L. 237 CSBA v. City & Comm. on Human Rights, 73 OCB 17 (BCB 2004) [Decision No. B-17-04 (IP)]

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

-between-

CIVIL SERVICE BAR ASSOCIATION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

CITY OF NEW YORK and NEW YORK CITY
COMMISSION ON HUMAN RIGHTS,

Respondents.
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Decision No. B-17-2004
Docket No. BCB-2339-03

DECISION AND ORDER

______On May 1, 2003, the City Employees Union, Local 237, International Brotherhood of Teamsters, AFL-CIO, and its affiliate, Civil Service Bar Association ("CSBA" or "Union"), filed a verified improper practice petition against the City of New York and the New York City Commission on Human Rights ("City" or "CHR"). Petitioner alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3), CHR retaliated against Joan Simon Faulkner for protected union activity by issuing a negative March 2003 performance evaluation and two June 2003 memoranda which were copied to her personnel file.[1] The City argues that these claims must be

[1] The Board will address Petitioner's claims regarding the two June 2003 memoranda, raised in Petitioner's Reply following the May 1, 2003, filing. The City was given the opportunity to file a Sur-Reply and testimony was received regarding these claims at a hearing at the Office of
(continued...)

dismissed because the facts fail to establish a violation of NYCCBL § 12-306(a)(1) or (3). After a hearing, this Board finds that the Union failed to show a causal connection between Faulkner's protected activity and CHR's issuance of the March 2003 performance evaluation and the two June 2003 memoranda.[2] Accordingly, the petition is dismissed.

BACKGROUND

In September 1989, Faulkner was hired by CHR as a Supervising Attorney in the Law Enforcement Bureau ("LEB"). Faulkner supervises Staff Attorneys and Human Rights Specialists ("Investigators") as part of a team. After 1994, Faulkner became increasingly critical of CHR's management decisions. In 1997, Faulkner filed a federal action against CHR, alleging gender and age discrimination, which was settled in 1999.

In early 2002, a change in CHR administration occurred. Patricia L. Gatling was appointed Commissioner, Randolph Wills became General Counsel, and Avery Mehlman and Clifford Mulqueen became Deputy Commissioners at LEB. Jennifer Siegel McNamara was the LEB Managing Attorney and directly supervised Faulkner and other Supervising Attorneys.

Under the new administration, CHR sought to reduce a backlog of approximately 5,000 cases. Some Staff Attorneys were responsible for approximately 300 cases which, according to

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[1](...continued)
Collective Bargaining. The parties agreed that all incidents occurring prior to January 1, 2003, are beyond the statute of limitations period and are considered as background information only.

[2] Faulkner, Gloria Johnson, Rockwell Chin, Judith Quinonez and Clifford Mulqueen testified at the hearing. Numbers in parentheses refer to the hearing transcript, hereinafter abbreviated as "Tr." Petitioner's exhibits and Respondent's exhibits will be referred to as "Pet. Ex." or "Res. Ex." respectively.

Mulqueen, was "unmanageable." Mulqueen and Mehlman began to hold "case reviews" with LEB attorneys and Investigators to review pending cases and direct their progress. Mulqueen stated that Supervising Attorneys were welcome to participate but were not asked or required to attend. Faulkner stated that this led to conflicting instructions being given by management and Supervising Attorneys, encouraging Investigators and Staff Attorneys to interact directly with management.

Between February 2002 and May 2002, Faulkner was asked by CHR management to conduct training duties on four occasions while Wills adjusted to his new position as General Counsel. Before 2002, Faulkner intermittently conducted such training. Wills, who had conducted the training since 1990, resumed these duties on May 7, 2002.

During 2002, CHR's new management instituted changes and sought to enforce agency policies. In February, 2002, Wills sent an agency-wide memo outlining CHR's flextime policy. In March 2002, CHR conducted performance evaluations for all attorneys which, according to the City, aided in improving the evaluation procedure and formulating new tasks and standards. These evaluations subsequently were nullified agency-wide on September 10, 2002, at which time Wills distributed CHR's new Master List of Tasks and Standards.[3] In April 2002, LEB attorneys

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[3] CHR's Master List of Tasks and Standards for Associate Attorneys, including Supervising Attorneys states, in relevant part:

Task I — Supervises investigators from commencement of investigatory process through and including completion of investigation and issuance of determination of probable cause or no probable cause.

