Cotov, L.1549, Espendez v. HHC, et. al, 53 OCB 16 (BCB 1994) [Decision No. B-16-94 (IP)]

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

MARIO COTOV,

DECISION NO. B-16-94

Petitioner,

DOCKET NO. BCB-1317-90

-and-

BELLEVUE HOSPITAL CENTER, DUNCAN QUARLESS, GERALD MILLER, and ALAN CHANNING,

Respondents.
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In the Matter of the Improper Practice Proceeding

LOCAL 1549 and ROSA ESPENDEZ,

DOCKET NO. BCB-1333-90

Petitioners,

-and-

BELLEVUE HOSPITAL CENTER and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.
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DECISION AND ORDER

On August 27, 1990, Mario Cotov, an Office Aide employed at Bellevue Hospital Center ("Bellevue" or "the Hospital"), filed an improper practice petition docketed as BCB-1317-90, against the Hospital, Duncan Quarless, Gerald Miller, and Alan Channing ("Respondents").[1] Mr. Cotov alleges that beginning on or about on September 1, 1989, the Respondents violated §12-306a of the New York

[1] At the time the instant petition was filed, the named respondents held the following positions at Bellevue Hospital Center: Duncan A. Quarless, Director of Labor Relations; Gerald Q. Miller, Associate Executive Director of Human Resources Development; and Alan H. Channing, Executive Director of Bellevue Hospital Center.

City Collective Bargaining Law ("NYCCBL")[2] by committing the following improper labor practices:

(i) barring the petitioner from doing any union work;
(ii) refusing to permit the petitioner time to carry out his union work; and
(iii) harassing petitioner in a clear effort to discourage and prevent the petitioner from doing his union work.

On October 5, 1990, the New York City Health and Hospitals Corporation ("HHC"), on behalf of the Respondents, moved to dismiss the complaint on the grounds that Mr. Cotov failed to provide sufficient evidence to support his claim that the Respondents committed the alleged improper practices. Before the Board rendered its decision on HHC's motion, Local 1549 of District Council 37, AFSCME, AFL-CIO ("Local 1549" or "the Union"), submitted on behalf of Rosa Espendez, another improper practice petition docketed as BCB-1333-90, alleging that Respondent Bellevue and HHC attempted to "interfere, restrain, and coerce her from engaging in union activity." On December 19, 1990 the Board issued an interim decision (Decision No. B-78-90), denying HHC's motion to dismiss Mr. Cotov's complaint. In denying HHC's request, the Board found that "sufficient facts [were]... alleged to find that the petition state[d] a cause of action under the NYCCBL."

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[2] **Section 12-306a** of the NYCCBL provides, in pertinent part, as follows:

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

Subsequently, the Union made a request to consolidate Mr. Cotov's and Ms. Espendez' (the "Petitioners") claims on the grounds that the employer was the same in both matters and because the Petitioners were likely to be called as witnesses in each other's case. After a pre-hearing conference, during which the parties settled on guidelines to ensure that neither party would be unfairly prejudiced or burdened by consolidation, the Petitioners' claims were consolidated for hearing pursuant to Section 1-13(l) of the Rules of the City of New York ("RCNY").[3]

The hearing began in September 1991, and lasted until February of 1992.[4] The Union presented documents and testimony on the question whether the Respondents retaliated against the Petitioners on account of their union activity.[5] Both parties submitted post-hearing briefs in May of 1992.[6] Thereupon, the record in this matter was closed.[7]

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[3] RCNY §1-13(l) provides as follows:

Consolidation or Severance. Two or more proceedings may be consolidated or severed by the board on notice stating the reasons therefor, with an opportunity to the parties to make known their positions. For purposes of this subdivision the term "proceedings" shall include but not be limited to representation, arbitrability, arbitration, mediation and impasse and improper practice proceedings.

[4] The hearing was completed in 4 days. The actual dates were as follows: September 5, 1991; November 15, 1991; November 26, 1991 and; February 28, 1992.

[5] On the first day of hearing in this matter, pursuant to a stipulation of settlement between the parties a claim alleging that Ms. Espendez was improperly disciplined and suspended for an incident that occurred in connection with her representation of a union member was withdrawn.

[6] In its post-hearing brief, HHC, inter alia, moved to dismiss both improper practice petitions on the grounds of mootness.

[7] It should be noted that at the close of the record in this (continued...)

FACTS

In addition to handling their duties and responsibilities as Office Aides at Bellevue, Petitioners Cotov and Espendez served as Local 1549 shop stewards for nine and ten years, respectively. (Tr. 14, 52).[8] At the time of the events which form the basis of the instant petitions, both Petitioners were serving as shop stewards on an ad hoc basis. Ad hoc shop stewards are employee representatives who are granted release time for union business on a case-by-case basis.

On September 12, 1989, Ena Iyesi, a Local 1549 member, was relieved from duty that morning for refusing to accept an assignment to work in Psychiatric Admitting. Ms. Iyesi contacted Petitioners Cotov and Espendez, who then accompanied her to Bellevue's Department of Labor Relations even though no one had an appointment. Once there, both Petitioners and Ms. Iyesi waited in order to meet with Mr. Duncan Quarless, the Director of Labor Relations at Bellevue. (Tr. 19, 52, 206). Mr. Quarless had been appointed to his position at Bellevue on August 28, 1989. Thus, this was to be the first meeting between Respondent Quarless and the Petitioners. (Tr. 53, 222).

