NYCHA's refusal to provide Petitioner with voicemail did not violate the NYCCBL. Further, we found that NYCHA did not eliminate Petitioner's break periods. However, the Board found that NYCHA's order that Petitioner remove Union-related material from his work space was motivated by anti-union animus. Accordingly, the Petition was granted, in part, and denied, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, and MITCHELL FEDER,

Petitioners,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On September 14, 2009, the Civil Service Technical Guild, Local 375 ("Union"), and Mitchell Feder ("Petitioner") filed a Verified Improper Practice Petition against the New York City Housing

Authority ("NYCHA" or "Authority") 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) by refusing to provide Petitioner with voicemail on his NYCHA-issued phone, eliminating daily break periods for employees in his unit, and instructing him to remove all Union-related material from his work space because of his testimony during a proceeding before the Board. NYCHA contends that the voicemail claim is untimely. NYCHA further argues that each claim fails to set forth a *prima facie* case, and that NYCHA's actions were motivated by legitimate business reasons, and not by anti-union animus. We find that Petitioner's voicemail claim is timely, but that NYCHA's refusal to provide Petitioner with voicemail did not violate the NYCCBL. Further, we find that NYCHA did not eliminate Petitioner's break periods. However, NYCHA's order that Petitioner remove Union-related material from his work space was motivated by anti-union animus. Accordingly, the Petition is granted, in part, and denied, in part.

BACKGROUND

The Trial Examiner held four days of hearing and found that the totality of the record established the relevant facts to be as follows:[1]

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[1] The instant matter, BCB-2796-09 ("*Feder V*"), was consolidated for hearing purposes with Petitioner's previous improper practice proceeding, *Feder*, 4 OCB2d 46 (BCB 2011) ("*Feder IV*") because the factual background concerning Petitioner's union activity and some of the issues raised herein relate to matters also present in *Feder IV*. The four days of hearing in *Feder V* followed 13 days of hearing in *Feder IV,* and was transcribed in a separate transcript. Both sets of transcripts will be referred to herein. The hearing in *Feder V* concluded before the Board issued its decision in *Feder IV*.

Petitioner appeared before the Board on three prior occasions: *Feder*, 1 OCB2d 23 (BCB 2008) ("*Feder I*"); *Feder*, 1 OCB2d 27 (BCB 2008) ("*Feder II*"); and *Feder*, 1 OCB2d 41 (BCB 2008) ("*Feder III*").

Petitioner has been an active Union member during his employment with NYCHA. Since 1997, Petitioner has served in various Union positions, including delegate for Local 375's Chapter 25 ("Chapter 25"), Chapter 25 Treasurer, and Chapter 25 President. Since 2002, and during the relevant time period, Petitioner served as Chapter 25 President. In this position, Petitioner filed grievances, represented employees at Step I hearings, responded to members' questions, organized and attended monthly Chapter 25 meetings, and disseminated information to the members. *See Feder I*V, 4 OCB2d 46 at 4 (BCB 2011).

Prior to and during his presidency, Petitioner held various positions within NYCHA.[2] NYCHA established the Office of Business and Revenue Development ("OBRD") in early 2007 and Petitioner has worked in OBRD since February 5, 2007. OBRD's main mission is to generate revenue for NYCHA through various methods, including leasing laundry facilities to private contractors, licensing vending machines throughout NYCHA facilities, conducting studies on parking facilities, and "journal advertising." (*Feder V* Tr. 165). Four employees currently work in OBRD. Petitioner is the coordinator for the laundry room contracts. His primary duties include the promotion and development of housing-related projects. Since February 2007, his main project was the "laundry initiative," which involved researching the financial feasibility of expanding laundry room operations within NYCHA's housing project buildings. (*Id.* at 116). This project, in part, required Petitioner to visit various laundry facilities, and to communicate with vendors, building managers and

[2] Petitioner began his public employment in 1983 with the New York City Department of Housing Preservation and Development and worked for various agencies before starting at NYCHA in 1992. Petitioner began at NYCHA in the Department of Design and Capital Improvements; he was then transferred to NYCHA's Division of Capital Projects, Department of Development; he was again transferred to NYCHA's Office of Finance, Division of Receivables. *See Feder IV*, 4 OCB2d 46 at 3.

superintendents, and equipment manufacturers by phone and email. OBRD provided Petitioner with a computer with email and internet access, and an office telephone with two direct lines.

Petitioner asserts that in each of his prior NYCHA positions, and before NYCHA transferred him to OBRD, his NYCHA telephone was equipped with a voicemail feature. Petitioner's OBRD telephone, however, does not have this capability. Petitioner also testified that the former laundry contract coordinator had voicemail on his NYCHA telephone and that he had personally left that coordinator voicemail messages. When OBRD was created, the former laundry contract coordinator transferred the laundry work to OBRD.[3] Petitioner testified that he performs a "subset" of duties that the former coordinator performed, including telephone and email correspondence with vendors and superintendents. (*Id.* at 233). Petitioner's Direct Supervisor, Cassandra Deas testified that, unlike Petitioner, the former coordinator controlled all work related to laundry contracts, including the money portion, which Petitioner has never been assigned. Deas did not know whether the former coordinator had voicemail because she began working for OBRD during the transition period when the former coordinator no longer worked on laundry contracts.

According to NYCHA, when it created OBRD in 2007, Deputy Director Rico Velez reviewed the job functions of his staff and determined that non-managerial employees in OBRD did not require voicemail to carry out their NYCHA duties. Thus, non-managerial employees in OBRD, including Petitioner, never had voicemail and only the OBRD managerial employees currently have voicemail. At all relevant times, Petitioner and one other employee were the only non-managerial employees at OBRD, and neither had voicemail. All OBRD employees, however, have access to a voice mailbox

[3] The transition of all work related to laundry contracts from the former coordinator to OBRD was completed in or around June 2008.

connected to OBRD's general telephone line. Calls to this general line ring on all OBRD employees' telephones. All OBRD employees' telephones also have the capability to transfer calls to a coworker. Petitioner admits that he was aware of each of these options.

