

Committee of Interns and Residents, 51 OCB 26 [Decision No. B-26-93 (IP)], enforced, Committee of Interns and Residents v. Dinkins, No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

The Committee of Interns and
Residents,

Petitioner,

Decision No. B-26-93
Docket No. BCB-1522-92

-and-

New York City Health and Hospitals
Corporation,

Respondent.

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DECISION AND ORDER

On September 4, 1992, The Committee of Interns and Residents ("the Union") filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation ("HHC") violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law ("NYCCBL").¹

¹ Section 12-306 of the NYCCBL provides, in relevant part:

(a) **Improper public employer practices.** 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....

Section 12-305 of the NYCCBL 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

(continued...)

The Union alleges that Kings County Hospital Center ("KCHC" or "the hospital") and its agents interfered with, restrained and coerced public employees in the exercise of rights granted under the NYCCBL and engaged in a pattern of harassment, discrimination and retaliation against Dr. Sharon Dillon and Dr. Patricia Harding. As a remedy, the Union requests that the Board grant the instant improper practice petition; direct KCHC to cease and desist in denying interns and residents access to their files as guaranteed under the collective bargaining agreement; and direct KCHC to award Dillon credit at the PGY-IV level for the period July 1, 1991 to October 30, 1991 and pay the appropriate salary differential due to her for that period. It also requests that the Board direct KCHC to remove and redact any document in Dillon's files regarding her "non-promotion" to PGY-IV year direct KCHC to certify that Dillon has completed four years of residency training and issue a certificate of completion; direct KCHC to conform to all standards of due process mandated by the State University of New York Health Science Center-Brooklyn ("SUNY-HSCB".) protocols and the collective bargaining agreement; require KCHC to post the order in conspicuous places in the Department of Obstetrics and Gynecology; and such other and further relief as the Board deems just and equitable.

HHC filed an answer on October 2, 1992, in which it

(continued)
of their own choosing and shall have the right to refrain from
any or all of such activities ...

maintained that Dillon was a resident who was below standard and that the actions of the hospital were taken for legitimate business reasons. Hearings were held on November 25, 1992, December 10, 1992, December 11, 1992, December 21, 1992, December 23, 1992, January 4, 1993, January 19, 1993 and February 20, 1993. A transcript of 826 pages was taken.

Background

In 1988, Dr. Sharon Dillon began a four-year postgraduate program at KCHC in the Department of Obstetrics and Gynecology ("the department") (tr. 89). She expected to complete training in the program in June 1992 (tr. 89). Residents in the program are students at SUNY-HSCB and employees of KCHC. Upon completion of the program, if they are certified by the hospital, they become eligible to take an examination for board certification in obstetrics and gynecology (tr. 89-90).

Although the parties disagree as to whether Dillon's performance was deficient during her first two years in the program, they agree that she was rated acceptable in her first and second years and progressed to her third year. HHC submitted 19 performance evaluations of Dillon (Ex. R-1), completed by attending physicians for rotations of limited duration in various specialties. The evaluations consist of 33 possible specific ratings in knowledge, skills and attitude, comments by the evaluator, and an overall rating.

There are nine evaluations in the record for the period from July 1988 to August 1990. Dillon's overall rating on each of these evaluations was "acceptable" except for the Oncology rotation, for which she received an overall rating of "needs improvement." In the ten evaluations in the record for the period from May 1991 to September 1992, Dillon's overall rating on three was "acceptable," her rating on one was "below acceptable," and six evaluations had no overall rating.

The residency training program uses an examination administered by the Council on Resident Education in Obstetrics-Gynecology ("CREOG"). During Dillon's first two years of residency, the acceptable passing standard for the CREOG examination at SUNY-HSCB was at the 30th percentile of national scores (tr. 23). Residents scoring below this standard were placed on probation and assigned to a tutor. Dillon testified that during her first two years in the program, "Dr. Schwarz [director of the program during Dillon's first two years of residency] wanted the residents to get... 30th percentile correct on the exam, but it was known in my department that only one to two residents for each year achieved that standard" (tr. 92). She stated that, during that time, tutors were assigned to most of the residents in the program (tr. 94).

In 1989, Dillon scored at the 22nd percentile and was assigned to a study group (Ex. R-1). In 1990, Dillon again scored at the 22nd percentile and was warned that "continuation

in this residency program is contingent on improvement in your academic performance" (Ex. R-2). Dillon testified that it was her understanding from the beginning of her training that residents were judged primarily on clinical performance (tr. 91).

In April 1990, Dr. John Boyce was appointed as Chairman of the SUNY-HSCB Medical Obstetrics and Gynecology Department. Boyce is Chief of Obstetrics and Gynecology at KCHC, an examiner for the American Board of Obstetrics and Gynecology ("ABOG") and a member of the New York State Board of Medicine. Boyce testified that he changed the standard for passing the CREOG examination in May 1990 to the 40th percentile (tr. 515). Dr. Carla Petterkin and Dr. Roland Matthews are currently fourth-year residents in the program. Both testified that Boyce informed them at a meeting in the fall of 1990 that the passing rate, would be at the 40th percentile (tr. 461-62, 463).

Boyce testified that residents are advised of standards of performance and behavior in written material and lectures (tr. 503-505). He stated that "the ultimate standard of performance... is the in-service CREOG exam (tr. 509)." He testified that residents are evaluated on character issues such as honesty, reliability, punctuality and respectfulness (tr. 511). The faculty also considers teaching skills, professional ethics, and interaction between residents and faculty (tr. 511). He defined a deficiency as "when they don't meet the standards we expect them to meet" (tr. 512-513).

Boyce testified that when he changed the CREOG standard to the 40th percentile, he met with the residents individually to advise them of his expectations. He recalled such a meeting with Dillon in December 1990 (tr. 515). In a meeting with Dillon after the 1991 CREOG scores had been released, he stated, he told Dillon that she was on probation and outlined for her a required tutorial program (tr. 517-518). However, according to Dillon and Dr. Patricia Harding, a former resident in the program, residents were informed of the change after administration of the January 1991 examination (tr. 24, 96).

Dillon was informed on March 29, 1991, that she had received a score of 64 percent correct, which was at the 19th percentile (Ex. R-13). On the basis of the 1991 in-service examination scores, Dillon and other residents were placed on probation (Ex. R-13). Boyce required these residents to take an oral examination, and advised them that promotion and continuation in the program depended on their performance (tr. 98).

Dillon testified that she asked other residents about their scores and discovered that half of the fourth year residents had not met the standard and would not be allowed to take the written examination for Board certification without passing an oral exam. Dillon said that two of the other five residents in the third year-had not met the standard and would take oral examinations to determine whether they would be made chief residents; half of the second year residents had not scored above the 40th percentile,

but would be promoted without taking an oral exam (tr. 102-104).

In April 1991, Dillon received a letter from Boyce stating that because of her performance on the CREOG exam, she would be assigned to a tutor and would be required to take an oral examination to determine whether she would become a chief resident in her fourth year (tr. 100). Dillon stated that she then inquired of CREOG about passing scores. She recalled that she was told that the exam was designed to be used as a teaching tool rather than to determine failure or promotion. She said that she was told that the CREOG standard for remediation was a score of less than 60 percent correct (tr. 104). This was corroborated by testimony from Boyce (tr. 590) and written material from CREOG (Ex. P-19). Dillon said that she and Harding then contacted the Union ask about the new standards and uses of the CREOG exam, and determine whether their careers were in jeopardy (tr. 104-105).

Harding was a fourth-year resident during the 1990-91 term (tr. 20). She is now the medical director of an obstetric and gynecological clinic in Florida (tr. 19). She testified that before Boyce became chairman of the department, the CREOG exam was used only as a teaching tool at KCHC (tr. 22). She stated that after the results of the 1991 CREOG were announced, Boyce told the fourth-year residents that if they did not pass an oral examination, they would not be certified by KCHC to take the written medical board examination (tr. 24). Harding scored in

the 23rd percentile and was required to take an oral exam (tr. 25).

Harding stated that she discussed her concerns with Steve Vaccaro, a contract administrator for the Union (tr. 29). She stated that she spoke to several residents, including Dillon, and "they all felt very much threatened, because everyone wanted to sit this exam...." Dillon testified that she and Harding arranged for residents to meet with Vaccaro, and that five residents attended the meeting (tr. 105). Harding stated:

a couple of residents said that they didn't want to get involved, they were afraid of Dr. Boyce, and they thought that just meeting and trying to discuss anything as far as your rights was concerned was not a good idea. So two chiefs refused to meet and the others-met.... [W]e were instructed to make copies of [our] file, because in the past I have spoken with other residents, and things change whenever they started talking among themselves, they see changes in their file (tr. 30).