According to Mr. Quarless, he returned to his office at approximately one o'clock and agreed to meet with all three of them. At the conclusion of the meeting, which lasted approximately one hour, Mr. Quarless asked Ms. Iyesi and Ms. Espendez to report back to Labor Relations at eight o'clock the following morning to ascertain whether he (Quarless) "could work out a reassignment." (Tr. 315). According to all accounts of what had transpired, this outcome was satisfactory to all concerned. (Tr. 21, 53, 130, 139, 316).

Mr. Cotov, Ms. Espendez and Ms. Iyesi all testified that immediately following the meeting, Mr. Quarless told Petitioners Cotov and Espendez that he

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[7](...continued)
matter, Petitioner Cotov and Respondents Quarless, Miller and Channing were no longer employed at Bellevue.

[8] References to the transcript are denoted as (Tr.).

didn't want to see either of them in Labor Relations any more. Turning to Petitioner Cotov, Mr. Quarless allegedly said: "I'd like to break your balls and stuff them in your mouth." (Tr. 21-22, 54, 131, 161). According to Ms. Espendez, Mr. Quarless accused Mr. Cotov of being "disruptive" and "not helpful to the member." (Tr. 53). Ms. Iyesi testified that it was Mr. Quarless who kept interrupting Mr. Cotov. According to Ms. Iyesi, "Every time Mr. [Cotov] would open up his mouth to say something on my behalf, Mr. Quarless would interrupt him and tell him, 'Would you keep quiet.'" (Tr. 159).

Mr. Quarless maintains that telling Petitioners Cotov and Espendez to never again return to his office was inconsistent with what had just been agreed to, i.e., that Ms. Espendez and Ms. Iyesi would report to his office the following morning. (Tr. 317). As for the remark directed at Mr. Cotov, Mr. Quarless testified that he said: "a tennis ball in the mouth of a Mario Cotov will no doubt improve communications in the future." (Tr. 317).

The record establishes that at some point in the fall of 1989, Mr. Quarless began to examine Bellevue's policy concerning the release of shop stewards for union business. Mr. Cotov alleges that this was undertaken because of the September 12th incident, and that, thereafter, the procedure for obtaining approval for release time was applied to him in a discriminatory manner. (Tr. 24). According to Local 1549 Chief Shop Steward Ralph Palladino, Petitioner Cotov's requests for release time were made subject to the approval of Lillian Calvanico, an Associate Director of the department in which Mr. Cotov worked, while other shop stewards only needed to obtain their immediate supervisor's signature. (Tr. 164-166). Although Ms. Calvanico was an administrator in Mr. Cotov's area, she was not his immediate supervisor. (Tr. 165-166). Mr. Cotov alleges that before the policy was enforced, he was regularly granted permission to represent Local 1549 members. Now, he maintains, a majority of his ad hoc release time requests were being denied. (Tr. 25).

According to Mr. Quarless, in October 1989, he had received complaints from some of Bellevue's department heads concerning the disruption that was caused by

ad hoc shop stewards leaving their work areas to attend to union business without prior approval. He further testified "that there would be counseling sessions ... scheduled and two or three [Local] 1549 stewards would converge on the department and be generally disruptive." (Tr. 222). According to Mr. Quarless and Lynne Stumer, Senior Director of HHC's Department of Labor Relations, in response to these complaints and in consultation with the Union, an existing but previously unenforced Bellevue policy mandating that ad hoc shop stewards be required to obtain their supervisor's written approval before being released for union business was implemented "across the board". (Respondents Exhibits 12-14, 16-19, 21-22, 38, 39)(Tr. 223-235, 392-400). According to Mr. Quarless, although enforcement had become lax, the policy, which had been last reviewed in 1987, was still set forth in Bellevue's Personnel Procedure Manual.(Tr. 229). Mr. Quarless testified that during one of the labor-management meetings in which this issue was discussed, the Union submitted a memorandum (Respondent Exhibit 20), "supposedly as proof that Mr. Cotov had been released back in '86, I believe, to do union business between 9 a.m. and 10:30 a.m." (Tr. 255). Mr. Quarless explained, however, the actual intent was to "restrict" the time that Mr. Cotov spent on union business to those hours "because of the disruptive manner of his just leaving the unit constantly at any time of the work day." (Tr. 256).

Mr. Quarless further explained that in conjunction with implementation of the ad hoc steward release time policy, department heads were advised that all Local 1549 business was to be scheduled during the release time periods of Ralph Palladino and Emma Franklin, Local 1549's "regularly scheduled" half-time shop stewards. In consultation with the Union, their schedules were arranged so that with the exception of Thursday mornings, all working hours were covered during the day tour. (Respondents Exhibit 15)(Tr. 235-237). As a result, Mr. Quarless continued, Local 1549's unscheduled ad hoc shop stewards were to be granted release time only when "special circumstances" exist, such as when both Ms. Franklin and Mr. Palladino were unavailable or if an ad hoc steward had a "history of involvement" with a particular union member so as to maintain a

continuity of representation. (Tr. 287, 333).

