Burton, 77 OCB 15 (BCB 2006)

[Decision No. B-15-2006 (IP)] (Docket No. BCB-2423-04).

Summary of Decision: Petitioner alleged that HRA violated the NYCCBL when it denied his request for Union representation at case conferences with supervisors, engaged in coercive conduct to prevent Petitioner from requesting Union representation at these meetings, and retaliated against Petitioner by suspending him for invoking his right to Union representation. The City claimed that Petitioner was not entitled to Union representation because these meetings were not disciplinary in nature, and Petitioner's suspension was a result of his own misconduct. The Board dismissed Petitioner's claim that HRA engaged in coercive conduct and retaliated against him. However, the Board held that HRA violated Petitioner's *Weingarten* rights because Petitioner had a reasonable belief that discipline could result from a case conference. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

PIERRE BURTON,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Respondents.

DECISION AND ORDER

On August 20, 2004, Pierre Burton, a member of Social Service Employees Union, Local 371 ("Union"), filed a verified improper practice petition against the City of New York and the New

York City Human Resources Administration ("City" or "HRA") alleging that HRA violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3).[1] Petitioner claims that HRA denied him Union representation at certain meetings with management, engaged in coercive conduct to prevent him from requesting Union representation, and retaliated against Petitioner by suspending him for invoking his right to such representation at these meetings. The City maintains that Petitioner failed to articulate *prima facie* claims because Petitioner was not entitled to Union representation at these meetings and that HRA, based upon Petitioner's insubordination and physical assault of his supervisor, has demonstrated legitimate business reasons for its actions. A hearing was held in the instant matter over the course of three days. We find that HRA did not engage in coercive conduct in violation of the NYCCBL, nor did it suspend Petitioner in retaliation for invoking his right to Union representation at these meetings. However, we find that HRA violated Petitioner's right to Union representation during the April 21, 2004 case conference because at this particular meeting: Petitioner had a reasonable belief that discipline could results therefrom, his supervisor refused his Union representative access to the meeting, and then continued the case conference without Petitioner's consent to do so without such representation present. Accordingly, the petition is granted, in part, and dismissed, in part.

BACKGROUND

The Bureau of Fraud Investigations ("BFI") within HRA's Office of Revenue and

[1] Petitioner filed the petition and amended petition *pro se*, but was represented by counsel for District Council 37 at the hearing.

Investigations investigates alleged acts of fraud in social services programs administered by the HRA. The Food Stamp Division, within BFI, investigates these alleged acts of fraud as they relate to this particular social service.

In 1987, Petitioner was hired by HRA to be a Fraud Investigator Level I in the Food Stamps Division. When Petitioner took leave in 2004, he held the job title of Fraud Investigator Level II. He spent his entire tenure in the Food Stamps Division and investigated alleged fraudulent conduct relating to the improper application, receipt, dissemination and appropriation of food stamps. Supervisors in this division assign cases, instruct on how best to proceed, and determine the date for completion of these cases. Case conferences are scheduled at the request of either the supervisor or the investigator and are used to track and manage the timely progress of particular cases in the BFI system. Case conferences typically occur once or twice a month.[2]

In 2001, HRA charged Petitioner with, among other things, failure to complete approximately 30 overdue cases in a timely manner, failure to follow a supervisor's instructions, and insubordination. He was subsequently disciplined for these offenses.[3] According to the Charges and Specifications, Petitioner ignored his supervisor's instruction on how to proceed on particular matters and that as a result, a number of his cases remained incomplete. Petitioner testified that he attended case conferences, and, that, at these meetings, he and his supervisor disagreed on how to proceed on particular matters. Petitioner testified that these disagreements led to a souring of his

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[2] Eric Plasa, Assistant Deputy Commissioner of Investigations, testified that, aside from case conferences, supervisors in BFI also utilize disciplinary conferences, which are scheduled only by the supervisor, and "can be called for any reasons, [such as] somebody is late, somebody didn't clock in on time or clock out on time, somebody has a dispute with somebody in the union, [and] can lead to disciplinary action."