Standards

* * *

4. Ensures that all documents prepared by investigators are properly drafted.
5. Supervises and reviews draft conciliation agreements for compliance with Bureau policy.

(continued...)

were required for the first time to maintain and submit for review "attorney logs" of their work. Also in April 2002, the Commissioner sent an e-mail to all LEB staff stating that all outgoing correspondence should be submitted to McNamara for review. On August 6, 2002, Wills issued a memo to all CHR staff stating that taking a late lunch is not permitted. CHR employees are not permitted to skip lunch in order to justify arriving late or leaving early (late lunch). (Pet. Ex. 13.)

Faulkner's March 2002, performance evaluation rated her overall as "very good," but "conditional" with regard to her supervision of Investigators. Faulkner appealed the evaluation and filed a grievance on September 6, 2002, after CHR failed to respond to her appeal.

In May 2002, in response to the new requirement for all attorneys to keep "attorney logs,"

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[3](...continued)

* * *

Task II — Supervises staff attorneys in the litigation of their cases from a threshold determination of probable cause through and including referral to the Hearings Division.

Standards

* * *

3. Supervises any mediation and/or settlement negotiations undertaken by staff attorneys; reviews draft conciliation agreements.

* * *

Task VIII — Complies with Bureau policy and procedures,including those relating to recordkeeping and to filing, and assists in the implementation of those polices and procedures of the Bureau by staff attorneys, investigators and support staff.

Standards:

1. Adheres to Bureau policies and procedures at all times.
2. Promptly seeks managerial assistance if Bureau policy or procedure is not understood or if application of Bureau policy or procedure would not be appropriate.

* * *

Task IX — Supervises staff attorneys and investigators in projects that are not case-specific.

Standards:

1. Identifies and develops legal issues.
2. Promptly and effectively directs such research as is necessary.
3. Reviews and approves all written material.
4. Ensures timely completion of project.

Faulkner requested and scheduled a labor-management meeting because she considered the new requirement a breach of the collective bargaining agreement. Faulkner testified that for some period of time between April 2002-October 2002, she did not submit attorney logs.

After Wills sent the August 6, 2002, memo prohibiting all CHR staff from taking a late lunch, Faulkner admitted that she was still "in the less restrictive mode of taking lunch." (Tr. 195.) According to Faulkner, the memo contradicted CHR's practice of ten years to have a flexible lunch hour. On September 5, 2002, McNamara sent Faulkner a memo regarding her timesheet for the week of August 25-31, 2002, stating that on five occasions, she left early, took no lunch, and arrived at CHR beyond her designated flex start time. McNamara reminded Faulkner that taking late lunches violates agency policy. On September 6, 2002, McNamara designated three and one-half hours of Faulkner's time for that week as AWOL. Faulkner replied that McNamara's memo was inaccurate and retaliatory in nature. McNamara responded with an outline of CHR's policy on office hours, flextime, and unauthorized late lunch. On October 3, 2002, Faulkner filed a grievance regarding McNamara's September 6, 2002, AWOL memo. On October 8, 2002, Wills denied the grievance in part and sustained it in part. Wills modified McNamara's AWOL designation to only two occasions when she came into work late and/or left early, a total time of one and one-half hours. Wills did not designate Faulkner AWOL for other occasions when she did not take lunch but found that she had violated agency policy. On November 4, 2002, Wills denied Faulkner's Step II appeal. On November 12, 2002, the Union advanced the grievance to Step III. The record does not indicate whether a hearing has been scheduled for Step III.

Quinonez, a Supervising Attorney, testified that after she received Wills's late lunch

memo, she did not take late lunches, except one time which was approved by McNamara who told her that she could not do so again. On one occasion, Quinonez asked Mehlman if she could leave early and take a late lunch but was refused on the ground that if he allowed her to do so, he would have to let everyone else take late lunches.