Mr. Quarless testified that the decision whether to approve the release of an ad hoc shop steward was done on a case-by-case basis. In describing the procedure, he stated that "Mr. Palladino would call. He would request the release of a shop steward to be involved in a counseling session, and if there was no connection, no compelling reason, we would deny it." (Tr. 287). Mr. Quarless further testified that following implementation of the policy, Labor Relations was "bombarded, literally, with requests for Cotov and Espendez." (Tr. 288). Thereupon, 47 forms requesting release time for Mario Cotov, from January 11, 1990 through August 12, 1991, were introduced into the record.[9] (Respondents Exhibit 27). Thirteen forms requesting release time for Rosa Espendez, from April 4, 1990 to July 3, 1991, were introduced earlier in the hearing. (Respondents Exhibits 1-10)[10] and (Petitioners Exhibit 1(a)-(c))[11]. When asked if there were similar numbers of requests for other ad hoc stewards, Mr. Quarless could identify only one occasion, where a special request was made for Dolly Ramos. When asked if, in the instances when release time was denied to either Mr. Cotov or Ms. Espendez, another Local 1549 shop steward was available, Mr. Quarless responded, "Yes. Most of them, most of the union business was scheduled within those release time periods for either Mr. Palladino or Ms. Franklin." (Tr. 188).

According to Ms. Stumer, both parties benefitted from enforcement of

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[9] Of the 47 requests for release time, 29 were denied. In one instance where the request was granted, there was a note from the member for whom the counseling was being held, in which a specific request for representation by Mr. Cotov was made. In most of the instances where the request was denied, there was an indication that either Ralph Palladino or Emma Franklin would attend. Among the supervisors who signed off on Mr. Cotov's requests were Lillian Calvanico, Ruth Smith, and Alicia Howard.

[10] Of ten requests, seven were approved.

[11] All three requests were denied.

Bellevue's release time policy: the employer through minimization of disruptions that were caused by ad hoc releases and the Union's members by an increased amount of scheduled coverage for labor-management activities. (Tr. 396). Ms. Stumer also testified that enforcement of the release time policy for ad hoc stewards was implemented on notice to the Union and that the matter was fully discussed at labor-management meetings (Tr. 392-394); that the schedules for shop stewards Franklin and Palladino were arranged in consultation with the Union (Tr. 395); that a policy to deal with the "special circumstances" that would justify the release of an ad hoc steward was developed by both parties (Respondents Exhibit 23)[12](Tr. 396-398); and that the current policy was consistent with

[12] Respondents Exhibit 23, the newly revised release time policy for Local 1549 ad hoc shop stewards at Bellevue, provides:

> In accordance with the provisions of Executive Order No. 75, Bellevue Hospital Center has established one full-time equivalent scheduled ad hoc release for Local 1549 stewards to handle counselings, warnings, disciplinary and grievance actions of their constituents employed at the facility.
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> The full-time equivalent release is divided equally between two stewards, Ralph Palladino and Emma Franklin. Counselings, warnings and Step 1A conferences would be scheduled with either Mr. Palladino or Ms. Franklin during their regularly scheduled release time.
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> Should a conflict of scheduling occur which cannot be resolved [by] the rescheduling or delay in start time of a conflicting meeting, the [scheduled] release[] time shop steward should immediately advise the designated individual(s) within Bellevue Labor Relations/Human Resources Department of the conflict, and request the ad hoc release of another specified shop steward to cover the conflicting meeting. The initial request may be either in writing on the form developed by Bellevue for such purpose, or by telephone. If the request is made by telephone, a form must be completed immediately thereafter. The request should include:
>
> * The reason for the conflict.

(continued...)

Executive Order 75[13](Tr. 403). According to Chief Steward Palladino, there was no question that both he and Ms. Franklin were qualified to represent Local 1549's members in counseling sessions. (Tr. 197).

Additional testimony was elicited concerning both Petitioners' involvement in the formation of an anti-discrimination committee at Bellevue. Ms. Espendez testified that this committee was created in 1989 in response to complaints by Latino employees regarding the lack of minorities interviewed by Bellevue's Personnel Department for available positions. (Tr. 56). In January 1990, during a joint labor-management meeting, Mr. Cotov, the co-chairperson of the anti-discrimination committee with Ms. Espendez, questioned then Bellevue Executive Director Alan Channing about the lack of minorities in high-ranking positions at

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[12](...continued)

* The name of the shop stewards whose ad hoc release is being requested.
* The nature of the meeting, date, time and place which will be covered on an ad hoc basis.

Additionally, an ad hoc release may be granted based on a showing of a particular reason that the presence of another shop steward other than the scheduled release time stewards will be useful. The request of an employee for a shop steward other than those on scheduled ad hoc release, absent such showing is not reason for release of another steward on an ad hoc basis.

Labor Relations/Human Resources will verify with the supervisor/administrator of the area if a request for an ad hoc release can be granted upon staffing and other operational needs. Every effort will be made to release the requested shop steward.