Shortly thereafter, both Dillon and Harding requested copies of their files from Clara Martin, the residency educational coordinator (tr. 442). Harding stated that when she asked for her file, "I had a copy of the contract with me...[Martin] said ... Dr. Boyce said you cannot have it... I showed her the contract and she said, that doesn't apply to us, we have our own rules...." (tr. 31). Dillon stated that when she looked at her file she was surprised to see only five first-year and three second-year evaluations. She related that she had not signed the second-year evaluations and did not recall having seen them before. According to Boyce, Dillon refused to sign some of the

evaluations (Ex. R-G).

Martin testified that she oversees resident evaluations and department files. Residents who wish to view their files, she said, may do so under her supervision; there is no formal departmental procedure (tr. 442). She stated that on April 17, 1991, Dillon asked to photocopy her file. Martin recalls that she told Dillon that she would make a copy of the file for her "when she had a chance," but that she could not have the file (tr. 443). Dillon testified that she returned later in the day and that Martin told her that she had been instructed by Boyce not to give her copies (tr. 109). Eventually, Martin testified, she had a chance to copy the file. She did not notify Dillon to pick it up (tr. 454). Instead, she delivered it to Felix Cappadona, head of Labor Relations at KCHC, because "by this time he was notified that they were requested and they were going through ... Mr. Vaccaro and Mr. Cappadonall (tr. 444).

In a letter to Boyce dated April 18, 1991, Vaccaro stated:

the apparent threat made to residents of disqualification for Board certification examinations, denial of chief status to PGY III's already entitled to PGY IV year contracts, and of outright dismissal represent a serious and unnegotiated departure from the department's past practice. In particular, it appears that disciplinary action is contemplated on the basis of failure to meet expectations which were not published or stated clearly or consistently, and which may not be consistent with accepted norms.

Vaccaro requested copies of written documents such as educational objectives and methods of evaluation, standards of clinical and academic performance, hospital policy regarding probationary

status, and copies of individual contracts and personnel and credential files for all residents. He then stated:

please be notified that this letter initiates step one of the grievance procedure on behalf of Patricia Harding, M.D., Sharon Dillon, M.D. and all other residents similarly situated who on April 17 and April 18 of this year requested photocopies of their departmental personnel files and were refused. Per Article XIX, Section 5 of our Collective Bargaining Agreement, and correspondence dated January 30, 1989 from Thomas Doherty, HHC Vice President for Human Resources to John Ronches, CIR Executive Director (incorporated in the Agreement as "Addendum Ell, page 70 of the Agreement booklet), each House Staff Officer may photocopy all evaluative and other material in their personnel files (Ex. P-7).

Boyce testified that he consulted with Cappadona and was advised that the items requested by the Union were outside the contractual obligations of the hospital except for the request to make available personal and professional files of employees. Boyce stated that Cappadona told him that he had personally made available the residents' files (tr. 525-526). Dillon testified that, as the result of "another grievance process," she received some copies of her evaluations in July 1991 and copies of the entire personnel file several months later (tr. 111).

Dr. Schuyler Kohl is a professor of obstetrics and gynecology at SUNY-HSCB and vice chairman of the Department of obstetrics and Gynecology at KCHC (tr. 466). Kohl said that in April 1991, Harding told him that her name had been added to a grievance without her permission. He recalled that Harding was concerned that she would not get a good recommendation and would not be certified to sit for the board examinations (tr. 481).

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Kohl said that he advised Harding to "make her peace with the chairman of the Department and the sooner she did that the better things would be" (tr. 468-69). Kohl testified that he advised Harding to write to Boyce (tr. 470) and that Harding also asked him to write a letter of recommendation in April 1991 (tr. 471). He stated that he told her that the letter "could be a better letter if she had her status in the Department straightened out healthier than it was at that particular moment" (tr. 472).

Harding testified that Kohl asked her if she was "trying to commit suicide" because "Dr. Boyce took seriously that letter you wrote about the grievance, he was disturbed about that" (tr. 35). She stated that she wrote a letter to Boyce, at Kohl's suggestion, and that "Dr. Kohl added that he would tell him what we talked about, as far as my not having anything against him, nothing personal, I was just interested in trying to obtain a copy of my file for my own use" (tr. 36).

Harding testified that, "after April 18th the attitude of the OB/GYN staff changed towards us, people who used to say "hill wouldn't, after the letter" (tr. 33-34). She said that some attending physicians told her that they worked under Boyce and could not write an evaluation without his approval (tr. 40). She continued:

I went to all the people, because I didn't get any letters and a week had gone by and the employers were calling, asking for these letters... Even Dr. Boyce's right hand, Mitchell Maiman... I said, you wrote a letter last year and I would like to know whether you

can write another... He said, you are out to get my boss and I can't help you right now. He said, I can write you a letter. I will write saying you are a marginal resident... I said if you are going to write a letter saying marginal when I was excellent, superior before ... don't write the letter (tr. 40-41).

Harding sent the following letter to Boyce on April 25, 1991:

I want you to know that I have nothing against you personally. I want this program to grow and succeed. There is nothing wrong with high academic performance. I felt very threatened as far as my future was concerned, when I learned that I was on probation on 3/29/91 because of my academic performance. I was concerned that there was a potential violation of my rights. I was approached by Steve Vaccaro on the payline who had been speaking with other residents with the same problems.

I was advised of my rights under the contract. I heard that it was stated that I had multiple deficiencies as a resident ... and wanted to find out what was in my files. I understood by CIR that this is my right. I tried repeatedly, and was refused. I informed CIR, and Steve Vaccaro made a decision without consultation to me to include my name in a letter with other residents, specifying that withholding my files was a violation of the contract. I want to clarify that I do not have a grievance with you or the OBS/GYN department. Unfortunately this has been misinterpreted to be an effort to disrupt the work of the department. I have no desire to disrupt the work of the department... If I had to do it over again, I would do it differently.

Evidence was introduced and testimony was heard concerning a patient complaint against Dillon in an incident which occurred on April 20, 1991. Adina Cambridge, who has been employed by KCHC for twenty-four years (tr. 366), was admitted for surgery as a private patient of Dr. Ming Macasaet (tr. 364-365). Dillon was the resident responsible for her care (tr. 365-366). Cambridge testified that, although she first complained about abdominal discomfort in the morning, Dillon did not examine her. Instead,

she related, a nurse gave her two Dulcolax suppositories and two Fleet enemas during the course of the day (tr. 366-370).. After midnight, Cambridge stated, the nursing supervisor told her that Dillon had said that "she was not about to come to the floor at 12:30 to look up my behind to find out why I could not go to the bathroom" (tr. 372). At 1:00 A.M., Cambridge called Macasaet (tr. 373).

Macasaet is a member of the faculty of SUNY-HSCB, an attending physician at KCHC, chairperson of the quality assurance program for gynecology and Director of Gynecology. Macasaet called Dillon and told her to take Cambridge down for an X-ray examination (tr. 431). Cambridge stated that Dillon treated her roughly while she was being transported to and from radiology (tr. 374-35). Macasaet and Cambridge both testified that they believed that there was an irregularity in the patient progress notes, indicating to them that Dillon had added a note out of chronological order to make it appear that she had examined Cambridge when she had not (tr. 375, 417-418). On cross-examination, Macasaet stated that the alleged irregularity in the patient progress notes was not noted in an administrative review of the incident (tr. 432) and that she did not file a complaint about it (tr. 433) .

In a letter to Boyce dated May 20, 1991 and in testimony, Dillon stated that on April 20, 1991, she was responsible for 70 patients on the floor. She testified that the nurses called her

about Cambridge, but that she had examined her that morning and considered her to be in stable condition (tr. 117). She stated that Macasaet told her to "drop what she was doing and take care of the patient," although she would have to leave the floor uncovered (tr. 117). Dillon stated that diagnostic tests confirmed her original diagnosis (tr. 118).

Dillon also stated that a first year resident submitted a letter confirming her account of these events, but that the letter did not appear in her chart (tr. 95). Boyce testified that when he spoke to the first year resident, "she denied being with Dr. Dillon throughout the length of the complaint" (tr. 531). Dillon claimed that Boyce did not interview four nurses who were on duty when the incident occurred, but only interviewed one nurse who was a longtime friend of Cambridge. In addition, she stated that her account of the incident is missing from her file (Ex. P-5).

In May 1991, Boyce attended a weekly residents' conference and distributed copies of the Union's grievance letter. Dillon testified that "it was strange for Dr. Boyce to come down ... because in the time that we had had [the residents' conference], Dr. Boyce had never come down, so the residents were all surprised to see him there" (tr. 112). She testified further that Boyce referred to "Just a few deficient residents" who had filed the grievance and were "trying to use labor to buttress their deficiencies," and looked at her and Harding (tr. 113).

Dillon continued:

most people had gone through the document and Dr. Harding's name and mine were mentioned. He quickly took back the documents and said that he is trying to improve things for us, he is trying to improve the residency and that in his attempt to make things better for him, that people are trying to get at him. And then reconfirmed that it didn't apply to all of you just to a small minority, and he left the conference room (tr. 113).