[3] These charges are currently the subject of a pending grievance arbitration.

relationship with his superiors, and, eventually his discipline.

Beginning in 2002, Petitioner's direct supervisor was Miguel Rosario. The record demonstrates that when Rosario took leave from September 2003 to June 2004, Petitioner was supervised by Brigitte Faustin and Charmaine Harvey, and that he was the only one in his division to have this arrangement. The City claims Faustin was responsible for Petitioner's time and leave matters, and Harvey was responsible for his case review. Petitioner, however, testified that both supervisors engaged in caseload review, and, at times, offered conflicting advice. As a result, Petitioner initiated a grievance, and in January 2004, a Step II determination stated that Petitioner would be reporting to only one supervisor.

After this determination was issued, a meeting was scheduled between Petitioner, his Union Representative, Christopher Kapetanos, and Cathy Silva, Acting Director of BFI, to discuss the implementation of the Step II determination. However, due to adjournments requested by both sides, this meeting did not occur until May 12, 2004.

On February 17 and 24, 2004, Harvey scheduled case conferences to discuss Petitioner's caseload. Petitioner testified that he communicated to Harvey on both days in question that he would not attend these conferences until HRA complied with the Step II determination. According to Harvey, Petitioner never communicated to her that he would not attend these conferences, however she admitted that she was cognizant of Petitioner's concerns in attending case conferences until the Step II determination was implemented.

Even though no evidence was presented by either party concerning whether Petitioner refused to attend the February 17 and 24, 2004 case conferences because he requested and was denied Union representation, it appears that Petitioner made such a request. In a memorandum, dated February 27,

2004, entitled "Failure to Follow Instructions," Harvey advised Petitioner that case conferences do not require Union representation, that Petitioner's refusal to attend case conferences without Union representation "has been a recurring issue," that such "behavior is insubordination" and that Petitioner is "on notice that future incidents of failure to follow instructions and insubordination may result in disciplinary action."

Harvey then scheduled case conferences approximately every two weeks for the next two months but Petitioner continued to refuse to attend. According to Petitioner, he was "suspicious" of his supervisors because the Step II determination had not been implemented and he was still reporting to both Faustin and Harvey. Petitioner testified he was skeptical of management's motive behind scheduling these case conferences and feared that his supervisors were setting him up for a disciplinary charge.

On April 19, 2004, Harvey sent Petitioner another memorandum, entitled "Failure to Follow Instructions," which reiterated Petitioner's unwillingness to attend case conferences without Union representation, scheduled another case conference for April 21, 2004, and stated that "if you again refuse to attend these caseload conferences unless a Union Representative is present, then I will pursue disciplinary action against you for insubordination for failure to follow instructions." The memorandum also informed Petitioner that the Bossman and Walker cases were overdue, that they required immediate attention, that he had ignored Harvey's previous instructions on these cases, that such refusal to comply with her instructions was also insubordinate, and that "by refusing to comply with the Prosecution Division and my instructions, your behavior is insubordination and I am referring you for disciplinary action." This memorandum concluded with Harvey stating "that future incidents of failure to follow instruction . . . may result in disciplinary action."

According to Petitioner, upon receipt of this memorandum, he became increasingly wary of Harvey's intentions because, in his view, the memorandum contained misrepresentations and inaccurate allegations. He testified that "I completed both of them [Bossman and Walker cases], and they were considered satisfactory not just from my level but also my supervisors." Therefore, Petitioner stated that he feared some type of disciplinary reprisal at the April 21, 2004 case conference, but attended the meeting anyway.