Former Supervising Attorney Chin and Quinonez, testified that they and other Supervising Attorneys were concerned by the direction the new management was taking. By letter dated July 3, 2002, Supervising Attorneys Faulkner, Davis, Quinonez, Chin, and Slovak-Stern requested that the Commissioner meet with them to address their diminished role and alleged marginalization in the performance of CHR's mission. The Commissioner did not meet with the Supervising Attorneys personally. Instead, Mehlman, Mulqueen and Wills, met with the Supervising Attorneys a few days later and told them that their letter was considered "adversarial" and that they were impeding CHR's productivity. On July 5, 2002, *The Chief* newspaper published a letter that Faulkner wrote in support of a step plan for CSBA attorney salaries. The letter was signed by Faulkner as well as Supervising Attorneys Chin, Davis, Slovak-Stern, and Karlin.

During 2002, CHR management and Faulkner disputed two incidents regarding Faulkner's supervision of her team. First, on March 11, 2002, McNamara sent Faulkner an e-mail stating that Faulkner had assigned a case to a Staff Attorney even though she had been instructed not to do so, an instruction that Faulkner contended she never received. Later that day, after discussing the situation, McNamara approved the case assignment.

Second, on July 5, 2002, an Investigator, Heribierto Mateo, was transferred from Faulkner's team because CHR found Faulkner's supervision of Mateo inadequate, a conclusion Faulkner disputed. Mateo was initially assigned to Faulkner on June 5, 2002. At the time,

Faulkner supervised two staff attorneys, Michael Silver and William Hair, and three Investigators, Leslie Williamson, Petros Solomon, and Alonso Myers. From June 10 to 14, 2002, Faulkner was on annual leave. On June 28, 2002, Faulkner learned that McNamara would be transferring Mateo to Chin since he had fewer Investigators. Faulkner claims that McNamara did not mention any deficiency in her supervision nor any issue with Mateo's performance. On July 3, 2002, McNamara notified Faulkner by e-mail that Mateo would be reassigned immediately and that the basis for the transfer was Mateo's lack of productivity, persistent personal calls, and poor performance, which demonstrated that he was not being adequately supervised.

According to Gloria Johnson, President of CSBA, Faulkner has been known by employees and management as the "point person with any advice" for the members of her shop, and would often request and schedule labor-management meetings. Faulkner has been a member of the Union since 1989 and she participated in union activity throughout 2002. Faulkner was released by CHR to attend bargaining sessions on: March 6 and 13; April 1, 2, 11, and 12; May 13; and June 17. In May 2002, Faulkner was elected to serve on the Union's executive board. In addition to filing two grievances, Faulkner attended labor-management meetings on May 7 and September 10, 2002.

The March 2003 Performance Evaluation

On March 4, 2003, Faulkner received a performance evaluation for the period February 18-October 18, 2002, which refers to CHR's Tasks & Standards. McNamara's overall rating of Faulkner was "unsatisfactory." McNamara noted that "Joan's inability to fulfill her duties required a transfer of one of her team members to another team." (Pet. Ex. 18.)

The performance evaluation also stated that Faulkner did not adequately supervise her

attorneys or know the facts of certain cases. Mulqueen testified that Faulkner was not criticized for not knowing the facts of all her cases and the cases of her subordinates, but was criticized for a limited number of cases that were pending trial. In particular, the evaluation cited two cases as evidence of Faulkner's poor work performance: *Cruz v. Lucchese* and *Walton v. Smith*. Addressing *Cruz*, the evaluation stated that on August 1, 2002, Mehlman and Mulqueen found that a key fact had not been included in the complaint – that Cruz, a disabled cleaner who had requested as an accommodation not to climb ladders, fell after the school custodian allegedly made Cruz climb a ladder to change a light bulb. According to Mulqueen, such an allegation of fact, if true, would be a clear violation of the human rights law. By the time Mulqueen and Mehlman discovered the omission, the statute of limitations had expired, and the case was presented to a judge at the Office of Administrative Trials and Hearings ("OATH") without an amendment to the complaint. OATH found the case to be without merit and CHR subsequently issued a "no probable cause" determination. According to Faulkner, she did not get involved in the case, which had been pending for years, until spring of 2002, at which time the "case was a mess." CHR had issued a probable cause determination in 1998, before her involvement. Although, the complaint could have been amended under CHR, state, and federal law, Faulkner did not research this during the time of her involvement because the atmosphere was "one of high anxiety." Instead, management ordered the attorney who was assigned to the case under her supervision to issue a "no probable cause" determination.