Harding testified that at the end of the conference, Boyce entered the room, "to everyone's surprise because he usually didn't come to these sessions," and distributed copies of Vaccaro's letter. She stated, "[h]e told us all that this doesn't apply to all the residents, but a few residents with multiple deficiencies are trying to get at him And he was staring at Dillon and I ..."

Boyce testified that he distributed copies of the grievance to the residents. He stated that he told the residents that he had discussed the grievance with individuals in the labor relations department, related to them the opinion of those individuals, and "pointed out to them the reason for setting up the program, the goals and objectives of the program and that we will continue with the program" (tr. 529). He stated that he then took the copies of the grievance back to his office (tr. 530).

By letter dated May 22, 1991, Boyce advised the Union that "Dr. Dillon and Harding have copied their personnel files" (Ex. P-11). On cross-examination, Boyce testified that the statement

in the letter was not true, but that Dillon and Harding had received copies of their files by that date (tr. 643).

Although Dillon was not scheduled to take the oral examination until June 14, 1991, the Executive Committee of the department met on June 13, 1991. The minutes of the meeting contain the following:

Dr. Dillon

Consistent problems with exams. Unable to communicate with her. Patients complain about her. Rude to patients and medical students.

ISSUE: Progression to chief year.

CONCLUSION: Recommend denial of promotion to chief year - unanimous (Ex P-C1).

Dillon took the oral exam on the following day (tr. 101). According to Dillon, on June 20, 1991, Boyce told her that she had failed the oral examination and would not be promoted to chief resident, and refused her request to see the results of the examination (tr. 124, 126-127). Dillon was then advised by Schwarz, who was provost of the medical college, to meet with Dr. Kathryn Lane in the Graduate Medical Education Division (tr. 128, 148). Lane told Dillon that she could not be demoted without due process (tr. 128) and advised her to continue in her regular duties as acting night GYN chief resident until the matter was resolved (tr. 133).

Harding related that after she passed her oral examination in June 1991, Boyce told her, "you passed the exam, and I want you to know that your name is now dirt in this department. You

can check your file in a week or so and there would be something in there to reflect that" (tr. 50).²

By letter dated June 27, 1991, Boyce informed Dillon:

you will not be a chief resident in this program effective July 1, 1991. The reasons for this decision are:

- a) failure to improve your performance on the inservice examinations in 1990 and 1991 and the departmental examination on June 14, 1991.
- b) Persistent problems with patients e.g., 2-3 negative evaluations in 1989 and 1991 in spite of counseling, a letter from a patient Adina Cambridge and a letter from [an attending physician].

You will be put on probation for one year and you will be expected to improve your academic performance and change your attitude, behavior and sensitivity to patients. The latter will be measured by a lack of complaints about patients and information from the faculty. You may remain as a third year resident.... It is also recommended that you receive psychiatric evaluation on account of the faculty's inability to communicate with you (Ex. P-4).

Dillon stated that during July 1991, she was assigned to a third-year schedule, but was performing some work normally assigned to fourth-year residents (tr. 143-144) and was promoted to Clinical Assistant Instructor PGY-IV (Ex. P-22). Dillon stated that she was assigned to work in an area of the hospital

² Subsequently, Boyce recommended Harding with reservations to the Board of Medical Examiners in Florida (tr. 51). His recommendation necessitated a hearing before that Board, but Harding was eventually licensed to practice in Florida after the Union intervened (tr. 51-54). She stated, "[t]hey reviewed me and said you have wonderful evaluations, and just one is really bad, the one from Dr. Boyce. And we have seen instances like this in the past ... and welcome to Florida" (tr. 54).

not normally assigned to fourth-year residents, and that the workload was significantly greater and more difficult than that of other fourth-year residents (tr. 145-146). She stated that she had no more supervision than usual at this time (tr. 146). In July 1991, Dillon instituted a grievance with the hospital's Graduate Medical Education Committee ("GMEC"), an administrative body composed of physicians and administrators, claiming lack of due process in her demotion to third-year status.

On August 13, 1991, the GMEC met to consider Dillon's appeal and to hear testimony from Dillon. The minutes of the meeting state, in relevant part:

The task of this sub-committee is to determine if the GME Committee's guidelines on due process have been followed in the demotion and probation of this resident....

It was pointed out that the results of CREOG exams cannot be used as a reason for non-promotion Due Process Policies state that the Provost Office receive notification of an Adverse Action. The Provost Office did not receive notice from the OB/GYN Department of the Adverse Action....

In reviewing the evaluations from prior years the resident was not given bad evaluations, but they were average. An attitude problem was not documented. The resident was assigned a tutor ... and has been meeting weekly with her....

Dr. Dillon reported that while she was on vacation in July, Dr. Boyce, at noonday conference, announced to the other residents her CREOG test scores, read the letter of complaint from the patient and told them she was not returning.... (Ex. R-G).

The GMEC reconvened on August 20, 1991, to hear testimony from Boyce. The minutes of the meeting state, in relevant part:

Dr. Boyce informed the committee of the sequence of

events that led to the decision not to promote the resident and to put her on probation.... [Dillon] took the oral exam and failed. The executive committee of the department met on June 13, 1991 and was unanimous in recommending that Dr. Dillon not be promoted to chief....

It was noted that the evaluations were not signed by the resident. Dr. Boyce said that Dr. Dillon declined to sign the evaluations. When Dr. Boyce signed her loan forms he asked her to sign.... (Ex. R-G)

The committee met again on August 23, 1991. The minutes of the meeting state, in relevant part:

in the House Staff Due Process and Grievance Protocol it is stated that "departmental guidelines and procedures for house staff review and evaluation must be explicit and in written form and consistent with RRC requirements" and... the OB/GYN department does not have these in writing....

[I]n 1989 one evaluation shows that interpersonal skills and attitude was a problem, receiving an overall rating of 2, while others in 1990 show ratings of 4 on attitude and interpersonal skills. These evaluations are signed which shows that she had a problem and was told about it... [I]t was only one faculty member who had given the bad evaluations (Ex. R-G).

On August 25, 1991, the committee found that Dillon had been denied due process and recommended that she be reinstated to fourth-year status. She was not reinstated (tr. 150-151). Boyce testified that he did not receive a final recommendation from the committee at that time (tr. 544). Because Schwarz was on vacation the committee contacted Dr. Irwin Weiner, who is the dean of the medical college (Ex. P-C2). Weiner declined to reinstate Dillon on the grounds that he was in charge of medical students but Dillon was a paid employee (tr. 151).

In a letter dated September 20, 1991, Boyce protested the

decision of the GMEC on behalf of the Executive Committee. He requested, and was granted, an opportunity to submit further documentation (Ex. R-G, tr. 542). By letter to Boyce dated September 27, 1991, the Union requested a written response, in accordance with the contractual grievance procedure, explaining why Dillon had not been reinstated. It also claimed that Dillon had not received photocopies of her files and requested that she be reinstated to fourth-year status with retroactive pay from July 1, 1991 (Ex. P-12).

By memorandum dated October 16, 1991, Weiner informed Boyce that the GMEC had reconvened and upheld its original finding. The issues cited by the committee were the apparent use of CREOG scores as the initial and sole rationale for potential adverse action; lack of consistent documentation of review of evaluations; lack of prior notification in writing to Dillon, including a rationale for the adverse action and suggestions to improve; demotion and probation at the same time; and "faculty meeting that determined status of resident prior to oral exam session" (Ex. R-15). Schwarz wrote to Boyce on October 23, 1991, stating:

It is my understanding that in my absence Dean Weiner reconvened the Appeals Committee concerning the grievance of Dr. Dillon, concerning due process. Once again, I understand this committee has found a failure of due process and, therefore, as a remedial measure, I am directing that her status be changed to Chief Resident on Probation. Neither the deliberations of the committee, nor my direction in this matter concern the faculty's or your judgment concerning the competence of the resident, which is a matter of the judgment of the faculty and the department, and not the

responsibility of the administration (Ex. R-15).

By letter dated October 31, 1991, Boyce informed Dillon that she had been made a Chief Resident on Probation (tr. 154). Boyce testified that Cappadona advised him that Dillon's chief resident year should run for twelve months from October 1992 (tr. 545). He stated that Dillon's rotations from September 1, 1991 to October 31, 1991, were the same as other residents, but that she did not perform chief resident rotations before October 31, 1991 (tr. 723).

In a letter to Boyce dated November 26, 1991, the Union stated:

Dr. Dillon asked you on November 13, 1991, to advise her about her Board eligibility status, but received no response... [S]ince November 20, 1991 you have had her application to sit for the June 1992 Ob/Gyn Board Examination and have neither signed that Application... nor have you advised her that you will not sign the Application. As you may already know, the Application must be postmarked no later than November 30, 1991.... [emphasis in the original]

Dillon testified that she did not receive a response from Boyce by November 30, 1991 and that he told her in December that he did not intend to sign the application (tr. 175). In a letter to Boyce dated November 27, 1991, Vaccaro stated:

Dr. Dillon has appealed various disciplinary actions taken against her by the department. Two documents in Dr. Dillon's personal file, dated October 18 and November 6 of 1991, indicate that you are contemplating her dismissal... I urge your immediate compliance with my request for information dated April 18, 1991.