Petitioner testified that at the April 21, 2004 case conference he and Harvey began discussing the Bossman and Walker cases. Petitioner attempted to explain that he thought these cases were completed and approved, but if any further adjustment was necessary, he would comply with her instructions. According to Petitioner, his attempt to explain any possible discrepancies led to Harvey raising her voice and not allowing Petitioner to "get a word in edgewise." Petitioner testified that, at this point, he requested Kapetanos's presence and Harvey responded, "Mr. Burton, this is a case conference. Case conferences do not require representation." Nevertheless, Harvey allowed Petitioner to call Kapetanos. According to the testimony of Petitioner and Kapetanos, when Kapetanos arrived, Harvey stated that Kapetanos's presence was not needed because this was a case conference and not a disciplinary meeting. Kapetanos left, and Harvey continued with the meeting. Petitioner refused to cooperate without Kapetanos and left Harvey's office shortly thereafter.[4]

Harvey testified that she met with Petitioner some time in April but was unsure of the exact date of this meeting. When Petitioner arrived, she immediately began discussing the Bossman and Walker cases. Petitioner then requested to call Kapetanos and walked out of the office. Petitioner

[4] Based on the record, it is unclear how long Petitioner remained after Harvey denied Kapetanos access to her office.

returned 15 minutes later with Kapetanos, and Harvey explained to Kapetanos that his presence was unnecessary since this was a case conference and no discipline may result from these types of meetings. Harvey testified that Kapetanos then spoke with Petitioner, and reiterated Harvey's statement concerning the innocuous nature of case conferences, and left. Harvey proceeded with the case conference, and Petitioner became increasingly uncooperative and unresponsive to her questions. According to Harvey, she noticed Petitioner's disposition and asked if Petitioner would like to end the conference. Still unresponsive, she stated "we are not getting anywhere today. Maybe you will have to reschedule this, and that was it. . . . he walked out of the office."

On May 5, 2004, Petitioner attended another case conference with Harvey; she again asked Petitioner about the Bossman and Walker cases and whether Petitioner had completed all the tasks assigned to him. Petitioner testified that he attempted to explain how he had, in fact, completed these tasks, but when he interrupted Harvey, she began to raise the volume and tone of her voice. According to Petitioner when he requested Union representation, Harvey insisted that "case conferences do not require Union representation," but still allowed Petitioner to call Kapetanos. When Kapetanos arrived, Harvey denied Kapetanos access to her office and sent him away. Petitioner refused to continue the case conference and left Harvey's office immediately. Harvey did not testify as to what happened at this conference.

On May 12, 2004, a meeting was held with Petitioner, Union Representatives Sid Weiss and Kapetanos, Union Organizer Jose Velez, Director Silva, and Deputy Director Zenaida Rivera to discuss Petitioner's dual supervision. The parties also discussed Petitioner's inability to have a Union representation at case conferences. According to Petitioner, Silva instructed Petitioner and Harvey to work out their difference because Silva was placing Petitioner under Harvey's sole

supervision.

On June 24, 2004, Rosario returned from leave and resumed sole supervision of Petitioner. On July 23, 2004, Petitioner attended a case conference with Rosario to discuss the Smith and Acciarello cases. Petitioner testified that Rosario started the meeting by discussing the Smith case and insisted that Petitioner had failed to complete all of his required tasks. Petitioner testified that he informed Rosario that he "did complete that case" and asked Rosario "to verify this with IRIS," which is HRA's case tracking program. According to Petitioner, Rosario became agitated, refused to check IRIS, and then quickly switched topics to the Acciarello case. Petitioner had worked on this case, but it was returned by the prosecution division for additional work on June 10, 2004. Petitioner testified that he told Rosario that he was not the proper supervisor to oversee this matter since Harvey was the supervisor who approved Petitioner's initial actions on the case, and when the additional work was requested. According to Petitioner, his comments agitated Rosario, and he began to raise his voice. Petitioner then insisted that he have Union representation present and called Kapetanos.