Addressing *Walton*, the evaluation stated that the file contained documents that shed doubt on the complainant's alleged bias/harassment claim and that the case had not been fully investigated. Pending a proceeding at OATH, CHR withdrew the case, and a more thorough

investigation was conducted, after which the case was found to be without merit. The evaluation concluded: "Ms. Faulkner erred by allowing this case to move forward to trial prior to an appropriate investigation. The commencement of a trial under the facts of this case could have put the agency in a very embarrassing and perhaps unethical position." (Pet. Ex. 18.) Faulkner testified that Mehlman and/or Mulqueen referred the case to OATH on April 8, 2002. Moreover, according to Faulkner, the "documents" that shed doubt on the case include only one letter dated May 20, 2002, from the New York City Police Department stating that the complainant was "less than truthful in his complaints." This document could not have been in the file before the case was referred to OATH because it was received after April 8, 2002.

The performance evaluation also stated that Faulkner consistently flouted Bureau policy and procedure (citing the August 25-31, 2002, late lunch incidents), had not adhered to a memo requiring that all outgoing correspondence be reviewed by McNamara, and had repeatedly failed to submit her attorney logs. According to Faulkner, McNamara never questioned her about outgoing correspondence and told her – after the Commissioner's memo was issued – that she did not have to submit her correspondence for review. Finally, the performance evaluation also criticized Faulkner and her team for the team's low case closure rate. Mulqueen testified that the case closure rates were based on a report generated by a case tracking system, which distinguishes between administrative and non-administrative closures, whether cases were closed after trial, and whether they were affirmed on appeal.

On March 27, 2003, Faulkner attended a conference with McNamara as part of the appeal procedures for performance evaluations. On April 29, 2003, Faulkner submitted a 29 page appeal, beginning with the following quotation:

> He who replies to words of Doubt
> Doth put the Light of Knowledge out.
> The strongest poison ever known
> Came from Caesar's Laurel Crown.
>
> *William Blake on the poison of power.*

In her appeal, Faulkner claimed: "I was judged on unwritten, unspoken standards: my age, active union involvement, opinions, substantive memos, questions, and stated doubts on policy, procedure and decisions by the current administration." (Pet. Ex. 22.) Faulkner also stated:

> This administration brooks no disagreement, period. Disagreement results in punitive action such as the evaluation challenged here. I believe that the two cases, upon which my rating is based, supports [sic] my proposition that *it is the fact of my disagreement and differing opinion in and of itself that was and is objectionable to the evaluators and formed the basis for the unsatisfactory rating in this category.*

(Pet. Ex. 22, emphasis in original.)

On May 1, 2003, the Union filed the instant petition. Mulqueen denied Faulkner's appeal of her March 2003 performance evaluation on May 6, 2003. In response, Faulkner delivered to Wills a 24 page memo with a 60 page appendix, arguing that the evaluation was baseless. In her memo, Faulkner criticized Mulqueen's characterization of the agency's backlog. She stated:

> Mr. Mulqueen opens his memorandum by addressing a generalized statement to Randolph Wills as though he was introducing the matter of the backlog to Mr. Wills for the first time. As Randolph Wills was responsible for the backlog in his [former] capacity as Deputy Commissioner of the Law Enforcement Bureau, this fact clearly needs no introduction. This administration chose to retain Mr. Wills as General Counsel. Thus, the evaluators have attempted to distance him from the backlog and poor administration of the Giuliani years, by placing the blame of unassigned cases (a managerial policy decision in the 1990's) on lackadaisical prosecution on the supervisors, or more to the point, specifically on the two supervisors whom this administration would like to get rid of . . . . In fact, it is well known by attorneys and investigators who worked in LEB in the 1990's, that case files languished in managerial offices for years . . . . If the substance of my work were as problematic as the evaluators are now alleging, why was it not brought to my attention during the 13 months of the administration prior to the issuance of the evaluation. . . . . I was judged for my status as an older woman and long-time civil servant and civil rights and union activist; judged solely on my words, actions, beliefs, status,

and in retaliation for prior complaints of disparate treatment. (Pet. Ex. 24.)

On July 17, 2003, after Wills determined that the March 2003 evaluation was reasonable, Faulkner appealed Wills' determination to the Commissioner. On July 22, 2003, the Commissioner determined that the evaluation was fair and reasonable.