[13] Executive Order 75 provides for the release of duly designated employee representatives, without loss of pay, when acting on matters relating to certain union business, i.e., the adjustment of grievances, participation in labor-management meetings, fact-finding and negotiations, etc. It further provides guidelines for employee representatives who may be permitted release time on an ad hoc basis.

the Hospital.[14] (Tr. 22, 56, 67, 167). Petitioner Cotov alleged that after the labor-management meeting, he was subjected to harassment by Ms. Calvanico. (Tr. 30). According to Mr. Cotov, in addition to frequently questioning him about his whereabouts during the course of the day, Ms. Calvanico allegedly ordered him back to work whenever she observed him outside his office during business hours. (Tr. 29-30). Mr. Cotov testified that Ms. Calvanico said she was harassing him by "order of management." (Tr. 30).

In addition to testifying on behalf of Mr. Cotov, Petitioner Espendez alleged on her own behalf that Bellevue discriminatorily applied its release time policy to her in retaliation for her union activity. Ms. Espendez claimed that after the labor-management meeting in January 1990, she began to have her release time requests denied, even if a member specifically requested that she represent them. (Tr. 73-76). In support of this claim, the Union presented one release time request form dated June 4, 1990, and two forms dated September 18, 1990, all of which indicated that the request was denied "per Labor Relations." (Petitioners Exhibit 1(a)-(c)) (Tr. 117-124). Ms. Espendez maintained that two of those requests should have been granted as a "special circumstance," in that the member (the same in both instances) made a specific request for Ms. Espendez. Attached to the earlier of those two requests was a memorandum from the grievant on whose behalf the request for release time was made, addressed to Petitioner Espendez, to wit:

> I would like you to be present as my shop steward, Local 1549, when my meeting on disciplinary charges comes up. Since you have been handling my case from the beginning, I feel you are the appropriate person to represent me.

According to the testimony of Chief Shop Steward Palladino, management "always" granted a members' request for a particular shop steward except when

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[14] There is a discrepancy in the record. Mr. Cotov testified that this joint labor-management meeting took place in January 1990. (Tr. 27). However, Local 1549 Chief Steward Ralph Palladino stated that this meeting was held in approximately March, 1989. (Tr. 168-69).

either Petitioner Cotov or Espendez was requested, in which case, he stated, the request was "never" approved. (Tr. 198-199). In support of this contention, Mr. Palladino related several instances of what he characterized as "gray areas," where a counseling or grievance session was cancelled because Mr. Cotov was not released on the request of the grievant. (Tr. 189-196).

Ms. Espendez further claimed that the policy requiring written approval for the release of ad hoc shop stewards was being applied more restrictively to her than to other shop stewards. In support of this allegation, Ms. Espendez testified that as of April 1990, she had to obtain the written approval of her immediate supervisor while another shop steward, Dolly Ramos, continued to be granted release time after April 1990 without having to submit any release time forms. (Tr. 74).

As further proof of a course of conduct intended to retaliate against Petitioner Espendez on account of her union activity, the Union points to the following statement that appeared on her 1989-1990 Employee Performance Evaluation form, dated October 23, 1990:

> She [Ms. Espendez] must properly execute the union release time policy as needed." (Exhibit H of Ms. Espendez' Petition)

The Union alleges that this remark was derogatory and intended to discourage Ms. Espendez from continuing to aggressively discharge her duties as a union shop steward.

POSITIONS OF THE PARTIES

The Union's Position

The Union alleges that the Respondents have engaged in a pattern of harassment directed at both Petitioners, which includes interference with their representation of Local 1549 members; coercive, close supervision; unilateral establishment of special rules restricting Petitioners' discharge of their duties as shop stewards; and derogatory remarks about union activity in employee performance evaluation forms. The Union maintains that this course of conduct

is in retaliation for Petitioners' protected activity and is intended to discourage further protected activity in violation of Section 12-306a(1) and (3) of the NYCCBL.

In support of its allegations, the Union alleges that the Petitioners' sudden decrease in approved release time for union business was a direct result of their outspoken, often vocal participation as shop stewards and their involvement as co-chairpersons of Bellevue's anti-discrimination committee. The Union contends that Bellevue's motivation for enforcing the policy requiring ad hoc stewards to obtain their supervisor's approval before receiving release time was to discourage and restrict both Petitioners' participation in subsequent union activities.

The Union adds that in spite of Bellevue's contingency plan regarding "special circumstances" cases with regard to the scheduling of its ad hoc stewards, HHC retaliated against both Petitioners by denying the requests of members specifically seeking their services as stewards. The Union submits that similar requests for ad hoc stewards other than the Petitioners were "always" granted.

The Union next argues that HHC committed an improper practice by placing Associate Director Lillian Calvanico, as opposed to Mr. Cotov's immediate supervisor (Ruth Smith) in charge of approving and/or denying his release time requests. According to the Union, Mr. Cotov was the only shop steward required to obtain Ms. Calvanico's approval while other ad hoc shop stewards needed only to seek the approval of an immediate supervisor. The Union asserts that Mr. Cotov's prior participation as a shop steward in addition to his outspokenness regarding the lack of minorities holding "high-ranking" positions within Bellevue was the reason why the Respondents required him to obtain this higher level of approval for release time. The Union also claims that Petitioner Cotov was verbally harassed by Associate Director Calvanico. According to the complaint, Ms. Calvanico provided "coercive[ly] close supervision" of Mr. Cotov by constantly ordering him to return to his room whenever she "found him" outside

of his office during regular hours. Mr. Cotov testified that Ms. Calvanico told him that she was harassing him "by order of management."