Residents must complete specific training routines in order to be "privileged" or "credentialed" to perform procedures. As

the resident completes each sequence, it is documented by an attending physician. A resident must be credentialed in a specified number of procedures before he or she can be certified to sit for the board examination. Dillon received an Employee Warning Notice dated December 3, 1991, signed by Boyce. It stated that she had failed to complete privileging to the standard of chief resident and warned that failure to complete the assignment would result in disciplinary action and a recommendation that Dillon had not met requirements for the year. She was directed to complete the assignment and present proof of completion to Boyce by December 17, 1991 (Ex. R-7).

Dillon stated that she had completed the credentialing procedures and given the documents to Boyce before December 3, 1991, but that Boyce told her that she had not completed them and that she then completed the paperwork a second time (tr. 154). Dillon stated that she asked other residents in the program if they were completely credentialed for all their procedures and they were not; she stated that no other resident had received a warning specifically stating that he or she would be terminated if not properly credentialed (tr. 156). An account of this meeting prepared by Boyce and dated December 3, 1991, includes a statement that "Dr. Dillon inquired as to what areas of privileging was missing in order to be in compliance. Dr. Boyce referred her to the privileging code book, the GME office and Dr. Kay Lane" (Ex. P-G). A letter to Boyce dated December 4, 1991

from Vaccaro alleged that the department did not provide PGY IV residents with a list of procedures for which they must be credentialed (Ex. P-G).

By letter to Dillon dated December 4, 1991, Boyce clarified Dillon's probationary status. He identified her deficiencies as lack of knowledge, patient complaints, arrogance, and absence or lateness at conferences; Boyce informed her that "the January inservice examination will be used as a basis of judgment" of her knowledge of obstetrics and gynecology and that "[f]ailure to answer correctly 65% of the questions will be considered substandard." He stated that the probation period would end in April 1992, with an interim evaluation at the end of January 1992 (Ex. P-6). By letter dated January 10, 1992, Boyce informed Dillon that her contract would not be renewed when it expired on June 30, 1992, "inclusive of your unfilled term as chief resident which began October 30, 1991" (Ex. P-7).

Boyce testified that the standard for passing the 1992 CREOG exam was again set at the 40th percentile (tr. 645), that Dillon had been told that she must answer 65 percent of the questions correctly (tr. 646) and that no other residents were sent similar letters (tr. 659). He stated that in 1991, the 40th percentile corresponded with 65 percent answered correctly; in 1992, the 40th percentile corresponded with "approximately 68 or 69 percent" (tr. 651). Dillon answered 67 percent of the questions correctly on the 1992 CREOG exam (Ex. P-24) and was placed on

academic probation (tr. 650-651).

On February 4, 1992, Dillon assisted in a surgical procedure. According to Dillon:

the patient lost half of her blood volume with the procedure and her blood count had gone to one-third of its normal level. I asked a junior resident to call for help. When she did not call for help and the patient was critical, I called the department myself... [T]he attending told me he would report me because he did not ask for help"

Boyce testified that Dillon arrived late for the surgical procedure, acted belligerently towards the attending physician, stated repeatedly that the patient was going to die, and threw surgical instruments (tr. 555). He stated that some people involved in the incident were not willing to give written statements (tr. 663), but none of the individuals either commented negatively on the performance of the attending physician or substantiated Dillon's account (tr. 738). He then stated that one of the individuals substantiated Dillon's statement that the attending physician's glasses fell into the surgical area and that the patient lost a large amount of blood. He also stated that three people corroborated the account of Dillon throwing surgical instruments (tr. 739).

On February 19, 1992, Dillon's elective gynecological surgery privileges were suspended (Ex. P-8). Dillon testified that performing elective surgery was necessary in order for her to meet the requirements for board certification (tr. 168). Although these privileges were suspended, she stated, she

continued to perform emergency surgery at the hospital as usual (tr. 170). Boyce turned the matter over to the hospital's Personnel Department, which conducted an investigation (tr. 666). A representative of the Union met with the hospital's House Staff Affairs Committee in March 1992 and Dillon's elective surgery privileges were reinstated (tr. 172).

Dillon testified that in March 1992, she received a letter from Boyce stating that her chief residency year began on October 31, 1991 and would end on October 30, 1992. Dillon stated that if her fourth year ended in October, she would be unable to take the written Board examination in June 1992 (tr. 173-175). In a letter dated March 26, 1992, the Union wrote to Cappadona, reminding him that HHC had promised to allow Dillon to finish the fourth year of her residency and asking that this be confirmed in writing (Ex. P-15).

By letter to Boyce dated September 3, 1992, the Union instituted a grievance alleging that assignments given to Dillon differed from those of other chief residents, deprived her of normal chief resident experiences and subjected her to further discipline without just cause, due process or pedagogical objectives. It complained of irregularities in personnel policies concerning Dillon, citing several instances in which it claimed that documents were missing from Dillon's file or that documents which had not previously been in her file had subsequently appeared there (Ex. P-16). The Union filed the

instant improper practice petition on September 4, 1992.

In a letter to Boyce dated September 21, 1992, Vaccaro wrote:

Despite your practice of ignoring my correspondence (most recently, that of September 3, 1992), I am compelled to once again protest your department's discriminatory treatment of Dr. Dillon. In April of this year, Dr. Dillon submitted to the Department privileging data signed by her superiors indicating completion of requisite numbers of ... procedures... In August of this year, Dr. Dillon submitted similar privileging data.... Dr. Dillon has received no notification from the Department that the above mentioned privileging data is flawed or insufficient. Yet, a SUNY-HSCB printout dated September 14, 1992, delineating her clinical privileges does not include any of the procedures....

The failure of your Department to notify SUNY-HSCB and affiliated institutions of Dr. Dillon's clinical privileges has impaired Dr. Dillon's ability to function as a Chief Resident, and thus to complete her training.... Dr. Dillon is the sole chief resident in your program who was not provided with a letter from your department to send to the ABOG for an application to sit.... No written evaluations of Dr. Dillon's clinical performance since July 1, 1991 are contained in her personnel file (Ex. P-17).

In a letter to Boyce dated November 6, 1992, Vaccaro wrote:

Attached please find correspondence dated 11/26/92 [sic], 9/3/92, 9/21/92 and 10/27/92. In each of these letters, you are requested to clarify Dr. Sharon Dillon's ABOG eligibility status.... Please indicate in writing Dr. Dillon's board eligibility status and direct [the hospital] to issue Dr. Dillon a certificate of completion of residency training (Ex. P-18).

By letter dated November 9, 1992, Boyce informed Dillon that she had not satisfactorily completed her residency because of professional misconduct in the operating room and improper care of patients, and because she had copied and distributed pages of

a patient's medical record (Ex. R-5). At the time that these hearings were held, Dillon was working at St. Luke's-Roosevelt Hospital. She testified that her employer required a letter from the hospital documenting completion of the residency program (tr. 178). On November 18, 1992, Boyce sent a copy of his November 9, 1992 letter to Dillon to St. Luke's-Roosevelt Hospital (tr. 178, 550).

Boyce testified about incidents of alleged poor patient care by Dillon. He stated that a pediatric patient was admitted with a possible ectopic pregnancy and that Dillon performed an inadequate diagnostic procedure and discharged the patient. According to Boyce, the patient's pediatrician brought her back to the hospital, where she was found to have a ruptured ectopic pregnancy (tr. 555-556). Macasaet corroborated Boyce's account of this incident (tr. 421-423). Boyce testified further that Dillon saw a patient with acute pelvic inflammatory disease, treated her for two days, and released her without an adequate plan for further treatment (tr. 556).

Boyce stated that he considered the operating room and ectopic pregnancy incidents to be life-threatening (tr. 557). He stated that Dillon has had the greatest number of patient complaints and malpractice suits of any resident in the history of the program (tr. 562-563). He testified that Dillon was renewed at the end of her first year of residency because the faculty believed it could correct her deficiencies (tr. 745) but

was not put on probation during her first two years in the program (tr. 749). Boyce also testified that reasons for firing a resident could include improper sexual relations with a patient, substance abuse, or any action injurious to a patient which would cause death or "near death" (tr. 751). During a hearing about the incident in the operating room, Boyce testified, Vaccaro handed Dillon a copy of the patient's chart. Boyce believes that the chart was copied by Dillon without the patient's consent and sent to the Union (tr. 559)

Dr. Sandra McCalla is an attending physician in OB/GYN at KCHC, an assistant clinical professor at SUNY-HSCB, and has been affiliated with KCHC for ten years (tr. 403, 404). She was Dillon's tutor in 1991 (tr. 403). McCalla testified that she and other faculty members were aware of Dillon's deficiencies from her performance on the CREOG exam and complaints about her clinical work (tr. 404). When asked on cross-examination about the importance of the CREOG exams, McCalla answered that she "would not be in a position to quote departmental policy." When asked what importance she placed on the CREOG exams as an instructor of residents, she answered, "It wouldn't be fair for me to describe what importance I give to the CREOG exams, we function under a departmental policy" (tr. 406-407). McCalla could not recall a meeting at which Dillon's promotion was discussed (tr. 407-409), but does recall that Dillon's alleged problems with communication were discussed at some time (tr.