Supervising Attorney Quinonez received a performance evaluation in March 2003 rating her "Conditional," a rating with which she did not agree and which she appealed. She testified that the reason for management's rating was because she was outspoken, because she had challenged policies and new practices, and because of her ethnicity.

The June 6 and 19, 2003 Memoranda

On April 10, 2003, the Commissioner issued an agency-wide memo stating that she should be informed of case settlements accompanied by a brief memo. On June 4, 2003, Myers, an Investigator under Faulkner's supervision, prepared a memo for the Commissioner on a settlement in *Peterkin v. Sentry Security Co.* On that day, Mehlman advised Faulkner that Myer's memo was inadequate because it lacked salient facts. Subsequently, Faulkner e-mailed Myers and told him to revise his memo by June 5, 2003. The e-mail included a statement that the Commissioner's memo was "poorly worded" and did not properly convey the policy's requirements. The next day, Myers submitted a revised memo. Later that day, Mulqueen criticized another document Myers prepared and submitted to McNamara – the Conciliation Agreement for the *Peterkin* case – because it contained typographical errors. Faulkner testified that she did not review the document because it had not been submitted to her. McNamara approved the Conciliation Agreement despite the errors.

On June 6, 2003, Mulqueen sent a memo to Faulkner, copied to her personnel file, which

stated that during their conversation on June 5, 2003, Faulkner had told Mulqueen that she was unaware of the agency policy whereby all internal correspondence by her subordinates should be reviewed by her and that as to outgoing correspondence, Faulkner had stated that McNamara told her that she need not submit such correspondence for review. With regard to the latter claim, Mulqueen wrote:

> I have attached the memo dated 4/12/02 outlining the policy and procedures. Your claim of ignorance regarding the policy is somewhat incredulous since both your most recent evaluation and your appeal of that evaluation discuss the issue. Even if you were under the impression that you were exempt prior to receiving your evaluation, surely the evaluation made it clear that you were not.

In the same memo, Mulqueen criticized Faulkner because the Conciliation Agreement Myers submitted contained "misspellings and other errors" and stated that Faulkner's description of the Commissioner's memo as "poorly worded" was divisive and disruptive of the functioning of the agency. (Pet. Ex. 30.) On June 19, 2003, Faulkner wrote a memo in response to Mulqueen, contending that the memo contained discrepancies and requested that it be taken out of her personnel file. Faulkner claims that she did not deny knowledge of any policy regarding review of internal correspondence because there was in fact "no such policy." (Tr. 217-218.) She also challenged Mulqueen's characterization of the discussion referring to the *Peterkin* settlement, claiming that she told him that the document was not submitted to her and that she did not give the settlement to McNamara because it was not her case.

On June 19, 2003, McNamara, by memo, noted Myers's "sloppy" preparation of a letter to a charging party in the *Tammaro v. Fried, Frank* file, which had been approved for closure by Faulkner and which had been submitted to McNamara for approval. McNamara stated that the document in question should have been submitted to McNamara prior to being mailed. This

memo was copied to Wills, Mulqueen, Mehlman, and to Faulkner's personnel file. On July 3, 2003, Faulkner replied that she had instructed all Investigators to submit all outgoing correspondence to her and then to McNamara. Faulkner also requested that McNamara's memo be removed from her personnel file. According to Faulkner, Mehlman thereafter called her into his office to discuss the *Tammaro* document and told her that if she had not seen it, she should not be held accountable. At the hearing, Faulkner testified that she had never seen the document and that McNamara, in her review of closed cases, happened to find this document by Myers.

As a remedy, the Union requests the Board to order the City to cease and desist from retaliating against Faulkner, make Faulkner whole by including a direction to amend the March 2003 retaliatory performance evaluation; remove the June 6 and June 19, 2003, memoranda from Faulkner's personnel file; and direct the City to post a notice.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that CHR has violated NYCCBL § 12-306(a)(1) and (3) because it has interfered with Faulkner's rights and discriminated against her for protected union activity.[4] The

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[4] NYCCBL § 12-306(a) provides in relevant part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

* * *

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

NYCCBL § 12-305 states in part:
Public employees shall have the right to self-organization, to form join or assist public
(continued...)

March 2003 performance evaluation and the June 2003 memoranda represent CHR management's "desire to rid itself of the CHR attorneys' most outspoken union activist."