The Union further alleges that Mr. Quarless committed an improper practice by telling Mr. Cotov that he would "like to break [Mr. Cotov's] balls and stuff them in [his] mouth." The Union argues that this statement reflects clear union animus since Mr. Quarless made the remark to Mr. Cotov, a shop steward, in the context of a union-related meeting.

Finally, DC 37 argues that Petitioner Espendez also was treated differently than the other shop stewards in retaliation for her union involvement. Ms. Espendez claims that HHC strictly enforced its release time policy against her while it relaxed the rules for another shop steward. According to the Union, Bellevue's decision to include the phrase, "She [Rosa Espendez] must properly execute the union release time policy as needed," on Petitioner Espendez' 1989-1990 Employee Evaluation reflects union animus on the part of Bellevue because it was intended to discourage Petitioner Espendez from continuing in her role as a shop steward. In contrast, Ms. Espendez testified that Shop Steward Dolly Ramos was routinely granted release time without having to submit any of the "required" forms.

HHC's Position

HHC maintains that the facts, even when viewed in a light most favorable to the Petitioners, demonstrate that the Respondents did not violate any provisions of the NYCCBL, and that the Petitioners failed to establish union animus on the part of any of the Respondents. HHC asserts that the Union was consulted and did not object to the handling of the majority of union business by Ms. Franklin and Mr. Palladino, Local 1549's two regularly scheduled half-time shop stewards. The Respondents argue that the change in procedure more effectively and efficiently serves the Hospital's needs because the system is equivalent to having a full-time shop steward on duty at Bellevue. HHC points out that it attempted to accommodate its ad hoc shop stewards by implementing another policy whereby these stewards were assigned to those complaints involving "special circumstances."

HHC offers support for the need for this policy by emphasizing some of the problems that had plagued Bellevue in the past. In particular, HHC alleges that various departments throughout the Hospital had complained that Local 1549 shop stewards were compromising the "efficient functioning of the hospital" by leaving their work sites to attend union functions without first obtaining proper authorization.

HHC denies the allegation that Mr. Quarless made a comment in which he referred to Mr. Cotov's genitals. However, HHC contends that even if Mr. Quarless made the remark, this alone would not constitute an improper practice within the meaning of §12-306a(3) of the NYCCBL, since it was not intended to discourage or prevent Mr. Cotov or any other employee from participating in union activities. Mr. Quarless concedes that he said "a tennis ball in the mouth of Mario Cotov will no doubt improve communications in the future". However, he maintains, this statement was made in jest following their September 12, 1989 meeting, during which Petitioner Cotov "constantly" interrupted him while attempting to resolve a union dispute.

HHC also argues that the Union failed to provide any authority to support

its claim that union employees are entitled to the shop steward of their choice. Furthermore, HHC argues, in any instance in which Petitioners Cotov and Espendez were denied release time, it was because there was adequate union representation already available. In the alternative, HHC asserts that even if the Board finds that union members have the right to choose their own shop stewards, the issue cannot be raised until a union employee (as opposed to a shop steward) files a complaint alleging that his or her rights were violated.

With regard to the allegation that a reference to Ms. Espendez' role as a shop steward in her performance evaluation is an attempt to discourage this activity, HHC maintains that the comment ["She must properly execute the union release time policy as needed"] was not a derogatory remark about the Petitioner's union activity. Instead, HHC asserts that it was restating the release time policy that was in effect at the time. Additionally, the Respondents emphasize that Ms. Espendez received a satisfactory evaluation, and at worst, the statement could be construed as "constructive criticism".

Lastly, in its post-hearing brief, HHC contends that because Petitioner Cotov and Respondents Quarless, Miller and Channing are no longer employed by Bellevue Hospital Center, both improper practice petitions should be dismissed on grounds of mootness.

DISCUSSION

At the outset, HHC's assertion that the Petitioners' claims are moot because Messrs. Cotov, Quarless, Miller and Channing are no longer employed by Bellevue Hospital Center must be rejected. An improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remains open to consideration.[15]

[15] Decision Nos. B-56-91; B-32-91; B-44-82.

When an improper petition alleges violations of NYCCBL Sections 12-306a(1) and (3), we apply the standard adopted by the Public Employment Relations Board ("PERB") in City of Salamanca, 18 PERB ¶3012 (1985).[16] We first applied the Salamanca test in Decision No. B-51-87, and have employed it consistently ever since.[17] According to this test, the Petitioner must establish 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.