According to Petitioner and Kapetanos, when Kapetanos arrived at the meeting, Petitioner began explaining the events that had just transpired. Then, Kapetanos asked Rosario to check IRIS to verify whether Petitioner had completed the Smith case. Upon Kapetanos's urging, Rosario checked IRIS and discovered that Petitioner had completed this case. As to the Acciarello case, Kapetanos also asked Rosario whether he was the appropriate supervisor to instruct Petitioner regarding this matter. Then, according to Petitioner, Rosario "got more agitated, [and] said that's an issue that has to be taken up with upper management," which brought the meeting to a close. Rosario did not testify about what transpired at this meeting.

Case conferences were scheduled for July 26 and August 11, 2004. Petitioner testified that he did not attend these meetings because he would not be able to have Union representation and because he believed he could face some form of discipline as a result of these meetings. On August 11, 2004, Rosario issued a memorandum to Petitioner stating:

> Your repeated refusal to attend case conferences without union representation, has contributed to a backlog of your assigned cases. Again you are advised that union representation is not needed for routine case review/case plan of action, which are designed to assist in completing your cases. Your refusal to obey a direct oral or written order or failing to carry out a direct order expeditiously (insubordination) may lead to disciplinary action.

On August 20, 2004, Petitioner filed his initial improper practice petition against HRA alleging that he was denied Union representation at case conferences and improperly referred for disciplinary action because he exercised his right to Union representation.

According to Petitioner, on September 9, 2004, he attended a case conference with Rosario to discuss approximately ten overdue cases. The meeting began with Rosario instructing Petitioner that these cases were incomplete and required additional investigation. When Petitioner requested that Rosario look in the IRIS system to check the status of these cases, Rosario became angered. At that point, Petitioner called Kapetanos, who arrived shortly thereafter. According to Kapetanos, upon his arrival, Rosario became increasingly agitated because Petitioner kept insisting that Rosario check the IRIS system. Kapetanos also testified that Rosario refused to search the IRIS system during the meeting because "he wanted to stick to his agenda." According to Petitioner and Kapetanos, Rosario then abruptly got up, left his own office, and walked toward the water cooler. Petitioner and Kapetanos followed Rosario out of his office and waited for Rosario to return. According to both of these witnesses, no words were exchanged while the three men were outside

of Rosario's office.

According to Petitioner and Kapetanos, after one minute, Rosario returned and entered his office passing Petitioner and Kapetanos, who were still waiting outside. Petitioner and Kapetanos then followed Rosario back into the office and the meeting resumed. Petitioner and Kapetanos testified that Rosario was still agitated and continued "badgering" Petitioner. According to Petitioner and Kapetanos, Petitioner then reached over Rosario's desk and placed his hand upon Rosario's wrist for a couple of seconds to get his attention and to allow Petitioner to respond to Rosario's inquires. They testified that, after Petitioner was given an opportunity to speak, Rosario dismissed the two men because the meeting had already extended beyond the time allotted.

According to Rosario, he scheduled the September 9, 2004 conference to discuss the fact that he had found four completed cases on Petitioner's desk which Petitioner had worked on and one case that was still under investigation, but not assigned to Petitioner. Before the conference began, Petitioner requested Union representation; Rosario complied and allowed Kapetanos to be present. Rosario testified that he instructed Petitioner to return cases to the appropriate location once the investigative actions were complete, and not to have any case files that were not assigned to him. According to Rosario, after he completed instructing Petitioner on these matters, Petitioner and Kapetanos "started bringing up issues that was [sic] resolved already, and then I said no, I don't want to hear it." Nevertheless, Petitioner and Kapetanos continued to discuss these matters and Rosario informed them that the meeting was over, and walked out of his office toward the water cooler, passing by Hilda Ortiz, who is a Clerical Associate, level three, with HRA and whose desk is directly

outside of Rosario's office.[5]