The Union argues CHR's retaliation is evidenced by a prior pattern and practice of conduct such as: (1) accusing Faulkner of disobeying an instruction on March 11, 2002, on the same day that she participated in collective bargaining; (2) revoking her training duties after she complained about attorney logs during a labor-management meeting; (3) issuing an inflammatory memo on July 3, 2002, after Faulkner requested a meeting between the supervising attorneys and the Commissioner, a request CHR deemed "adversarial"; (4) and declaring Faulkner AWOL during the week of August 25-31, 2002, on the same day that she filed a grievance regarding her March 2002 performance evaluation.

Undoubtedly, McNamara, Mulqueen, and Mehlman knew of Faulkner's union activities throughout the evaluation period. According to the Union, the March 2003 evaluation contains flaws undermining any claim that it was issued for valid reasons. First, CHR's characterization of Faulkner's supervision of Mateo, whom she supervised for only eleven days, is unfounded. The evaluation's statement that Mateo was transferred because of deficiencies in Faulkner's supervision is undermined by the fact that no one spoke to Faulkner about any problems with her supervision during the evaluation period. Second, regarding the *Cruz* case, the complaint was amended and a probable cause determination granted before Faulkner's team was assigned. When Hair was assigned the case, Faulkner discovered that the additional fact had been omitted but Mehlman or Mulqueen would not allow her to correct the omission. As to the *Walton* case,

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[4](...continued)

employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

Faulkner did not give an order to refer the case to OATH, and the document management referred to could not have been in the file at the time the case was referred to OATH. CHR's citation to these two cases out of nearly 400 under Faulkner's supervision is particularly dubious given CHR's admission that Faulkner could not be "current with 300 cases." (Tr. 471.) Finally, as to CHR's accusation that Faulkner flouted bureau policy and procedure because of the August 25-31, 2002, late lunch incidents, a single violation of a new policy counter to years of past practice cannot be characterized as "consistently flouting." Additionally, McNamara told Faulkner that she did not have to submit her correspondence for review and the false comparison between Faulkner's case closures with other CHR attorneys fails to account for the complexity of Faulkner's cases or the number of cases litigated.

Moreover, the evaluation (1) deviated in format from DCAS rules; (2) did not address Faulkner's positive contributions; (3) did not mention Faulkner's participation in training; and (4) did not address all applicable tasks and standards.

Since McNamara, Faulkner's direct supervisor, did not testify during the OCB hearing, the Board should draw an inference unfavorable to CHR's position.

According to the Union, in retaliation for filing the instant petition, CHR issued two June 2003 memoranda. Mulqueen's retaliatory June 6, 2003, memo, only weeks after CSBA initiated this proceeding, was factually inaccurate. Moreover, no supervisor discussed the substance of McNamara's retaliatory June 19, 2003 memo, also copied to Faulkner's file. Faulkner did not review the document and even Mehlman acknowledged that she should not be held accountable for it.

City's Position

A negative inference should not be made because McNamara could not testify at the hearing. McNamara is no longer a CHR employee and could not be present because of litigation commitments in private practice. Mulqueen testified that he agreed with McNamara's March 2003 performance evaluation and had direct knowledge of the specific cases mentioned. Mulqueen issued the June 6, 2003, memo and was aware of McNamara's June 19, 2003, memo with which he was in complete agreement.

The City asserts that the Union failed to allege facts sufficient to find that the City violated NYCCBL § 12-306(a)(1) and (3). The Union has also failed to set forth any facts demonstrating that CHR interfered with, restrained or coerced Faulkner with regard to the rights afforded under NYCCBL § 12-305.

The decisions to relieve Faulkner from training duties, to transfer an employee from Faulkner's supervision, and to designate Petitioner as AWOL, were reasonable and a proper exercise of management prerogative under NYCCBL § 12-307(b). CHR temporarily assigned training duties to Faulkner and after Wills had settled into his new role, another attorney did not have to conduct the training. CHR had legitimate business reasons to transfer Mateo to Chin because Chin was supervising fewer Investigators and Faulkner was not adequately supervising Mateo. The Union has failed to establish a connection between a request to meet with Commissioner Gatling and Mateo's transfer. Furthermore, CHR designated Faulkner AWOL in August 2002 because she failed to follow agency guidelines.