Some time prior to August 6, 2007, Petitioner requested voicemail for his NYCHA telephone. On August 6, 2007, he sent an email to Velez, stating: "Just a reminder that I need voicemail." (Ans., Ex. 14). On August 27, 2007, he sent another email to Velez, stating in relevant part:

> As a follow-up to my previous request for voicemail, . . . [o]n behalf of the Laundry Assessment Report, I will soon be making calls to various appliance suppliers and/or manufacturers and associations for additional information. Since I will not be at my desk all the time . . . the firms will be expecting voice mail to leave a message to inform me that they have called-back and not having it will be problematic and will reflect upon the Authority as being unprofessional.
>
> In addition, in the past, I had always had voice mail, whether it was in the Design Department or the Department for Development. More importantly, as a union representative, it is imperative that my field members be able to leave me a message when they call. . . .
>
> Your assistance in acquiring voice mail is appreciated, but if you are not the one to authorize it or to arrange for it to be installed, please inform me and I will follow-up with the appropriate section, especially if I have to request this through Labor Relations.

(*Id.*). The record is unclear whether NYCHA responded to this request, but it is undisputed that NYCHA never installed voicemail on Petitioner's telephone.

In addition to using the telephone, computer systems, and email to perform NYCHA work, Petitioner used these resources to conduct Union-related business from his cubicle before and after work, during lunch, and during his two paid 15-minute breaks. *See Feder IV*, at 5. Petitioner also stored thousands of pages of Union-related documents in approximately ten closed boxes under and around his desk, which he referenced "weekly or bi-weekly" for Union-related matters, depending

on the needs of his members. (*Feder V* Tr. 124). Petitioner testified that he generally spent "five minutes or less" actually looking at the Union-related documents on any one occasion. (*Id.* at 126). Petitioner brought these boxes with him from his previous department when NYCHA transferred him to OBRD in February 2007. Although Petitioner's supervisors visited his cubicle "on average . . . at least two to five times a day," they never inquired as to the contents of the boxes or requested that Petitioner move any of the boxes. (*Id.* at 68). Petitioner also testified that he told his former supervisor, Deas' predecessor, that the boxes contained Union-related materials.[4] (*Id.* at 69).

In April 2008, NYCHA served disciplinary charges against Petitioner alleging that he repeatedly used NYCHA equipment, specifically NYCHA's computer systems and email, for non-NYCHA purposes during times he was required to be working for NYCHA. In June 2008, NYCHA issued an amended set of disciplinary charges, restating the same charges and adding a claim that Petitioner failed to perform his NYCHA duties in a satisfactory manner. In response, in August 2008, Petitioner filed an Improper Practice Petition against NYCHA (*Feder IV*), claiming that NYCHA retaliated against him for his Union activity by serving these disciplinary charges, and that NYCHA's policies governing employee use of its computer, internet, and email unlawfully interfered with Union activity. A 13-day hearing was held in that matter, beginning on April 21, 2009.[5]

NYCHA sets forth its policies governing use of NYCHA property in various handbooks. NYCHA's General Regulations of Behavior lists, in relevant part, prohibited conduct:

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[4] Deas' predecessor was not called as a witness.

[5] In *Feder IV*, the Board found 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. However, the Board found that NYCHA established a legitimate business reason for its investigation and discipline of Petitioner's use of his NYCHA computer for campaign purposes. *Id.* at 1.

> Employees shall not . . .
>
> Engage in any non-Authority activity during working hours other than appropriately minimal personal use of Authority communications and business system . . . on Authority time or with Authority equipment except as authorized.
>
> Use Authority resources, such as staff or letterhead, for any non-NYCHA purpose, other than to the limited extent contemplated by the Authority's Communications and Business Systems Policy.

(Ans., Ex. 3).[6] Likewise, NYCHA's Human Resources ("HR") Manual, entitled "Personnel Rules and Regulations," states that employees "may not use NYCHA letterhead, personnel, equipment, supplies, or resources for a non-NYCHA purpose, nor may you pursue personal or private activities during times when you are required to work for NYCHA." (Ans., Ex. 2).

Moreover, NYCHA's "Communications and Business Systems Policy" identifies "storage of information that is not related to one's job on any computer system or email account" as an inappropriate use. (*Feder IV*, Ex. 33). That section states that "Communications and Business Systems . . . include, but are not limited to telephones, voice mail, answering machines, fax machines, computers, email, internet access and photocopiers." (*Id.*). NYCHA's General Regulations of Behavior states that "Supervisors or managers are required to take appropriate and timely action when they become aware of any violation of these [rules]." (Ans., Ex. 3). NYCHA asserts that these rules establish that employees are not to use NYCHA's equipment and property, including their assigned work space, for any non-NYCHA purpose except as specifically authorized by NYCHA. No provision, however, specifically addresses the storage of material in one's work space.

On April 22, 2009, during the improper practice hearing in *Feder IV*, Petitioner testified that

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[6] Petitioner acknowledges that he received a copy of NYCHA's General Regulations of Behavior on April 25, 2005. (Ans. Ex. 4).

he stored Union-related materials in his cubicle and desk drawers and that he had never been told that he could not store these materials. (*Feder IV* Tr. 284). Specifically, he stated that he has boxes of Union materials "up to [his] ears." (*Id.* at 284).

Upon hearing this testimony, NYCHA counsel informed Adam Eagle, Chief of Labor Relations at NYCHA, of Petitioner's testimony. Eagle then visited Petitioner's work space and photographed the cubicle. (*Id.* at 1058). Eagle testified: "While I didn't look at anything in particular to say what each one was, it was a very cluttered environment" and because "I know [Petitioner] is very active in the [U]nion. I know he is the chapter president. I know he is very, very involved. I'd say it was I think an educated assumption that most, if not all, of the stuff on his desk was [U]nion-related." (*Id.* at 1058-59). Further, Eagle testified that due to "the sensitive nature" of the situation, he called the Union's Second Vice President of Grievances and informed her that Petitioner was keeping non-NYCHA materials in his cubicle and that NYCHA was going to ask Petitioner to remove the materials. Eagle also asked her if the Union would permit Petitioner to keep his materials at Union headquarters, a five-minute walk from Petitioner's work location. (*Id.* at 1059-60). The Union's Second Vice President of Grievances agreed to supply Petitioner with storage space, and asked NYCHA to provide Petitioner more time to move the boxes.