409).

McCalla testified that she was asked to investigate patient complaints involving Dillon. Her only recollection of these investigations was that "there was no apparent wrongdoing in the relationship but I don't recall the details of the incident" and that she had reported this to Boyce (tr. 411). When McCalla was asked to compare Dillon's deficiencies with those of other medical residents, and whether all residents make mistakes, McCall stated, "there are different levels of training and the mistake or error would be judged, often based on what one assumes the resident would have acquired over a preceding period of time" (tr. 414-415).

Macasaet testified that the OB/GYN attending physicians agreed that Dillon should be supervised in the operating room at all times because of her probation and the difficulties with her performance (tr. 419). When asked whether she herself did anything special or unique during Dillon's last year in regard to Dillon's work, she replied, "I would not call it unique but there is, although this round is done with every resident, this was also done when Dr. Dillon was the resident in the GYN Department and that all the cases that were reported by the quality assurance nurse were looked at." Although she believes that Dillon's performance has been life-threatening in some instances, Macasaet testified that Dillon was not removed from her duties (tr. 433). Macasaet stated that Dillon performed "up to par" in

her work as chief resident in March and April 1992 (tr. 438), but stated that Dillon's work was not as good as other chief residents in the program (tr. 439).

When asked whether other residents had been "in trouble" with the department, Kohl recalled a resident who was often late to work (tr. 473) and a resident who did not write notes correctly (tr. 474). He recalled that a resident was fired on the spot because he misread a bottle during a transfusion for the second time and that a male resident was fired for behaving improperly towards a female patient. In other cases, such as when an assistant resident did not follow orders, the student was told to go off duty "until the matter was straightened out" (tr. 496). Kohl expressed his belief that Harding had been "less than forthright" in some situations, and referred to an incident in which Harding was believed to have failed to arrange adequate coverage during an absence (tr. 485).

Dr. Harold Schulman testified as an expert witness for HHC. He is Chairman of the Department of Obstetrics and Gynecology at Winthrop Hospital and a professor of obstetrics and gynecology at the State University of New York at Stony Brook. In previous positions, he has directed four-year OB/GYN residency programs.

Schulman stated that, based on the documents he received from HHC, his opinion was that Dillon had not satisfactorily completed the program. He cited poor evaluations, poor judgment in patient care, an inability to fulfill the department's

academic requirements, and Dillon's uncooperative attitude as the bases of his opinion (tr. 778). During the course of his testimony, the Trial Examiner learned that the only documents Schulman received from HHC to prepare for the hearing were transcripts of the hospital's testimony in hearings concerning grievances brought by the Union on Dillon's behalf³ and a copy of Dillon's file which was sent to him directly from Boyce's office. Many of the documents that HHC had sent to Schulman had not been entered into evidence in this proceeding or examined by counsel or the Trial Examiner.

The Trial Examiner gave Schulman copies of the exhibits in the record and allowed him time to examine them. Schulman stated that since he "didn't have full transcripts of any of the events and recognizing there are two sides to every story" he did not "feel without the patient's chart, for example, that [he] could make a judgment" (tr. 804).

Regarding Dillon's competence relative to other residents, Schulman stated that the number of patient complaints and other incidents in Dillon's file was "not particularly alarming" (tr. 823) but that the number of malpractice suits filed against Dillon was "extraordinary" (tr. 825). Schulman testified that the CREOG exam is intended to be used as a self-diagnostic tool for residents, and that CREOG has never set a cut-off standard

³Although we are aware that five grievances were brought to arbitration after the hearings in this proceeding were concluded, the record does not reflect the exact nature of each grievance.

for performance. He stated that the "passing" standard at Winthrop Hospital is the 30th percentile (tr. 786). According to Schulman, administrators of a four-year OB/GYN residency program should be able to decide whether to terminate a resident by the end of his or her second year (tr. 812).

Positions of the Parties

Union's Position

The Union claims that HHC retaliated against Dillon when she attempted to exercise her rights under the collective bargaining agreement. It argues that it has satisfied the requirement of the Salamanca test with the unrebutted testimony of Dillon and Harding that they were denied access to their files as a result of having filed a grievance, and that it has proven that the hospital's failure to promote Dillon was improperly motivated.

The Union asserts that HHC acknowledges that Boyce distributed copies of the Union's grievance letter to all residents at a conference. Although Boyce testified that the purpose of the conferences was to teach, the Union argues, there was no pedagogical value in this action. Rather, it claims, the aim of distributing the grievance letter was to chill further union activity by the residents. The Union maintains that the reasonableness of Harding's fears about filing a grievance was substantiated by Kohl's testimony that he advised her that making peace with Boyce was necessary to further her career and by the

reluctance of her supervisors to provide recommendations. The Union asserts that Boyce's letter to the Union stating that Dillon and Harding had copied their files was a misrepresentation of fact, and reflects on his credibility. The Union states that Dillon only received part of her file because she filed another grievance, and did not receive the complete file until November 1991.

The Union argues that the reasons given by HHC for not promoting Dillon are pretextual. It claims that the decision not to promote Dillon was made at a conference held on June 13, 1991. Dillon was told in April 1991 that she was required to pass an oral examination, the Union maintains, the examination was held on June 14, 1991, and she was informed that she had failed on June 20, 1991. Before June 27, 1991, the Union asserts, Dillon was told that her promotion was contingent exclusively on the results of the oral examination.

The Union maintains that academic work could not be a reason for not promoting Dillon, since she was promoted to assistant clinical instructor at the PGY-IV level while she was demoted to PGY-III status. In addition, the Union notes, Dillon worked as a chief resident while she was demoted. The Union states that HHC "cannot have it both ways. Dillon cannot be simultaneously castigated as a dullard and praised as a teacher, whose judgment is considered satisfactory by the faculty."

The Union asserts that the finding by the GMEC that Dillon had not been afforded due process, and Boyce's delay in, implementing the directive to promote her, is further evidence of improper motive. The Union-states that the GMEC was convened in response to a grievance filed by Dillon and that Boyce was aware of the grievance. It argues that the delay in instituting the GMEC's recommendation "had nothing to do with academics," and that when Boyce did comply, Dillon was placed on probation even though probation was not recommended by the GMEC.

The Union maintains that, although HHC asserts that Dillon did not reach the requisite standard of competency for a resident, HHC was unable to describe what the standards for evaluation are and how Dillon compared to other residents. It states that Boyce and Macasaet both testified that Dillon misdiagnosed an ectopic pregnancy, yet Macasaet still gave Dillon a favorable evaluation for gynecology rotations. Although HHC's witnesses stated that Dillon was the "worst resident" in the history of the program, the Union maintains, HHC never substantiated this claim. In fact, the Union asserts, Dillon was retained in the program until she graduated.

The Union recognizes that the relationship between the hospital and the residents combines employment with post-graduate instruction, and claims that it did not attempt to interfere with the university's right to create standards of performance. The Union argues, however, that the university promulgated guidelines

for evaluating and disciplining residents which are separate from the individual clinical evaluations for each rotation and that the record is devoid of evidence that KCHC followed these guidelines.

The Union asserts that HHC's claim that many and all actions alleged to have been taken against [Dillon] are of an academic, not employment nature" is not substantiated by the evidence. Assuming that Dillon was deficient, it argues, there is a question of why a review panel was never convened to examine her performance. In the instance of the operating room incident, it maintains, Dillon was not suspended pending a complete hearing, as required by the university, but her elective privileges were suspended and she was charged with insubordination.

The Union claims that at the same time that Dillon was denoted to third year resident, she was promoted to assistant Clinical professor in the university. Thus, it maintains, she was "promoted in academic rank and responsibility while being denied the concomitant employment promotion." The Union states that since these actions were taken by Boyce, either his academic judgment is suspect or he had no actual academic basis for not promoting Dillon to chief resident.

The Union claims that it has met the Salamanca standard by establishing a prima facie claim of improper practice and that HHC has not met its burden of proving that its actions against Dillon would have occurred even if she had not failed a

grievance. The Union also contends that, instead of terminating Dillon's services, the employer received the benefit of her services for four extra months as a PGY IV resident, for which Dillon was paid at the lower, PGY IV rate.