Faulkner's unsatisfactory rating in her March 2003 evaluation was due to a combination of factors. First, she failed adequately to supervise Mateo and other attorneys. Second, Faulkner refused to communicate on a professional level with McNamara and resorted to e-mail. Third,

Faulkner failed to follow CHR guidelines regarding time and leave. Fourth, she failed to handle cases responsibly. A material fact was omitted from the complaint in *Cruz* and Faulkner failed to investigate adequately the *Walton* case. Therefore, management had legitimate business reasons for the unsatisfactory performance rating. As to case closure rates, Wills and McNamara made an in-depth analysis of all attorney closure rates and considered several factors, including complexity and cases actually litigated, based on reports generated by a case tracking system. Even if CHR looked at closure rates alone, such an action would not constitute an improper practice. Thus, the Union has failed to make out a *prima facie* case that the March 2003 evaluation was retaliatory. Alternatively, the City argues that the Petition must be dismissed because the Board lacks jurisdiction over alleged contract violations. Whether CHR properly made the AWOL designation is an issue that is currently proceeding through the grievance procedure.

Finally, all of the claims alleged to have taken place subsequent to the filing of the Petition must be dismissed because the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) do not permit the Union to allege new facts that occurred after the date the Petition was filed. Even if the Board addresses these claims, Mulqueen's memo on June 6, 2003 was not retaliatory. The memo confirmed the conversation it addressed, reiterated that Myers's work was inadequate, and counseled Faulkner that she should review her supervisees' work prior to distribution outside the agency or to the Commissioner. McNamara's June 19, 2003, memo indicated that Myers's submitted documents were "sloppy" because they contained errors that were easily correctable.

DISCUSSION

The issue in this case is whether CHR harassed or retaliated against Faulkner because of protected union activity when CHR issued: (1) a negative performance evaluation in March 2003, covering the period February 18, 2002, through October 18, 2002; and (2) two memoranda on June 6 and June 19, 2003, which were copied to Faulkner's personnel file. This Board finds that the Union has not demonstrated that CHR's challenged acts were motivated by union animus.

To determine whether an action violates NYCCBL § 12-306(a)(1) and (3), this Board uses the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by the Board in *Bowman*, Decision No. B-51-87. Petitioner must demonstrate that:

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

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See Rivers*, Decision No. B-3-2003.

Proof of the second element must necessarily be circumstantial absent an outright admission. *Civil Service Bar Ass'n*, Local 237, Decision No. B-5-2004 at 10; *City Employees Union*, *Local 237*, Decision No. B-13-2001 at 9. At the same time, petitioner must offer more than speculative or conclusory allegations. Alleging an improper motive without showing a causal link between the management act at issue and the union activity does not state a violation of the NYCCBL. *Ottey*, Decision No. B-19-2001 at 8; *Correction Officer's Benevolent Ass'n*, Decision No. B-19-2000 at 8. Although proximity in time, without more, is insufficient to support an inference of improper motivation, timing may be considered together with other

relevant evidence. *Communication Workers of America*, *Local 1182*, Decision No. B-26-96.

Here, Faulkner engaged in protected union activity when she attended bargaining sessions on behalf of the Union during March 2002 through June 2002, when she filed two grievances in the fall of 2002, when she attended labor-management meetings in May 2002 and September 2002, and when she filed the instant petition on May 1, 2003. Since management knew of her activities, Petitioner has satisfied the first prong of the *Salamanca* test.

With respect to the second prong, we cannot conclude that union animus was the motivating factor for CHR's actions. The Union has not shown a causal connection between Faulkner's protected union activity and CHR's issuance of the March 2003 performance evaluation and the two June 2003 memoranda. Rather, the new administration's mission to reduce CHR's backlog and the significant agency-wide changes it effected appear to have caused friction with Supervising Attorneys who have worked at CHR for many years. In Faulkner's case, this friction was exacerbated by her resistance to changes in or enforcement of agency policies and directions by management – as evidenced by her taking late lunches and not submitting attorney logs. In turn, these disputes may have led to personal animosity on both sides. Such ill-will is evidenced by Faulkner's memo to Wills on May 22, 2003 – in which she states that Wills was responsible for CHR's backlog and the new administration was trying to cover up such mismanagement – and the Blake quotation on the poison of power.