Meanwhile, on May 12, 2009, Petitioner sent an email to Deas and the Deputy Director requesting the installation of voicemail on his NYCHA telephone. Petitioner stated:

> Last week as I performed my smart card/machine counter research where I phoned and left messages at a couple of manufacturers and/or laundry machine suppliers, I had received some return phone calls while I was away from my desk. Due to the fact that I do not have Voice Mail, I did not know who called, hence hampering my job performance. . . .

> Now that OBRD is directly responsible for the administration of laundry room operations/ initiative . . . I believe having Voice Mail is warranted.

(Pet., Ex A). Because he did not receive a response to this email, on May 27, 2009, Petitioner again emailed his supervisors stating, "you expect me to perform in a professional manner, be timely with reports and research, but have still refused to allow me 'Voice-mail,' where by not having it, directly interferes with my performance in not completing my assignments in a timely manner . . . ." (*Id.*). Petitioner testified that he made these requests because his responsibilities changed when he received the laundry initiative in "October or November 2008." (*Feder V* Tr. 39). Petitioner further testified that he also received additional assignments, particularly the Smart Card assignment, which required him to contact equipment manufacturers. (*Id.* at 39-40). Petitioner testified that he missed calls and persons "ended up emailing" him because they could not reach him by phone or leave a direct voice message. (*Id.* at 37). NYCHA never installed voicemail on Petitioner's telephone and Petitioner alleges that no one responded to his email requests.

On May 27, 2009, Deas emailed Petitioner in accordance with a directive she received from NYCHA counsel and Eagle. NYCHA counsel and Eagle informed Deas about Petitioner's testimony and recommended that she tell him to remove non-NYCHA material from his work space. Deas' email to Petitioner stated:

> Your assigned work location at 6-404 is to be used to carry out your OBRD work-related duties and to store OBRD work-related materials. It is acceptable to display a limited number of personal items appropriate to the size of your assigned work space as long as they are consistent with NYCHA rules and regulations.
>
> You may not store non-OBRD items such as boxes, files, folders, papers, etc. Please remove all such items from 6-404 by Friday May 29, 2009, 3:00 pm.

(Pet., Ex. B). Deas testified that she had noticed that Petitioner's work space was "cluttered" with papers all over the desk and boxes on the floor when she started her employment with OBRD in July 2008, but she had believed that most of the materials were NYCHA-related and that only "five, ten percent" was personal. (*Feder V* Tr. 172-73, 176).

Prior to May 27, 2009, Deas had never asked Petitioner about the contents of the boxes or requested that he remove them. Deas testified, however, that in July 2008 she sought to acquire additional storage space for OBRD because several employees' cubicles were cluttered, including Petitioner's. In November 2008, Deas received the additional storage space and instructed the staff to file materials in the new space. The instruction was part of an effort to "reorganiz[e]" the office, ensure the staff have a clear work area, and improve the file system. (*Id.* at 208) Deas' instruction did not order Petitioner or the staff to remove any non-NYCHA materials. Petitioner continued to maintain the boxes in his cubicle. Deas testified that she did not question him about the boxes, and that she assumed OBRD just needed more storage space.

Petitioner responded to Deas' May 27, 2009, email:

> [C]an you please site the specific section of the Housing Authority regulations that you are referring to? I have been holding the aforementioned items and articles for close to a decade and you are the first to direct me to remove them. I can only perceive this as a direct result of the on going disciplinary case against me.[7]

(Pet., Ex. B).

NYCHA counsel received Petitioner's response to the May 27 email, and replied:

> [I]t was your testimony in the OCB IP that made me aware of the fact that you are storing a significant amount of non-NYCHA materials in your assigned workplace. Once I heard that testimony, I had an

[7] Several other individuals were copied on this email, including NYCHA counsel and Eagle.

> obligation as a manager to follow up and then it was up to your department to respond in whatever way they deemed appropriate.
>
> It appears to me that [Deas] responded appropriately. In fact, her directive to you is consistent with the directives other managers have given to other NYCHA employees who stored large amounts of non-NYCHA material in their workplace.
>
> This has nothing at all to do with your status as a union representative and you are not entitled to different or preferred treatment because you are a union representative.

(*Id.*). NYCHA did not cite a specific provision addressing the storage of material in one's work space. NYCHA further informed Petitioner that Union headquarters had storage space and extended Petitioner's time to comply with the removal request to June 5, 2009. Petitioner complied with NYCHA's request. Petitioner claims that he cannot easily access the materials during his lunch break or 15-minute breaks when the materials are located at Union headquarters. Since Petitioner removed the material, no other conflict regarding storage of Union-related material has arisen. During this email exchange, NYCHA never threatened Petitioner with disciplinary charges.

Stephen Disch, Manager of Technical Services in NYCHA's Law Department, testified that he investigated two employees in the legal department for misusing NYCHA space to store non-NYCHA material, which"led ultimately to disciplinary hearings." (*Feder IV* Tr. 1242-43). Similarly in its Answer, NYCHA asserts that it instructed two employees in the legal department to remove non-NYCHA material from NYCHA property or face disciplinary charges.[8] NYCHA's Answer alleges that one instance involved an attorney who collected and stored unauthorized material

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[8] Petitioners' counsel did not deny any facts alleged in NYCHA's Answer or set forth facts in the Reply, or in the Petition, that dispute NYCHA's assertions that NYCHA instructed other employees to remove non-NYCHA material. Pursuant to OCB Rule 1-07(c)(4), "additional facts or new matter alleged in the answer are deemed admitted unless denied in the reply." *See Porter*, 4 OCB2d 9, at 2, fn 1 (BCB 2011).

in her office. She was instructed to remove the material or face disciplinary charges and arrangements were made for the attorney to remove her belongings after business hours. The other employee in the legal department was directed to remove personal items that she had stored in an unoccupied office or face disciplinary charges. However, in its Answer, NYCHA acknowledges that both employees complied with the directives and the disciplinary charges filed against these two employees were not based on the storage of non-NYCHA material. In addition, NYCHA's Answer also alleges that an employee in the HR department was asked to remove non-work related material from her workspace, but no testimony or other evidence was offered on this example.

During the hearing in the instant matter, the Union presented photographs that Petitioner took in November 2009 of other cubicles located on the same floor as OBRD. These photographs portray various cubicles in the Accounting Department, some used by employees and some used solely for storage, that have several boxes and electrical chords stored under the desk. (*See* Union Ex 3, 5, and 6). NYCHA did not refute this evidence.