HHC's Position

HHC maintains that the Union has failed to prove retaliation. It states that Dillon was not a union delegate and there has been no showing that she organized or attempted to carry out any union function. The sole allegation which approaches union activity, HHC asserts, is Vaccaro's request that Dillon be permitted to see and copy her file.

HHC maintains that Dillon's assertion that she had not reviewed her records before April 1991 is disproven by Martin's records and by Vaccaro's assertion that when he spoke to Dillon in April 1991, he was under the impression that she had seen her file. It maintains further that Vaccaro's testimony is consistent with Boyce's and Martin's statements that residents' files are kept both at KCHC and the medical school and are consistently available for review by all residents. HHC states that Dillon never returned to see her files after Martin told her that no copies had been made for her.

Should the Board interpret Dillon's request to see her files as union activity, HHC argues, it has proven that KCHC's actions would have occurred even in the absence of protected activity.

HHC states that "[d]uring the first three years of the residency program, according to Dr. Dillon, there was no disparate treatment, with the exception of the department's attitude toward her. These are given facts and have not been disputed."

HHC asserts that Dillon testified that she was given notice to improve her academic performance and was placed on probation when she failed to improve. HHC asserts that the record contains numerous instances of poor patient management, inappropriate operating room conduct, malpractice suits and patient complaints regarding Dillon, and that it is inconceivable that Dillon would receive a certificate of successful completion in the program.

HHC admits that copies of the grievance letter were distributed by Boyce at a residents' conference. It argues that there was only one claim in the grievance letter that could form the basis of a grievance, that the distribution was not made with improper motive, and that Boyce did not refer to Dillon and Harding as "deficient" residents.

HHC maintains that the Union's characterization of the tutorial program and oral examinations as disciplinary actions is false. It states that Harding testified that her rights were not violated by the tutorial program and that all residents were treated equally. It maintains that these actions were taken for the benefit of all residents similarly situated rather than to discipline Dillon. It asserts that the CREOG scores are used as an academic measure of performance rather than as a disciplinary

tool. HHC maintains that the Board has no authority to intervene in academic areas of the residency program, and that the department may set any standard it deems appropriate to obtain the best performance of the residents.

Although Dillon's oral examination was scheduled for June 14, 1991, HHC claims, a decision was made at a meeting on the previous day that she would not be made a chief resident if she did not pass the oral examination. HHC claims that the notes of the meeting, cited by the Union as evidence that the department decided not to promote Dillon before the oral examination was held, were written by a person who was later terminated for incorrect note-taking.

HHC asserts that Dillon was not denoted. Instead, it maintains, Boyce immediately carried out an order from the provost to make Dillon a chief resident on probation. Thereafter, HHC states, Dillon was a chief resident for twelve months and was paid accordingly. HHC also challenges the Union's allegation that the hospital jeopardized Dillon's ability to complete her training by issuing a non-renewal letter. It argues that the hospital may choose not to renew a fourth-year resident, and that the letter was timely.

HHC claims that Dillon's elective gynecological surgery privileges were appropriately suspended while the department investigated a serious incident in the operating room in which she was involved. If Dillon had not been suspended, HHC asserts,

the hospital could be liable for injury or loss of life caused by her conduct.

HHC maintains that Dillon was simply a resident who was below standard, and that the Union has failed to prove retaliation or harassment. It argues that the Board has no jurisdiction over academic training and lacks authority to mandate certification.

Discussion

The petitioner herein is the Union, which alleges that KCHC and its agents interfered with, restrained and coerced public employees in the exercise of rights granted under the NYCCBL. To prove this allegation, the Union has offered evidence and testimony to show that KCHC followed a pattern of harassment, discrimination and retaliation against Dr. Sharon Dillon and Dr. Patricia Harding.

HHC claims that Dillon was not a union delegate, and that there has been no showing that she organized or attempted to carry out any union function. It argues that the only allegation concerning union activity is Vaccaro's request that Dillon be permitted to see and copy her file. We disagree, and find that Dillon and, to a lesser extent, Harding engaged in significant union activity, beginning in April 1991 and continuing until the fall of 1992.

Dillon and Harding organized a meeting between residents and Vaccaro in April 1991 to discuss the impact of Boyce's change of the passing score on the CREOG exam. Dillon and Harding were named in a grievance concerning their right to copy their own personnel files in April 1991. In September 1991, in accordance with the contractual grievance procedure, the Union requested that Dillon receive copies of her file and be reinstated to fourth-year status with retroactive pay. The Union requested action on Dillon's application for the board examination and information necessary for its representation of Dillon in disciplinary hearings in November 1991. In December 1991, as a result of Dillon's difficulty with documentation, the Union complained that the department did not provide PGY IV residents with a list of procedures for which they must be credentialed. The Union intervened in March 1992 to have Dillon's elective surgery privileges restored. In March 1992, the Union also requested clarification of Dillon's status regarding renewal of her contract with KCHC. In September 1992, the Union instituted a grievance on Dillon's behalf alleging disparate treatment and irregularities in personnel procedures. In sum, there was significant union activity.

We now turn to the nature of the employer's conduct. In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LPM 2465 (1967), the U.S. Supreme Court enunciated two tests to evaluate the effect of an employer's conduct on employees' rights. It held:

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is on the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him (emphasis in the original).⁴

When considering allegations of improper practices within the meaning of § 12-306a of the NYCCBL, we have previously evaluated the facts according to the Salamanca standard set forth by the New York State Public Employment Relations Board ("PERB")⁵ which was derived from the second branch of the standard set forth in Great Dane. In the instant case, we find that the facts warrant examination under both branches of the Great Dane standard.

There are two categories of conduct which have been held to be inherently destructive of important employee rights. One "creates visible and continuing obstacles to the future exercise

⁴ See also, Decision No. B-7-89.

⁵ City of Salamanca, 18 PERB 3012 (1985).

of employee rights"⁶ and "jeopardizes the position of the union as bargaining agent or diminishes the union's capacity effectively to represent the employees in the bargaining unit."⁷ The second type "directly and unambiguously penalizes or deters protected activity."⁸ "Generally, those courts that have

⁶ National Fabricators, Inc. v. NLRB, 903 F.2d 396 (5th Cir. 1990), 134 LRRM 2488, quoting NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981) ; see also, Inter-Collegiate Press. Graphic Arts Division v. NLRB, 486 F.2d 837, 84 LRRM. 2562 (8th Cir. 1973), cert. den'd, 416 U.S. 938, 85 LRRM 2924 (1974) ; Loomis Courier Service v. NLRB, 595 F.2d 491, 101 LRRM 2450 (9th Cir. 1979).

⁷ Haberman Construction Co., supra, see also, Inter-Colleaiate Press, Graphic Arts Division v. NLRB, 486 F.2d 837, 84 LRRM 2562 (8th Cir. 1973), cert. den'd, 416 U.S. 938, 85 LRRM 2924 (1974); Portland Willamette Co., supra.

Habernan Construction Co., the court held that:

[e]xamples of such conduct include the grant of super seniority to returning strikers, see NLRB v. Erie Resistor Corp., 373 U.S. 221... 53 LRRM 2121 (1963), the institution of fixed work shifts to non-striking workers, action that insured that the strikers, upon return, would be permanently relegated to less desirable shifts, see NLRB v. Moore Business Forms, Inc. 574 F.2d 835 ... 98 LRRM 2773 (5th Cir. 1978) and the cessation of payments of insurance premiums for strikers, conduct which assured that the employers would be unable to obtain renewed insurance coverage for ninety days past the date of their reemployment. See id. at 841-42.

⁸ Haberman Construction Co., supra, which held:

[e]xamples of such action include discharges occurring because of the employees' expressed desire to obtain union assistance in attaining compliance with the collective bargaining agreement...and a discharge resulting from an employee's lobbying of legislators regarding changes in national policy affecting the employee's job security.

(continued ...)

addressed the question have described 'inherently destructive' conduct as that 'with far reaching effects which would hinder future bargaining, or conduct which discriminated solely upon the basis of participating in strikes or union activity.'⁹

In a case decided by PERB, an improper practice was found where a teacher was dismissed after attempting to organize workers at her college, although the hearing officer found that the department was concerned about standards of quality and believed the teacher to be a substandard employee. PERB found that the department chairman and other full-time faculty who participated in the decision not to reappoint were strongly opposed to the organizing activities, and held:

[t]he 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-1(c) even in the absence of proof of any intention to weaken the employee organization

8 (...continued)

See also, Kaiser Engineers v. NLRB, 538 F.2d 1379, 92 'LRRM 3153 (9th Cir. 1976); Portland Willamette Co., supra; NLRB v. Lantz, 607 F.2d 290, 102 LRRM 2789 (9th Cir. 1979); Indiana & Michigan Electric Co. v. NLRB, 599 F.2d 227, 101 LP.RM 2475 (7th Cir. 1979).

⁹ NLRB v. Sherwin Williams, 714 F.2d 1095, 114 LRRM 2511 (11th Cir. 1983), quoting Vesuvius - Crucible Co. v. NLRB, 668 F.2d 162, 108 LRRM 3209 (3rd Cir. 1981), in turn quoting Portland Willamette Co. v. NLRB, supra.