If the respondent does not refute the petitioner's showing on one or both of these elements, then the respondent must establish that its actions were motivated by another reason which is not violative of the NYCCBL.[18]

In the instant matter, there is no dispute that the employer was aware that both Petitioners Cotov and Espendez were active Local 1549 shop stewards. It is the second element of the Salamanca test which is at issue in this case, i.e., whether the complained of actions of the Respondents were motivated by the Petitioners' protected activity. In previous decisions, we have recognized that proof of this element is difficult to adduce.[19] In Decision No. B-17-89, we stated:

> ... [e]xamination of whether an employee's union activity was a motivating factor in an employer's decision to act requires that we try to ascertain the employer's state of mind when the challenged decision was made. In the absence of an outright admission, proof of this element necessarily must be

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[16] See e.g., Decision Nos. B-8-91; B-4-91.

[17] Decision Nos. B-1-94; B-20-93; B-2-93; B-21-92; B-48-91; B-21-91; B-8-91; B-4-91; B-24-90; B-4-90; B-3-90; B-6-89; B-36-89; B-28-89; B-25-89; B-17-89; B-8-89; B-7-89; B-1-89.

[18] Decision Nos. B-26-93; B-16-92; B-63-91; B-21-91; B-50-90; B-61-89; B-17-89; B-7-89; B-46-88; B-12-88; B-51-87.

[19] Decision Nos. B-1-94; B-50-90; B-25-89; B-17-89; B-8-89.

circumstantial.[20]

The Union alleges that enforcement of Bellevue's release time policy for ad hoc stewards became a matter for individual implementation and that the Respondents applied it in an arbitrary and capricious manner in violation of the NYCCBL. Specifically, the Union further alleges that the manner in which the policy was applied to Petitioners Cotov and Espendez violates §12-306a(1) and (3) of the NYCCBL, insofar as it was discriminatory, in retaliation for their past union activity and intended to discourage future protected conduct. In support of the allegation of disparate application, the Union claims that Mr. Cotov was required to obtain the approval of Associate Director Lillian Calvanico, while other ad hoc shop stewards only needed the approval of their immediate supervisors. The Union also claims that HHC strictly enforced the release time policy against Ms. Espendez while another shop steward, Dolly Ramos, was permitted to attend union meetings without having to obtain her supervisor's permission. As further proof of discriminatory application of the policy, the Union alleges that a Local 1549 member's mere request for a particular shop steward qualified as a "special circumstance" unless one of the Petitioners were requested.

The Respondents maintain that policy was applied in an evenhanded manner "across the board" and that the Petitioners have failed to prove that implementation of the release time policy interfered with, restrained or coerced public employees in the exercise of their rights granted in §12-305 of the NYCCBL. In any event, HHC contends, it has demonstrated that the action of enforcing the release time policy, in conjunction with arranging for the full time equivalent scheduled release of two Local 1549 representatives was reasonable, consistent with Executive Order 75, and a legitimate exercise of its management rights under the NYCCBL. As an affirmative defense, HHC argues that union members do not have the right to representation by a shop steward of their

[20] Decision No. B-17-89, at 13. See also, Decision Nos. B-1-94; B-2-93; B-67-90; B-50-90; B-24-90; B-8-89.

own choosing. HHC further asserts that adequate representation was provided to all Local 1549 members who had requested union assistance.

The record establishes that soon after the incident on September 12, 1989, the Respondents took steps to enforce a policy set forth in Bellevue's Personnel Procedure Manual that requires ad hoc shop stewards to obtain their supervisor's written permission before being released for union business. Prior to that, enforcement of this policy, which had been most recently revised in 1987, had become lax, resulting in situations where two or more ad hoc stewards might participate in the adjustment of an ongoing dispute. This would occur regardless of the fact that there were two Local 1549 shop stewards, each on half-time release, designated by the Union for the conduct of all Local 1549 union business.

The evidence of record arguably supports a conclusion that the September 12th incident could have been the catalyst for Mr. Quarless' decision to enforce the release time policy for ad hoc stewards at Bellevue. Circumstances that would support such a conclusion include: the fact that Quarless was newly appointed as Bellevue's Director of Labor Relations coupled with his receipt of complaints from some department heads about ad hoc stewards leaving their posts without permission; an occasion when two ad hoc shop stewards spent the better part of their work day attending to union business; and, no doubt, the verbal exchange between Messrs. Cotov and Quarless during their first encounter.

However, rather than support a claim of improper practice, the events which may have provided the impetus for Mr. Quarless' decision to enforce the policy actually support the employer's position that it had a legitimate business reason to act. We take very seriously HHC's argument that enforcement of this policy became necessary after certain shop stewards abused their privileges by leaving their assigned areas without permission. The lack of communication and resultant adverse impact on staffing is of great concern since, first and foremost, Bellevue is obligated to meet the needs of its patients. As a result, the Board is satisfied with the Respondents' explanation that the policy was enforced to

restore order and increase the overall efficiency of the Hospital.

As for the alleged disparate application of the ad hoc release time policy to the named Petitioners, the record is devoid of evidence indicating that the Union objected to enforcement of the policy even though it was clearly foreseeable that the number of unscheduled ad hoc shop stewards' release times would decrease significantly after the policy was enforced. On the contrary, the Union was consulted and participated in arranging the schedules for the regularly scheduled shop stewards on half-time release (Ms. Franklin and Mr. Palladino),[21] as well as in the development of the guidelines setting forth the "limited" circumstances under which ad hoc shop stewards would be released.