On July 31, 2009, Petitioner sought to use his 15-minute morning break to attend a retirement breakfast on a different floor within the building. Deas had returned early from a vacation that day and OBRD was posting its first solicitation for bids for a laundry room. According to Petitioner, he interrupted a meeting between Deas and another employee, and asked if he could attend a retirement party on a different floor. Petitioner claims that Deas responded, "[t]he staff here no longer has the right to take breaks," but told Petitioner that he could go anyway. (*Feder V* Tr. 48). Petitioner testified that he told Deas that she couldn't change the practice and that "I've been taking breaks since I have been here." (*Id.* at 48-49). The conversation concluded with Deas saying that "[W]e'll talk about it later." (*Id.* at 49). It is undisputed that Petitioner took his break as requested.

According to Deas, Petitioner informed her that he was taking his 15-minute break to go to a party and she asked: "Where is the party? Are you going to be returning in 15 minutes?" (*Id.* at 185). Deas testified that she wanted to ensure that OBRD had proper coverage in case anyone called regarding the solicitation. Deas testified that Petitioner continued the conversation, but she had to get back to work so she told Petitioner, "I'll talk to you later in regards to this." (*Id.* at 186). Deas denied that she ever told Petitioner that the staff could no longer take breaks.

Later that day, Petitioner sent an email to the Director of HR and the Deputy General Manager of Finance, bringing the break issue to management's attention.[9] Petitioner requested that they "overturn an oral directive by Ms. Cassandra Deas, in the hope of avoiding the need to file legal action against [NYCHA]." (NYCHA, Ex. 1). Petitioner stated that Deas' directive that "staff employees will no longer be allowed to take the two fifteen minute daily breaks" is "questionable and suspect." (Union, Ex. 2). He noted:

> Furthermore, during a July 21, 2008 OBRD staff meeting, Ms. Deas stated (paraphrasing):
>
> (1) staff need to inform the supervisor of taking a break away from the desk; and
>
> (2) if abused, the supervisor can remove flex-time and breaks from the employee.
>
> At no time, before or after that staff meeting, has either of the OBRD directors (current or past) cited any staff member (as I know and understand) with abusing the Authority's "break" policy. The removal of employee break-rights/privileges from OBRD staff "suspends belief."

(*Id.*). Petitioner further alleged in the email that "the underlying motive here is anti-union animus

[9] Several other individuals were copied on this email, including NYCHA counsel, Eagle, Velez, and Deas.

with the intent to prevent me from using any time, whether it be mine or [NYCHA]'s, to respond to and/or contact or communicate with [my members]" and "the harm . . . to which my unit is being subjected . . . [is] really aimed directly at me." (*Id.*).

On August 10, 2009, Petitioner received a response from NYCHA's HR department:

> I have conferred with OBRD management and I am comfortable that their directives conform to overall NYCHA policy in all respects, address the needs of the work unit, and are not administered in an illegal discriminatory manner. . . .
>
> I direct your attention to HR Memo #31/05, dated June 6, 2005, and HR Memo #33-09, dated July 6, 2009 (re-issue of HR Memo #30/06, dated June 6, 2006). These memos articulate NYCHA's long-standing policy in this area. The managers of [OBRD] are responsible for determining the needs of their operations and have discretion to grant or limit breaks.

(NYCHA, Ex. 1).

The 2005 memorandum, to which NYCHA's August 10 email refers, provides, in relevant part, that "[s]ome locations may permit a break or two of up to 15 minutes during the workday. When permitted, supervisors are responsible for scheduling breaks in a manner that assures adequate coverage." (Ans., Ex.10). Likewise, the memorandum issued in 2009 states, in pertinent part:

> While all employees are normally relieved from all of their duties during the meal period, they are not likewise fully relieved during a break. Rather, a break is an opportunity to slow down or stop the performance of work for a short period while still on work time in order to rest and/or have a refreshment in the time that may be permitted by the employee's supervisor.
>
> Employees should plan to address personal business such as shopping, banking, or personal appointments during their meal period, and not during break time that may be granted. Due to the special purpose served by a break period, as opposed to the meal period, and the need to maintain adequate staff coverage at all times, breaks are not to be "added" or "attached" to the meal period to make it longer.

(Ans., Ex. 11).

On August 11, 2009, Petitioner responded by email:

> [M]y only response is that you have to be on another planet if you think those particular memos are legal in nature, and that specific units can invoke **disparate treatment** among employees and have the right, to overnight remove a right or privilege that employees have had for close to if not for more than

(NYCHA, Ex. 1) (emphasis in original). During the hearing, Petitioner testified that he disagreed with the accuracy of the June 2005 memorandum, particularly the terms "may permit" and "some work locations," because NYCHA has a longstanding practice of providing two 15-minute breaks each day to every employee unless there is a "special reason" to deny a break. (*Feder IV* Tr. 256-57).

Both Petitioner and Deas testified that prior to July 31, 2009, OBRD employees were granted permission to take breaks upon request. Petitioner testified that he had never been denied permission to take a break when he asked for one. Since July 31, 2009, however, Petitioner claims that he has not officially taken a 15-minute break, but asserts that he does "take a breather now and then." (*Feder V* Tr. 49). Since July 31, 2009, Petitioner has not formally requested a break and thus, has not been denied a break. There is no evidence that any other OBRD employee has been denied permission to take a break since July 31, 2009.