Regarding the March 2003 performance evaluation, the record does not demonstrate a causal connection between Faulkner's protected activity and CHR's criticism of her supervision of subordinates, knowledge of certain cases, and her team's case closure rates. The Union merely asserts that management's criticisms were false but the record provides no evidence to

substantiate that assertion. With regard to the transfer of Mateo, the record shows that Chin, who had only two Investigators, needed another Investigator, and that there were issues with Faulkner's supervision of Mateo. Moreover, the record does not establish that the evaluation's statements regarding Faulkner's failure to adhere to CHR's policies and procedures were retaliatory. Wills sent an agency-wide directive not to take late lunches which all Supervising Attorneys were required to adhere to. However, Faulkner admitted that she continued to take late lunches. Nonetheless, in response to Faulkner's grievance of her AWOL designation, Wills sustained the grievance in part by modifying the AWOL designation to exclude two incidents when she took a late lunch even though he found that she had violated agency policy. Additionally, Faulkner admitted that at a certain point during the evaluation period she did not submit attorney logs. Thus, it was not unreasonable for management to make notations in her evaluation regarding her failure to follow agency policies.

We now turn to the memoranda issued on June 6 and June 19, 2003, which the Union claims were issued in retaliation for Faulkner's filing of the instant petition. Mulqueen's June 6, 2003, memo addressed Faulkner's failure to review the work-product of a supervisee before it was submitted to the Commissioner and to McNamara. Faulkner's claim that there is no policy regarding her responsibility to review her subordinates' work is undermined by the fact that her March 2003 performance evaluation and CHR's Tasks & Standards specified that part of her supervisory responsibilities required that she review all documents, including conciliation agreements, prepared by Investigators. In particular, CHR's Tasks & Standards state that a Supervising Attorney "[e]nsures that all documents prepared by investigators are properly prepared" and "[s]upervises and reviews draft conciliation agreements for compliance with

Bureau policy." In addition, even if McNamara at one time told her that she did not have to submit outgoing correspondence for review, her March 2003 performance evaluation put her on notice that she had not adhered to the Commissioner's memo and thereafter Faulkner continued to disregard the directive. Similarly, we do not find McNamara's June 19, 2003, memo retaliatory. Faulkner claims that she never saw her subordinate's document that McNamara deemed "sloppy." Yet Faulkner presumably saw the document because she reviewed the file for closure. McNamara like Mulqueen was concerned about Faulkner's failure to fulfill her supervisory responsibility to review the work-product of her subordinates. Therefore, the record does not support the allegation that McNamara's memo was motivated by union animus.

The Union offered as background evidence concerning certain events between February through September 2002, outside the period of the statute of limitations, which it contends demonstrates a pattern of retaliatory conduct leading to the March 2003 performance evaluation. We disagree. Although these events occurred during a seven month period when Faulkner participated in union activity, we are not persuaded that CHR's conduct demonstrates union animus.

First, the Union's assertion that a year before the disputed performance evaluation, CHR issued a retaliatory memo on the day that Faulkner participated in bargaining, is not supported by the record. She was released for bargaining on several occasions, between March 6 and June 17, 2002, without any claimed adverse consequence and there is no evidence that there was any bargaining on March 11, 2002, the date of the memo. Second, we reject the assertion that union animus caused the change in Faulkner's training duties. On four occasions between February and May 2002, Wills asked Faulkner to conduct training while he adapted to his position as General

Counsel. Indeed, she was given this duty after her union activity began. That Wills resumed the duties he had regularly conducted since 1990 on the same day Faulkner attended a labor-management meeting, under the circumstances, is not evidence of improper motive. Finally, as to the assertions that CHR improperly transferred Mateo after Supervising Attorneys requested to meet with the Commissioner and that it improperly issued the AWOL memo on the day Faulkner filed a grievance, these assertions are without merit as stated above. For these reasons, we do not find evidence of retaliatory motive leading up to the March 2003 performance evaluation.

Thus, the Union has not demonstrated that CHR's March 2003 performance evaluation and the two memoranda issued in June 2003 were tainted by union animus. Accordingly, the improper practice petition must be dismissed in its 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, BCB-2339-03, filed by the Civil Service Bar Association, Local 237, International Brotherhood of Teamsters, be, and the same hereby is, dismissed.

Dated: September 27, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

VINCENT BOLLON
MEMBER