Thus, an allegation that a majority of Petitioner Cotov's and approximately 50% of Petitioner Espendez' release time requests were being denied after the policy was enforced does not, alone, support a finding that the Respondents enforced this policy in retaliation for their union activity or for purposes of discouraging their future participation in such activities. In this regard, we note that the Union failed to offer any evidence to demonstrate that other ad hoc shop stewards were not experiencing the same denial rates. In addition, we note Mr. Quarless' unrefuted testimony that Bellevue's Labor Relations Department was being "bombarded" with requests for the release of Cotov and Espendez, while only an occasional request would come in for other ad hoc shop stewards.

As for the Union's allegation that the Petitioners were not released even when specifically requested by a Local 1549 member, we note that Bellevue's policy provides that "[t]he request of an employee for a shop steward other than those on scheduled ad hoc release, absent [a] showing [of a "special circumstance"] is not reason for release of another steward on an ad hoc basis." There is no dispute that examples of a "special circumstance" would be when a scheduled shop steward is not available or when an ad hoc shop steward has a

[21] In this connection, we note that the Union could have designated Mr. Cotov and/or Ms. Espendez as replacements for shop stewards Franklin and Palladino, which it declined to do.

"historical involvement" with a particular member.

The weight of the evidence simply does not support the Union's claim that the Petitioners were "never" released, even when "special circumstances" existed. There is one documented instance where Ms. Espendez was denied release time after a special circumstance was alleged. Against this single instance are all the other occasions where the request for release time was granted to Petitioners Cotov and Espendez. Although it is not clear from the record, under the newly enforced policy theoretically all of those occasions must have been special circumstances. In fact, the record does show that in one of the instances where release time was approved for Mr. Cotov, the request was accompanied by a note alleging a special circumstance. Because we find that this allegation is unsubstantiated, we need not examine HHC's affirmative defense that employees are not entitled to representation by the shop steward of their choice.

We next reject the Union's allegation that the employer's decision to make Mr. Cotov's requests for release time subject to the approval of Ms. Calvanico, who was not his immediate supervisor, a basis for a finding of an employer improper practice. The phrase "immediate supervisor" does not appear in the release time policy while the phrase "supervisor/administrator" does.[22] In any event, we note that in some cases, Mr. Cotov's immediate supervisor, Ruth Smith, and another supervisor by the name of Alicia Howard, signed off on requests that post-dated both the Hospital's enforcement of its newly revised release time policy for Local 1549 ad hoc shop stewards and the labor-management meeting where Petitioner Cotov made remarks as co-chairperson of the anti-discrimination committee. Therefore, the evidence does not support Mr. Cotov's claim that he was required to receive a higher level of approval in retaliation for his union activity.

For similar reasons we also reject Mr. Cotov's allegation that Ms. Calvanico systematically harassed him on account of his union activity, by

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[22] See note 12, supra, at 10-11.

constantly questioning him regarding his whereabouts. In support of this claim, Petitioner Cotov testified that Ms. Calvanico explicitly told him that she was harassing him by "order of management." With respect to this allegation, we find that the record does not contain credible evidence to substantiate such a claim.

With respect to the alleged comment made by Mr. Quarless at the conclusion of the meeting on September 12, 1989, regardless of the exact words, the record supports a conclusion that Mr. Quarless made a remark which arguably could constitute a physical threat toward Petitioner Cotov. According to the Union, the comment also constituted a violation of Section 12-306a(3) of the NYCCBL because it was intended to discourage Mr. Cotov from participating in future union activities. According to HHC, the remark was inconsistent with all accounts of the events which had transpired, in that the meeting ended with a satisfactory resolution for all concerned. HHC maintains, however, that even assuming, arguendo, that the remark was made, a comment made in the privacy of Mr. Quarless' office does not interfere with, restrain or coerce public employees in the exercise of their rights granted in §12-305 of the NYCCBL and does not discriminate against any employee for the purpose of encouraging or discouraging membership in or participation in the activities of any public employee organization.

Although we find that no employer improper practice has been committed with respect to Mr. Quarless' remark, we do not agree with the Respondents that such a remark could not be violative of the NYCCBL simply because it was made in the privacy of an office. Rather, it is the particular circumstances of this case that dissuade us from drawing an inference of improper motivation from the remark.

In Decision No. B-8-91, we held that a New York City Police Lieutenant did not commit an improper labor practice by initiating a heated dispute with a

Police Officer/PBA Delegate during the conduct of a PBA election.[23] Although stating that the Lieutenant's "outburst does not evidence an enlightened approach to labor relations," we found that the outburst, by itself, was insufficient evidence from which an inference of improper motivation might be drawn. In light of all the circumstances in that case, we held that the Lieutenant's behavior was, "at worst, not in accord with harmonious labor relations and, at best, an understandable response to provocation."[24]

Likewise, based on our review of the entire record in the instant matter, we find the record to support a conclusion that Mr. Quarless' statement was the result of frustration and personal animosity that had developed between Mr. Cotov and Mr. Quarless over the course of their hour-long meeting. It is not clear who the disruptive party was; however, without ascribing blame, it is sufficient to state that it is clear from the testimony that the encounter was antagonistic. We also note that Petitioner Cotov has a history of disruptive behavior. Thus, while neither version of the alleged remark evidences an "enlightened approach to labor relations," under the totality of the circumstances we decline to infer anti-union animus on the basis of this incident. In this case, we find that the

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[23] Decision No. B-8-91. In this case, Lieutenant Mannion asked Police Officer Genet, who was conducting a PBA Delegate election, to appear in his office after he was finished. When Officer Genet questioned if this was an order, Lt. Mannion responded " ... I am telling you." A boisterous argument soon followed which delayed tabulation of the election's results.