On September 14, 2009, Petitioner and the Union jointly filed the instant Improper Practice Petition against NYCHA alleging that it retaliated and/or discriminated against Petitioner by refusing to provide him with voicemail on his NYCHA telephone, rescinding the unit's breaks, and instructing Petitioner to remove all Union-related material from his work space.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by refusing to provide Petitioner with voicemail on his NYCHA telephone, rescinding the unit's 15-minute breaks, and instructing Petitioner to remove all Union-related material from his work space in retaliation for his protected union activity.[10] With respect to voicemail, the Union argues that throughout his tenure as Chapter 25 President, Petitioner has utilized his telephone voicemail to receive messages concerning Union matters. By denying his May 2009 request for voicemail, NYCHA retaliated against Petitioner and interfered with his Union activity. Petitioner contends that his duties expanded in November 2008, which prompted him to request the installation of voicemail. Given the low cost and widespread use of voicemail in the business world, the Union claims that NYCHA refused this request based on union-animus and with the intent to restrain Petitioner's union activity. In response to NYCHA's timeliness argument, the Union argues that the voicemail claim accrued when NYCHA

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[10] 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.

failed to respond to Petitioner's May 2009 request, and thus the claim is timely. The Union also distinguishes the May 2009 requests as separate from the 2007 voicemail request.[11]

Further, the Union contends that NYCHA's rescission of Petitioner's daily breaks was motivated by anti-union animus. The Union argues that Petitioner's testimony in *Feder IV*, that OBRD employees were allowed two 15-minute breaks, caused NYCHA to retaliate against him by rescinding his breaks. Although a supervisor may rescind an employee's ability to take breaks when the privilege is abused, Petitioner never abused the breaks and, in fact, rarely took them at all. The record shows that Petitioner typically sought permission from his supervisors to take breaks, especially when he was leaving OBRD. The Union claims these breaks were rescinded to prevent Petitioner from conducting Union business during work hours. Thus, Deas' directive to Petitioner on July 31, 2009, that he and other OBRD employees were not authorized to take such breaks violated NYCHA's policies and was in direct retaliation for Petitioner's protected Union activity, most notably his ongoing improper practice proceedings.

Finally, the Union contends that NYCHA discriminated against Petitioner by ordering him to remove all Union-related materials from his cubicle. No rule or policy prohibits the storage of Union-related material in one's cubicle. Further, Petitioner brought these materials with him to OBRD from his previous NYCHA office, and NYCHA had knowledge of their presence. The boxes were in open view, and Petitioner's supervisors visited his work space on a daily basis. Despite this, no supervisor inquired as to the contents of the boxes, and no supervisor ever informed Petitioner that his cubicle needed to be cleared of the boxes, that the material caused a safety hazard, or that his

[11] The Union does not claim that the 2007 voicemail request constitutes a violation of the NYCCBL.

cubicle violated any NYCHA policy. Nevertheless, in May 2009, less than one month after Petitioner testified that the boxes contained mostly Union-related materials, Deas, who had worked with Petitioner for nearly a year, ordered Petitioner to remove these boxes from his work space. NYCHA admitted that this order arose from his testimony in *Feder IV*. The Union presented photographs taken nearly six months following NYCHA's order to Petitioner and alleges that these photographs show that other cubicles on the same floor in the building where Petitioner works are equally cluttered with boxes, but NYCHA has not required those employees to remove any material. Moreover, the Union claims that NYCHA could have asked Petitioner to remove some, not all, material from his cubicle. This choice evinces NYCHA's intent to prevent Petitioner from acting in his Union capacity. The order denied Petitioner access to papers necessary to perform his Union-related work, with the intent of interfering with his Union activity. Thus, NYCHA's order discriminated against Petitioner in retaliation for his testimony.

As relief, Petitioners request that the Board issue an order directing NYCHA to cease and desist from retaliating against Petitioner and the Union, and from impeding the Union's ability to represent its members.

NYCHA's Position

At the outset, NYCHA contends that the Union's claim regarding voicemail is untimely. The decision to not provide voicemail to non-managerial employees occurred when OBRD was created. Petitioner learned that he would not have voicemail when he started at OBRD in February 2007, which falls outside the 4-month statute of limitations period. Petitioner requested voicemail in August 2007 and this request was denied. NYCHA asserts that this request also falls outside the statute of limitations period. That Petitioner again requested voicemail on May 12, 2009, or May 27,

2009, does not restart the statute of limitations because Petitioner has failed to show that his duties changed in a manner that would give rise to a new claim. Further, NYCHA claims that the May 12, 2009 request, standing alone, is untimely.

NYCHA also argues 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.[12] NYCHA is within its rights to not install voicemail on an employee's telephone, to deny an employee's request to take breaks during the work day, and to order an employee to clean-up his work space. Simply, NYCHA contends that it has a right to direct its employees, to maintain efficient operations, and to exercise control and discretion over its organization. All of the complained of actions contained herein by Petitioner fall within the scope of this right under the NYCCBL.

NYCHA further argues that Petitioner fails to establish a *prima facie* claim for discrimination against NYCHA with regard to voicemail. Since OBRD's inception, only managerial employees have had voicemail. Deas testified that NYCHA believed that the duties of non-managerial employees did not require direct voicemail. Thus, NYCHA's denial of voicemail to Petitioner is not discriminatory and not motivated by union animus. If the Board were to find that Petitioner established a *prima facie* claim, the claim still fails because NYCHA's belief that non-managerial employees duties do not require voicemail serves as a legitimate business reason to deny Petitioner's request. NYCHA also

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

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

notes that Petitioner does have voicemail through the general voice mailbox option and that the call forwarding function and email offer alternative methods to receive and retrieve telephone messages.

With regard to the alleged refusal to allow Petitioner to take his daily breaks, NYCHA argues that Deas never unilaterally rescinded NYCHA's policy on breaks and never ordered that Petitioner could not take a break. Petitioner failed to show that he did not take a break that day or that he was denied a break thereafter. NYCHA argues that breaks are still permitted. Further, NYCHA argues that its policies state that breaks are discretionary and Deas' actions complied with NYCHA policy; the actions were not based on union animus. NYCHA categorizes this incident as a "misunderstanding." (Ans. ¶ 104).

Last, NYCHA contends that its decision to order Petitioner to remove non-NYCHA material from his work space does not violate the NYCCBL. First, Petitioner cannot establish that the storage of Union material in Petitioner's NYCHA cubicle constitutes protected activity. Further, Petitioner has not established that the act was motivated by union animus. Moreover, the Union did not object to any action that NYCHA indicated it planned on taking. NYCHA contends that once Petitioner testified that he had boxes "up to his ears," NYCHA had a duty to investigate the situation and "to determine whether there was a safety or other violation." (Ans.¶ 46). Moreover, NYCHA argues that, even if NYCHA learned of the material in a different manner, and even if the boxes contained only NYCHA material, it would have ordered Petitioner to remove the material from his work space. NYCHA acknowledges that employees frequently keep a limited amount of personal property in their workspace, usually to personalize their space, which is acceptable. NYCHA alleges, however, that these employees keep the items at their own risk and asserts that employees shall not use these items to conduct non-NYCHA business and should not bring in so much material that it interferes with their

ability to perform their work duties, or creates a safety hazard.