[citations omitted].¹⁰

To establish improper motivation where the injury to employees' rights is "comparatively slight," the petitioner must show that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity and that the employee's union activity was a motivating factor in the employer's decision. If the petitioner satisfies both parts of this test, the employer must present evidence that attacks directly and refutes the evidence put forward by the Union, or it may present evidence that it had other legitimate and permissible motives which would have caused it to take the action complained of even in the absence of the protected activity.¹¹ This test, adopted by this Board in Decision No.

¹⁰Fashion Institute of Technology v. United Federation of College Teachers, Local 1460. AFL-CIO, 5 PERB 3018 (1972), rev'd on other grounds, Fashion institute of Technology v. Helsby, 44 A.D.2d 550, 7 PERB 7005 (1st Dept. 1974).

See also, County of Monroe and Monroe County Sheriff v. Security and Law Enforcement Employees, 18 PERB 3081 (1985), wherein PERB held that "the right to form, join and participate in an employee organization ... is intimately related to the ... right to be represented by an employee organization. Action taken for the purpose of frustrating the right of representation necessarily has a chilling effect on the § 202 right of organization and is inherently destructive of that right."

¹¹See e.g., Decision Nos. B-16-92; B-63-91; B-50-90; B-61-89; B-7-89; B-46-88; B-12-88; B-51-87.

B-51-87, derives from the decision of the NLRB in Wright Line. a Division of Wright Line. Inc.,¹² and was followed by PERB in City of Salamanca.

The events culminating in the instant alleged improper practice began when Boyce was named chairman of the department. He established a new standard for "passing" the CREOG in-service examination and instituted procedures to use the CREOG exam to determine whether residents were performing adequately. Residents became concerned about their professional standing and consulted the Union. The Union advised them to check their personnel files, and some residents reported to the Union that they were denied access to those files. The Union sent a letter to Boyce instituting a Step I grievance, and naming Dillon and Harding as grievants. Boyce made copies of the Union's grievance, distributed it to bargaining unit employees during his unusual appearance at a residents' conference, and commented to the employees that deficient residents were attempting to use the Union to cover up their deficiencies.

"Some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have

¹² 251 NLRB 1083, 105 LRRM 1169, enforced, 662 F.2d 899, 108 LRRM 2515 (1st Cir. 1981), cert. denied, 455 U.S. 989, 109 LRRM 2779 (1982). In Wright Line, the NLRB adopted the test of causation set forth in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 105 LRRM 1173 (1977), in which the Court determined whether protected conduct was "a 'substantial factor' - or, in to put it in other words, ...a 'motivating factor'" in the employer's decision. See also , NLRB v. Transportation Management Corp., 103 S.Ct. 2469, 113 LRRM 2857 (1983).

intended,' and thus bears 'its own indicia of intent.' If the conduct in question falls within this 'inherently destructive' category, the employer has the burden of explaining away,, justifying or characterizing 'his actions as something different than they appear on their face,' and if the employer fails, 'an unfair labor practice charge is made out.'"¹³

HHC contends that Boyce "distributed copies [of the grievance) so residents could read the letter, advised the residents that the letter had been discussed with Labor Relations, related Labor Relations' opinion regarding the letter and discussed the goals and objectives of the residency program." We reject this contention. Based on this record, including the circumstances surrounding the incident, we conclude that Boyce made a rare appearance at the residents' conference to discourage the residents from filing grievances. His alleged purpose of advising the residents about the hospital's response to the grievance, even if appropriate, and discussing "the goals and objectives of the residency program," could easily have been accomplished without distributing copies of the union's grievance or commenting specifically on the residents named therein. Furthermore, although Boyce testified as to the pedagogical objectives which are the reason for holding such conferences, we

¹³ Great Dane, supra, quoting Erie Resistor Corp. v. Labor Board, 373 U.S. 221, 53 LRRM 2122 (1963) at 228, 231; see also, NLRB v. Cimco, 964 F.2d 513, 140 LRRM 2817 (5th Cir. 1992) ; Esmark, Inc. v. NLRB, 887 F.2d 739, 132 LRRM 2710 (7th Cir. 1989).

do not believe that his action was calculated to advance those objectives. Rather, this was a tactic employed to counter what Boyce perceived to be a challenge by the Union and some of its members to his plans to improve the OB/GYN residency program at KCHC.

We find the facts here to be similar to those of Fashion Institute of Technology. In that case, the court found that although the faculty considered the grievant to be a substandard teacher, the chairman of the department and other faculty members were strongly opposed to union organizing activities. It held that the employer's conduct was inherently destructive of employee rights because it had a "predictably chilling effect" on membership participation in the union.

By the standards of Great Dane and its progeny, we find that this specific action taken by Boyce was inherently destructive of important rights guaranteed under the NYCCBL to the Union and the members of the bargaining unit. It sent a clear message to the residents that filing grievances would have a deleterious effect on their standing in the program. By so doing, KCHC created "visible and continuing obstacles to the future exercise of employee rights,"¹⁴ "diminishe[d] the union's capacity effectively to represent the employees in the bargaining unit,"¹⁵ "directly and unambiguously penalize[d and] deter[red] protected

¹⁴ Haberman Construction Co., supra.

¹⁵ Id.

activity"¹⁶ and "discriminated solely upon the basis of participating in ... union activity,"¹⁷

If not remedied, this action would have "far reaching effects which would hinder future bargaining."¹⁸ Since residents in the program would be less likely to exercise their rights to participate in union activity or support the Union, we conclude that there is "a predictably chilling effect on such employee organization's activities [that] clearly discourages membership in or participation in the activities of the employee organization."¹⁹ As we noted above, PERB has held, in Fashion Institute of Technology, that "conduct of an employer which is inherently destructive of ... employee rights is a violation ... even in the absence of proof of any intention to weaken the employee organization." Accordingly, we find that KCHC and its agent committed an improper labor practice when they engaged in the conduct described above, i.e., Boyce's conduct at the residents' conference in May 1991.

We next consider the evidence concerning Harding, who was completing her fourth year in the program and applying for employment, making it necessary for her to solicit letters of recommendation from program administrators and faculty members.

¹⁶ Id.

¹⁷ Id.

¹⁸ Portland Willamette Co., supra.

¹⁹ Fashion Institute of Technology, supra.

She was concerned that Boyce would give her a negative evaluation because she had been named in the grievance. Kohl advised Harding to "make her peace with the chairman of the Department and ... the sooner she did that the better things would be." Kohl told Harding to write to Boyce, essentially, to apologize for being named in a grievance. When Harding asked him to write a letter of recommendation, Kohl told her that although he would write a letter for her, it "could be a better letter if she had her status in the Department straightened out ... healthier than it was at that particular moment."

We find that Kohl's advice to Harding to "make peace" with Boyce, and his advice that his letter of recommendation "could be better if her situation in the department were healthier," were actions taken in response to the grievance that was filed in April 1991. Kohl made it clear in testimony that the quality of his recommendation for employment hinged on the "health" of Harding's status in the department, which had become "unhealthy" after she was named in a grievance filed by the Union. He also made it clear that he was constantly in communication with Boyce concerning the status of the residents in the program, and that he was aware that Harding had been named in the grievance.

Boyce and Kohl testified that Harding had what they considered to be serious character deficiencies. The two alleged incidents upon which they based their opinions took place before and after April 1991, respectively. If the first incident, the

details of which need not be considered here, had been egregious, we doubt that Harding would have been allowed to continue in the program. The second incident, in which Harding allegedly neglected to arrange for coverage during an absence, occurred in June 1991, after Harding asked for the letters of recommendation. We conclude that Harding's status, and the "health" thereof at the time that she spoke to Kohl, were affected primarily by the fact that she was named as a grievant in April 1991.

The Supreme Court has held, in Metropolitan Edison Co. v. NLRB,²⁰ that when the petitioner demonstrates that the employer's actions carry a strong inference of impermissible motive, "even if an employer comes forward with a nondiscriminatory explanation for its actions, the Board 'may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justification and the invasion of employee rights....'" The refusal of Kohl and other faculty-members to write letters of recommendation for Harding without reference to the grievance of April 1991 creates a strong inference of improper motive, overcoming HHC's contention that Harding was deficient in character and academic proficiency. We find, therefore, that KCHC and its agent committed an improper practice when Kohl conditioned writing a letter of recommendation upon Harding's

²⁰ 460 U.S. 693, 112 LRRM 3265 (1983), quoting Great Dane, supra.

apology for having filed a grievance.

Finally, we turn to the hospital's conduct towards Dillon. HHC argues that Dillon was simply a resident who was below standard and that this Board lacks jurisdiction over academic training. Medical residents employed by HHC are public employees who are certified to a collective bargaining unit and guaranteed certain rights under the NYCCBL.²¹ For this reason, this Board has jurisdiction over a claim that KCHC failed to certify a medical resident, or took any other action, for reasons that are violative of the NYCCBL.