[24] See also, Johnstown City School District, 15 PERB ¶3089 (1982). PERB described a school's principal's threatening remarks as "an understandable response to provocation", and thus, held that they did not constitute an improper practice.

In contrast, in Decision No. B-50-90, we held that a manager's anger, which manifested itself through a course of retaliatory conduct, was intended to intimidate or punish the petitioner for performing a legitimate responsibility as shop steward. In that case, we considered, inter alia, whether only personal animus was involved and found that the record did not support such a conclusion.

determinant factor is the Respondent's motivation for making the remark, not the comment itself.[25] This is to be contrasted, however, with circumstances where action taken by an employer is found to be "inherently destructive of employee rights," so that the conduct itself "bears its own indicia of intent." In such cases, we will require the employer to demonstrate legitimate or permissible motives for the complained of act, even in the absence of proof of improper intent.[26]

Finally, the Union argues on behalf of Petitioner Espendez that the inclusion of the phrase "She [Ms. Espendez] must properly execute the union release time policy as needed" in the Plans for Improvement section of her 1990 Employee Evaluation Form is an anti-union derogatory comment and constitutes proof that the Respondents were disparately enforcing the release time policy towards her. In this connection, the Union alleges that HHC strictly enforced the policy against Ms. Espendez while another steward, Dolly Ramos, was granted release time without having to obtain her supervisor's written permission. HHC contends that the comment simply referenced the release time policy in effect during the time period covered by the evaluation, and at worst, could be construed as a form of "constructive criticism".

In Decision No. B-8-89, we held that the inclusion of the following statement in the performance evaluation of an active union shop steward constituted an improper practice:

> Ms. Lindsay's frequent absences [due to her union activity] is a hardship on her clients and her co-workers and impacts on the function of the group.

Because "the purpose of performance evaluations is to provide guidance, i.e., to inform employees of what is expected of them and whether their performance is satisfactory," we found that a supervisor's observation as to the frequency of the petitioner's excused absences "in this context and in this manner as

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[25] See also, Decision No. B-8-89.

[26] See e.g., Decision No. B-26-93.

tantamount to an admonition."[27] In other words, Ms. Lindsay was being punished for performing duties as a shop steward even though her absences, albeit frequent, were sanctioned by the employer.[28]

In the instant matter, however, we find that the employer's unrefuted observation as to Ms. Espendez' need to "properly execute the release time policy" was not an unwarranted admonition. Rather than attempt to rebut the truth of the complained of comment, the Union claimed that the remark constituted evidence that the release time policy for ad hoc stewards was disparately enforced. In support of this allegation, the Union offered Ms. Espendez' uncorroborated testimony concerning one other ad hoc shop steward.

We find that the Union's claim is not advanced by this unsubstantiated testimony. Moreover, the Union's argument that Ms. Espendez should not be criticized for failing to get her supervisor's written permission since other shop stewards were not required to do so clearly supports a conclusion that Ms. Espendez was not adhering to the policy. Accordingly, we do not find that the Union has sufficiently shown that the underlying motive for the comment was to discourage Ms. Espendez from further participation in protected conduct. Rather, we find the comment an attempt by the employer to gain Ms. Espendez' compliance with the release time policy for ad hoc stewards, which theretofore had been lacking. Thus, even though the Union arguably met its burden to show that the employee's union activity was a motivating factor in the employer's decision to include the comment in Ms. Espendez's 1989-1990 Employee Performance Evaluation, the Respondents overcame that showing by establishing to our satisfaction that the employer's decision to act was motivated by a legitimate business reason.[29] Accordingly, we find that an employer improper practice has not been committed.

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[27] Decision No. B-8-89, at 13-14.

[28] In that case, we found significant the employer's testimony that Ms. Lindsay did not have a time and leave problem.

[29] See Decision B-17-89.

In summary, we find that the Union has not met its burden to prove that the Respondents violated §12-306a(1) and (3) of the NYCCBL by disparate enforcement of its ad hoc shop steward release time policy or by discriminating against Petitioners Cotov and Espendez on account of their union activity. Accordingly, we direct that both improper practice petitions be dismissed in their entirety.

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 docketed as BCB-1317-90, submitted by Petitioner Mario Cotov be, and the same hereby is, dismissed; and it is further

ORDERED, that the improper practice petition docketed as BCB-1333-90, submitted by Local 1549, District Council 37, AFSCME, AFL-CIO and Rosa Espendez be, and the same hereby is, dismissed.

Dated: New York, N.Y.
September 27, 1994

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

THOMAS J. GIBLIN
MEMBER

ANTHONY P. COLES
MEMBER

DENNISON YOUNG, JR.
MEMBER