Contrary to retaliating against Petitioner, NYCHA argues that it approached the situation with caution, did not pursue disciplinary action, and even sought the Union's cooperation in providing alternative storage space. NYCHA notes that it has taken similar actions with other employees regarding storage, and that it threatened filing disciplinary charges against other employees. Thus, Petitioner cannot establish a *prima facie* case of retaliation. If, however, the Board finds that Petitioner met its burden, Petitioner's storage of Union documents violated NYCHA policy and posed a safety issue. Absent authorization, non-work related materials do not belong on NYCHA property. Therefore, NYCHA established legitimate business reasons warranting its actions and the instant Improper Practice Petition should be dismissed.

DISCUSSION

At the outset, we must determine whether Petitioner's claim regarding voicemail is timely. Pursuant to NYCCBL §12-306(e), an improper practice charge "must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd*, *Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and Rule 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1));[13] *see also Banerjee*, 3 OCB2d 15, at 17 (BCB 2010).

[13] NYCCBL §12-306(e) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in

(continued...)

Thus, claims that occurred more than four months prior to the filing of the petition are not properly before the Board and will not be considered.

Here, the Union and Petitioner filed the Petition on September 14, 2009. To be timely, the acts about which Petitioner complains must have occurred, or Petitioner must have become aware of them, on or after May 14, 2009. *See Raby*, 71 OCB 14 (finding that where a petitioner claimed that the union failed to inform her that it would not file a grievance on her behalf, the statute of limitations began to run when petitioner knew or should have known that the union would not act). The record establishes that Petitioner requested voicemail in 2007 to aid him in calling various suppliers and manufacturers for information related to the Laundry Assessment Report. Although the record is unclear on whether NYCHA explicitly denied this request, Petitioner knew or should have known long before May 14, 2009, that NYCHA denied this request. Therefore, the challenge to the failure to grant the 2007 request is untimely.

NYCHA argues that Petitioner's May 12 and May 27, 2009 voicemail requests merely reiterate the untimely 2007 request, and therefore claims arising out of their denial are also time-barred. Petitioner, however, testified, and the July 31, 2009 email supports, that the assignment of the Smart Card project, in addition to the laundry initiative, prompted the May 2009 requests for voicemail. Although the Smart Card project entails similar duties, *i.e.* calling manufacturers, NYCHA did not dispute Petitioner's testimony concerning the Smart Card project and the record is unclear whether the Smart Card project significantly changed Petitioner's telephone duties. Thus, we

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[13](...continued)

> an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

find that Petitioner's May 2009 requests were based on new work assignments and was not merely a restatement of his 2007 voicemail request. Further, Petitioner did not receive an express denial to his May 2009 requests, and we cannot say that Petitioner should have reasonably known that NYCHA denied his May 12, 2009 request by May 14, 2009. *See Local 371*, 1 OCB2d 25, at 15 (BCB 2008) (finding a claim timely where the City never definitively denied the employee's requests to have his name restored to a hiring pool list); *Raby*, 71 OCB 14 (petitioner knew the union was not assisting her to her satisfaction when she called the union to no avail); *cf., Mora-McLaughlin*, 3 OCB2d 24 at 11-12 (BCB 2010) (petitioner knew the union would not file a grievance when the union expressly communicated its refusal). We find that the statue of limitations on this claim did not begin to run the day Petitioner made his May 12 or May 27, 2009 request, but commenced when Petitioner knew or reasonably should have known that NYCHA was denying this request. Accordingly, we find the voicemail claim to be timely and will proceed to address all of Petitioner's discrimination claims.

As an initial matter, we are not persuaded that NYCHA's managerial rights shield it from Petitioner's discrimination and/or retaliation claims. NYCHA's assertion that NYCCBL § 12-307(b) authorizes it to direct its employees, to maintain efficient operation, and to exercise control and discretion over its organization, does not provide NYCHA unlimited protection from claims that its decisions violate the NYCCBL. *See Feder IV*, at 43; *DC 37*, 3 OCB2d 56, at 14 (BCB 2010) (finding that a rule that appears neutral on its face can still be applied in a manner that is inimical to the NYCCBL and the mere recitation of such a provision does not absolve the agency of all responsibility for its action that disparately affect the exercise of protected rights); *DC 37,* 61 OCB 13, at 16 (BCB 1998) (the right to manage is not a delegation of unlimited power, nor does it insulate the City from an examination of actions claimed to have been taken within its limits); *DC 37*, 37

OCB 46, at 11 (BCB 1986) (holding that the management rights clause is intended as a means to enable management to do that which it should do but not as a license to do that which it should not). Indeed, this Board has held that the statutory authority to create a policy does not make such a 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 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 claims.

Here, Petitioner contends that NYCHA's refusal to install voicemail on his NYCHA telephone, NYCHA's denial of breaks to employees in his unit, and NYCHA's order to remove non-NYCHA material from Petitioner's work space constitute discrimination and/or retaliation under NYCCBL § 12-306(a)(1) and (3). To establish discrimination or retaliation 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).

Once a petitioner establishes a *prima facie* violation of NYCCBL § 12-306(a)(3), the burden shifts to the employer who may refute a petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of

even in the absence of protected conduct. *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).

Here, it is undisputed that Petitioner was engaged in protected union activity. At all times relevant here, he was an elected official of Chapter 25; he was in continuous contact with NYCHA management regarding issues affecting employees' rights; and he participated in numerous matters that constituted protected union activity. The record demonstrates and NYCHA admits that it was aware of Petitioner's involvement with the Union. Further, it is undisputed that Petitioner filed and participated in improper practice proceedings before this Board. *See supra* note 1; *see also DC 37*, 1 OCB2d 6, at 29 (testifying at an arbitration constitutes protected activity); *DC 37, L.* 376, 79 OCB 38, at 16 (BCB 2007) (finding that the City's awareness that a shop steward frequently spoke with unit members on employment issues and testified at an earlier improper practice proceeding satisfied the first prong of the *Bowman-Salamanca* test). Therefore, we find that Petitioner has satisfied the first prong of the *Bowman/Salamanca* standard.