The Union claims that KCHC engaged in a pattern of harassment against Dillon in retaliation for her union activity. We have held previously that actions which are properly within the scope of management's statutory prerogative may constitute improper practices if taken for purposes which contravene the NYCCBL.²² PERB has also held that "[e]valuation, reclassification and transfer are proper management tools if undertaken for legitimate operating purposes. They become improper if undertaken for the purpose of interfering with public

²¹ Board of Certification Decision No. 31-73. We note that when the GMEC ordered that Dillon be promoted to fourth-year status, the dean of medical students declined to do so on the grounds that Dillon was a paid employee and not a medical student.

²² Decision Nos. B-63-91; B-50-90; B-7-89; B-59-88.

employees' right of organization."²³ An allegation of improper motive alone, however, does not state a violation of the NYCCBL.²⁴ To prove an improper practice, petitioner must demonstrate a causal connection between protected conduct and the management actions in question.²⁵

The Union claims that although half of her colleagues failed to achieve the required score on the CREOG exam and were required to take an oral examination, only Dillon was disciplined. It maintains that the notes of the Executive Committee meeting of June 13, 1991 show that the decision not to promote her was made before the exam took place. In response, HHC maintains that the minutes of the meeting of June 13, 1991, were taken by an employee who was later terminated for poor note-taking. We find that, absent more conclusive evidence to the contrary, the notes of the meeting show that a unanimous decision was made not to promote Dillon, and that this decision was made on the day before her oral examination. The hospital's GMEC came to the same conclusion when it stated that one reason for upholding its original finding to promote Dillon was the "faculty meeting that determined [the] status of [the] resident prior to [the] oral exam session" by voting to deny her promotion to chief resident.

²³ Organization of staff analysts v. Board of Education of the City School District of the City of New York, 18 PERB 3068 (1985).

²⁴ Decision Nos. B-12-88; B-2-87; B-28-86; B-12-85; B-25-81.

²⁵ Decision Nos. B-21-92; B-21-91; B-1-91; B-28-89; B-12-88.

We are not persuaded by HHC's claim that a primary reason for refusing to certify Dillon was her inability to achieve the requisite percentile scores on the CREOG exams. Half of the residents in the program consistently failed to achieve the required score, and no other resident was denied certification. The GMEC noted that "the results of CREOG exams cannot be used as a reason for non-promotion," and until April 1991, Dillon was treated in a manner that was comparable to other residents who had "failed" the CREOG examinations.

HHC also cites Dillon's poor evaluations in clinical care as evidence that the hospital was not improperly motivated in denying her certification. The clinical evaluations are notable for their inconsistency; we also cannot overlook the fact that HHC has not produced evaluations of Dillon for the period from September 1990 to April 1991, and that the Union has alleged without rebuttal that Dillon's file appeared to have been tampered with. Here, we rely on the GMEC's view of the evaluations. The committee stated:

In reviewing the evaluations from prior years the resident was not given bad evaluations, but they were average. An attitude problem was not documented. The resident was assigned a tutor ... and has been meeting weekly with her.... [I]n 1989 one evaluation shows that interpersonal skills and attitude was a problem, receiving an overall rating of 2, while others in 1990 show ratings of 4 on attitude and interpersonal skills. These evaluations are signed which shows that she had a problem and was told about it. It ... was only one faculty member who had given the bad evaluations.

Furthermore, we have not been supplied with any means of comparing Dillon's evaluations and performance with the evaluations and performance of other, similarly situated residents. When questioned directly about Dillon's competence relative to other residents, the hospital's witnesses were evasive and inconclusive. Although Boyce and Kohl described incidents in which residents were fired for professional misconduct, only Schulman answered the question directly. He stated that the number of incidents on the record was "not particularly alarming," although the number of malpractice suits was "extraordinary." However, it is difficult to give weight to Schulman's testimony, since he stated an opinion based only upon selected records supplied by KCHC. The only reliable bases for judgment here are the opinion of the hospital's committee and the undisputed fact that Dillon was not terminated.

In summary, half of the residents regularly "failed" the CREOG examinations, Dillon, though allegedly the "worst resident in the history of the program," was not terminated, and the record is devoid of conclusive evidence that her performance compared unfavorably to that of other residents. On this record, and with evidence that the disparate treatment of Dillon began immediately after the first grievance was filed, we can only conclude that the department's actions towards Dillon were taken in retaliation for exercising her rights under the NYCCBL.

The Union claims that Boyce demoted Dillon to third-year resident in June 1991. It appears to us that Dillon was not actually demoted, but was held back as a third-year resident, and that the department made a decision not to promote her to fourth-year status. It is well-established that the employer has the right to determine criteria for promotion and to decide who shall be promoted.²⁶ As we stated above, however, actions properly within the scope of management's statutory prerogative may constitute improper practices if taken for purposes which contravene the NYCCBL. In Transportation Management Corp., the Court held that the NLRB was justified in finding an improper practice when it concluded that:

[the employee] would not have been discharged had the employer not considered his [protected union activity]. At least two of the transgressions that purportedly would have in any event prompted [the employee's] discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions... In addition, [the employer's agent] was obviously upset with [him] for engaging in such protected activity.

It is not within the jurisdiction of this Board to decide whether Dillon is qualified to practice medicine. Our determination here concerns only whether the hospital would have refused to certify Dillon for reasons other than retaliation for protected activity. We recognize that some of the incidents of mismanaged patient care alleged by HHC are disturbing. They are

²⁶ NYCCBL Section § 12-307b; Decision Nos. B-12-88; B-51-87; B-22-84; B-3-84; B-25-81.

disturbing enough, indeed, to question why the hospital did not terminate Dillon during the four years of her residency, as HHC correctly notes the hospital has the right to do. However, we agree with the Union that "the hospital cannot have it both ways." HHC asks us to find that KCHC would have refused to certify Dillon for legitimate business reasons, that is, because she was incompetent, despite any union activity or improper labor practice. Yet the hospital did not terminate her even in the face of professional conduct which KMC asserts was grossly incompetent.

HHC has not met its burden of proving, by a preponderance of the evidence, that Dillon was so incompetent that the hospital would have refused to certify her even in the absence of the violative conduct. Accordingly, the instant improper practice petition is granted.

In fashioning a remedy, we recognize that the matter of certifying medical residents involves the exercise of medical judgment, which rests solely with the hospital. Therefore, we must strike a balance between remedying a violation of the NYCCBL and preserving the hospital's mission to protect the public by screening its medical residents.

Although the hospital alone ultimately must decide whether Dillon is to be certified to sit for the written board examination, it must make that determination based upon a fair evaluation of Dillon's ability and performance and without regard

to her union activity. In order to remedy the hospital's improper practices, we will direct that HHC, after consulting with the Union, establish a plan whereby Dillon's application for certification may be evaluated, with or without a period of further training, and without reference to her involvement in union activities. Recognizing that time is of the essence to avoid continued violation of Dillon's rights under the NYCCBL, we direct HHC to create such a plan no later than September 1, 1993.

The Union requests that Dillon be paid retroactively for the period from July 1, 1991 until October 30, 1991. Dillon did not begin working as a fourth-year resident until October 1991 because of actions taken by the department, and it would be unreasonable to penalize her for a lapse for which the department was ultimately held accountable. For this reason, we direct that Dillon be compensated for any loss of pay and benefits incurred as a result of not being promoted on July 1, 1991.

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 the Committee of Interns and Residents be, and the same hereby is, granted; and it is further,

DIRECTED, that the New York City Health and Hospitals Corporation cease and desist from interfering with, restraining, coercing or discriminating against its employees in the exercise of rights protected by the NYCCBL; and it is further,

DIRECTED, that the New York City Health and Hospitals Corporation conspicuously post notices communicating the Board's decision in the instant case and all provisions of this order at all locations throughout Kings County Hospital Center, and in all forms, ordinarily used to communicate information to bargaining unit employees; and it is further,

DIRECTED, that representatives of the New York City Health and Hospitals Corporation, after consulting with representatives of the Committee of Interns and Residents, determine a procedure by which Kings County Hospital Center will decide whether Dr. Sharon Dillon may be certified as having satisfactorily completed its four-year residency program in obstetrics and gynecology, with or without a further period of training, and without regard to her involvement in activities protected by the NYCCBL; and it

is further,

DIRECTED, that the New York City Health and Hospitals Corporation create the above ordered plan no later than September 1, 1993; and it is further,

DIRECTED, that the New York City Health and Hospitals Corporation compensate Dr. Sharon Dillon for loss of pay and benefits suffered during the period from July 1, 1991 to October 30, 1991 as a result of the improper labor practices committed by Kings County Hospital Center.

Dated: New York, New York
July 29, 1993

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

STEVEN H. WRIGHT - I abstain.
MEMBER