Regarding the second prong, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26 (BCB 2006); *see also CEU, 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 conclusory allegations." *SBA*, 75 OCB 22, at 22 (BCB 2005). Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001). In addition, while temporal proximity alone is not sufficient to establish causation, the "repeated, suspicious, temporal proximity" between the protected union activity and the allegedly retaliatory action, in conjunction with other facts supporting a finding of improper motivation, may establish a *prima facie* case.

Colella, 79 OCB 27, at 55 (BCB 2008) (citing *SSEU, L. 371*, 77 OCB 35, at 15-16 (BCB 2006)).

Here, we do not find that NYCHA's decision concerning Petitioner's voicemail was motivated by anti-union animus. It is undisputed that, since OBRD's inception, only managerial employees have voicemail on their direct telephone lines and non-managerial OBRD employees do not have this service. Although Petitioner contends that his lack of voicemail hinders his ability to perform his assigned tasks, NYCHA provides a general voice mailbox, a call forwarding function, and email to assist Petitioner in receiving responses from vendors. Indeed, Petitioner admits his contacts have used these options when they are unable to reach him directly by telephone. Therefore, NYCHA's failure to provide voicemail to Petitioner in May 2009 was consistent with its department-wide policy, and therefore was not discriminatory and was not motivated by his union activity.

Nor can we find that NYCHA's alleged rescission of Petitioner's daily breaks constitutes retaliation or discrimination. It is undisputed that NYCHA permits two 15-minute breaks, and that supervisors have the discretion to grant or prohibit these breaks depending upon work coverage within the particular unit. NYCHA directed Petitioner's attention to this policy in the August 2009 email. With respect to OBRD, it is further undisputed that permission to leave one's work space during a break should be communicated to one's supervisor either orally or in writing, and abuse of breaks can lead to rescission of this privilege. The testimony establishes that prior to July 31, 2009, breaks were routinely granted and were almost never denied.

However, Petitioner claims that on July 31, 2009, when he requested a break, Deas issued an "oral directive" stating that OBRD "staff employees will no longer be allowed to take the two fifteen minute daily breaks." (Union, Ex. 2). Deas denies that she made this statement. We find Deas' denial credible because her testimony that she did not rescind breaks from OBRD employees

is consistent with the facts that actually transpired. Indeed, it is undisputed that Deas granted Petitioner permission to take the requested break on July 31, 2009. Additionally, there is no evidence that Deas denied any OBRD employee permission to take a break after July 31, 2009. Petitioner alleges that Deas told him that OBRD employees no longer had the right to take breaks, but then, without explanation, granted him permission to take the requested break. This version is unlikely. Therefore, we do not credit Petitioner's assertion that NYCHA rescinded its break policy for OBRD employees and cannot find that NYCHA retaliated against Petitioner on this basis.

We find, however, that the Union has established a *prima facie* case of retaliation with respect to NYCHA's order that Petitioner remove all Union-related material from his work space. Since his first day working for OBRD in February 2007 through May 2009, Petitioner stored approximately ten boxes of non-NYCHA materials under and around his work space. Most of the materials in the boxes were Union-related, and Petitioner referenced these documents on a fairly consistent basis. For over two years, Petitioner's supervisors visited his work space multiple times a day without inquiring about the contents of the boxes or expressing concern over the tidiness or safety of his work space. In addition, prior to his testimony in *Feder IV*, NYCHA never informed Petitioner that the boxes violated any NYCHA rule or policy. Thus, NYCHA's supervisors condoned the storage of these boxes in Petitioner's cubicle.

Only after Petitioner testified at an improper practice proceeding before this Board in April 2009 that the boxes contained Union-related material that he used to conduct Union business did NYCHA order Petitioner to remove these boxes from his work space. In fact, NYCHA admitted that it was Petitioner's testimony in the hearing at OCB that prompted its investigation of Petitioner's work space. Further, Eagle testified that, "[w]hile I didn't look at anything in particular to say what

each one was, it was a very cluttered environment" and because "I know [Petitioner] is very active in the [U]nion. I know he is the chapter president. I know he is very, very involved. I'd say it was I think an educated assumption that most, if not all, of the stuff on his desk was [U]nion-related." (*Feder IV* Tr. 1058-59). Eagle's investigation led NYCHA to issue the May 27, 2009 directive. Accordingly, we find that the Union established a *prima facie* case of retaliation.

NYCHA contends that its actions concerning the storage of boxes were supported by legitimate business reasons. Specifically, NYCHA argues that the material created a work place appearance and safety issue, and violated NYCHA's policies. NYCHA argues that it first learned that Petitioner stored non-NYCHA material in his cubicle at the hearing in *Feder IV*, and this knowledge created a duty for NYCHA to enforce its policy regarding personal items in one's work space. Moreover, it argues that, even if NYCHA learned of the material in a different manner, and even if the boxes contained only NYCHA material, it would have ordered Petitioner to remove the material from his work space. NYCHA also contends that it treated Petitioner similarly to other employees who have violated NYCHA's storage policy. However, we are not persuaded by these arguments.

With regard to appearance and safety, Petitioner stored the Union-related materials in plain view for several years without anyone raising a concern about safety or appearance. Deas even testified that she observed the boxes upon her arrival at OBRD in 2008 and thought Petitioner's cubicle was "cluttered," but never ordered Petitioner to remove any material. (*Feder V*, Tr. 172-73). Deas admitted that, although she did not know the contents of Petitioner's boxes, she believed that five to ten percent of the contents were non-NYCHA-related material, and still Deas took no action. That NYCHA never raised these concerns prior to Petitioner's testimony in *Feder IV* or in the email

exchange ordering Petitioner to remove non-NYCHA material indicates that the rationale is pretextual. *See UFA*, 1 OCB2d 10, at 25 (BCB 2008) (finding the City's legitimate business reason pretextual where a contemporaneous email exchange did not mention the concern and the reason was asserted only in the Answer, after the City's actions were challenged). Moreover, photographs taken by Petitioner nearly six months after he received the order to remove storage material show that several employees' cubicles on the same floor remain cluttered with boxes. Last, although NYCHA policies prohibit use of its resources for non-NYCHA business, no policy specifically prohibits the storage of union material in one's work space. Accordingly, we find NYCHA's safety and appearance rationales to be pretextual.

Additionally, although NYCHA claims that it has treated other employees similarly, the examples set forth by NYCHA do not establish a uniform application of NYCHA policy. First, NYCHA failed to present any evidence to corroborate its allegation that it treated the HR employee similarly to Petitioner. Second, NYCHA's actions regarding the employee who stored non-NYCHA material in an office that was not allocated to him does not demonstrate how NYCHA treats individuals like Petitioner, who allegedly misuse their assigned work space. Last, there was some testimony that a law department employee was investigated for storing non-NYCHA material in his/her assigned workspace. Although this example may have been probative, there was insufficient evidence presented to show the type and/or volume of non-NYCHA material that was stored in the work space. Moreover, the testimony elicited at the hearing concerning the outcome of the investigation of the law department employee is also inconsistent with that set forth in the Answer. This leaves the Board unable to assess whether the circumstances involving that employee are analogous to the instant matter. *See SBA*, 75 OCB 22, at 24 (BCB 2005) (Where proffered reasons

are unsupported by the record, this Board will find that the public employer committed an improper practice.); *see also Collella*, 79 OCB 27, at 58 (finding that a legitimate business reason could not be accepted where the record as a whole did not indicate that the employee would have been terminated in the absence of his protected conduct).

Further, testimony from other NYCHA witnesses did not support the conclusion that NYCHA's policy was uniformly enforced. Deas testified that prior to May 2009, Petitioner's cubicle, as well as other OBRD employees' cubicles, were cluttered, but she did not direct them to remove materials. Instead, the evidence herein showed that it was only after Petitioner testified in *Feder IV* that the material was used to conduct union activity that NYCHA chose to act. Prior to Petitioner's testimony, NYCHA never directed any other OBRD employees to remove non-NYCHA material. Considering these factors, we find that NYCHA's *post hoc* justification of its order to Petitioner to remove the boxes that contained Union-related material was pretextual.

Based upon the foregoing, we cannot find a violation of the NYCCBL related to the claims of discrimination against NYCHA in connection with its decision not to install voicemail on Petitioner's telephone and its alleged rescission of Petitioner's break times. We find that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by ordering Petitioner to remove the boxes from his cubicle.[14]

[14] Having determined that NYCHA's actions constituted a violation of NYCCBL § 12-306(a)(3), we find a derivative violation of NYCCBL § 12-306(a)(1). *See UMD, L. 333*, 2 OCB2d 44, at 22 (BCB 2009); *DC 37*, 71 OCB 20, at 5-6 (BCB 2003).

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 Civil Service Technical Guild, Local 375, and Mitchell Feder, docketed as BCB-2796-09 be, and the same hereby is, granted in part, regarding a violation of NYCCBL § 12-306(a)(1) and (3) with respect to the New York City Housing Authority's decision to order the removal of boxes of Union material from Petitioner's cubicle; and it is further

ORDERED, that the Improper Practice Petition filed by Civil Service Technical Guild, Local 375, and Mitchell Feder, docketed as BCB-2796-09 be, and the same hereby is, denied in part, regarding violations of NYCCBL § 12-306(a)(1) and (3) related to New York City Housing Authority's decisions not to install voicemail on Feder's telephone and alleged rescission of break times; and it is further

ORDERED, that the New York City Housing Authority cease and desist in discriminating against Petitioner; and it is further

ORDERED that the New York City Housing Authority post appropriate notices detailing the above-stated violations of the NYCCBL.

Dated: New York, New York
October 6, 2011

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

Dissenting in part.

M. DAVID ZURNDORFER
MEMBER

Dissenting in part.

PAMELA S. SILVERBLATT
MEMBER

Concurring in part.

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

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

We hereby notify:

That the Board of Collective Bargaining has issued 4 OCB2d 61 (BCB 2011), determining an improper practice petition between the Civil Service Technical Guild, Local 375, and 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 Civil Service Technical Guild, Local 375, and Mitchell Feder, docketed as BCB-2796-09 be, and the same hereby is, denied in part, regarding violations of NYCCBL § 12-306(a)(1) and (3) related to New York City Housing Authority's decision not to install voicemail on his telephone and allegedly rescind break times; and it is further

ORDERED, that the improper practice petition filed by Civil Service Technical Guild, Local 375, and Mitchell Feder, docketed as BCB-2796-09 be, and the same hereby is, granted in part, regarding a violation of NYCCBL § 12-306(a)(1) and (3) with respect to New York City Housing Authority's decision to order the removal of boxes from Petitioner's cubicle; and it is further

ORDERED, that the New York City Housing Authority cease and desist in discriminating against Petitioner; and it is further

ORDERED that the New York City Housing Authority post appropriate notices

detailing the above-stated violations of the NYCCBL.

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.

Opinion of Union Member Chargles G. Moerdler Concurring in Part

I concur in the judgment but not in the reasoning that leads to the partial denial (including the baseless assertion that NYCHA supposedly has "managerial rights" in these circumstances).

It merits note that the majority chooses not to "credit Petitioner's assertion that NYCHA rescinded its break policy . . ." without having seen or heard the witnesses. Thus, the majority correctly finds that NYCHA discriminated against Petitioner based on his union activities, that NYCHA and its primary witness (Deas) offered pretextual justifications to warrant improper conduct and yet it chooses to credit them and not Petitioner on the issue of the break periods. On this record, I see no basis for crediting either NYCHA or Deas.

Dated: New York, New York
October 6, 2011

CHARLES G. MOERDLER
MEMBER

Opinion of City Member M. David Zurndorfer Dissenting in Part, in which City Member Pamela S. Silverblatt concurs

I dissent from the portion of the Board's decision that holds that NYCHA committed an improper practice when, upon learning that Petitioner was storing thousands of pages of union-related materials in approximately ten boxes in his cubicle under and around his desk– where, in Petitioner's words he was "up to his ears" in union materials– it told Petitioner to remove those boxes and instead store them at Union headquarters, a five minute walk from Petitioner's cubicle, where the Union had agreed to provide storage space.

Dated: New York, New York
October 6, 2011

M. DAVID ZURNDORFER
MEMBER