Rosario and Ortiz testified that shortly after Rosario left his office, Petitioner and Kapetanos also exited and waited outside Rosario's office. After Rosario got a drink of water, he returned to his office but was prevented by Petitioner from entering. Rosario and Ortiz testified that Petitioner placed his hand on Rosario's chest to stop him from walking forward. After Rosario instructed both Petitioner and Kapetanos that this action was inappropriate, Petitioner removed his hand from Rosario's chest. According to these two witnesses, Petitioner then grabbed Rosario's arm as he attempted to pass. Rosario testified that he asked Petitioner "to get his hands off me." When Petitioner failed to let go of Rosario's arm, Kapetanos released Petitioner's grip. Then Kapetanos ushered Petitioner into a side conference room, and Rosario returned to his office.

According to Petitioner, on the morning of September 10, 2004, Rosario confronted Petitioner regarding his late arrival to work on the previous day. Petitioner testified that Rosario wanted to meet with Petitioner later in the day regarding this matter, but Petitioner suggested that they address the lateness matter now because it was easily explainable. The record demonstrates that Petitioner's ID Card malfunctioned on September 9, 2004, thereby preventing him from entering the area of the building where he worked. According to Petitioner, "we discussed it at my desk. We resolved the issue. He was satisfied. That was it." Rosario testified that he did not recall this event occurring.

That afternoon, Deputy Directors George Davis and Rivera approached Petitioner at his desk. Rivera presented Petitioner with a memorandum, dated September 10, 2004, stating, without

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[5] Ortiz is not supervised by Rosario, is not part of the Food Stamp Division, and is not represented by the Union.

explanation, that he was suspended effective the close of business that day. Petitioner, upon reading this memorandum, immediately requested Kapetanos's presence. Kapetanos was out of the office, so Petitioner refused to sign the memorandum. Rivera then made a copy of the memorandum, gave it to Petitioner and walked away. Rosario testified that the reason Petitioner was suspended was "for putting his hand on me the way he did, holding me against my will."[6]

Petitioner testified that on the day he returned from his suspension, September 16, 2004, he received two disciplinary memoranda. The first, dated September 7, 2004, stated that Petitioner was insubordinate when he failed to follow directives by not attending a Tasks and Standards meeting with Rosario and warned Petitioner that "[f]ailure to follow instructions may lead to disciplinary action." The second, dated September 9, 2004, stated that Petitioner was insubordinate because he refused to discuss an attendance matter with Rosario, that he had been warned about misconduct before, and that, therefore he was "being referred for disciplinary action."

Also on September 16, 2004, Petitioner received a memorandum that scheduled a case conference for the following day. According to Petitioner, he became extremely anxious because he had received the September 7 and 9, 2004 memoranda on the day he returned from his suspension. Petitioner testified that he tried to confront Rosario regarding these memoranda and whether Petitioner could have Kapetanos accompany him to the meeting scheduled for September 17, 2004; however Rosario refused to meet with Petitioner.

Petitioner and Kapetanos testified that they arrived the next day for the scheduled case conference at the office of Joy Planter, who at the time was Acting Assistant Director of BFI.

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[6] No charges were filed against Petitioner for the incident involving Rosario on September 9, 2004.

Rosario and Planter refused to meet with the two men. Petitioner and Kapetanos testified that they were startled by the supervisors' refusal to meet because the supervisors offered no explanation for the cancellation of the case conference. Later that day, Petitioner received a memorandum from Rosario which stated: "On the above said date, you failed to attend the scheduled routine case conference . . . . Your continuous failure to follow directives and your refusal to obey a direct oral or written order is insubordinate. Therefore, you are being referred for disciplinary action." Rosario testified that he did not recall this incident, and no other witness refuted the testimony of Petitioner and Kapetanos.

At the end of business on September 17, 2004, Petitioner went on a leave of absence and, has since left the employment of HRA.

On November 1, 2004, Petitioner submitted his amended improper practice petition, which, in conjunction with the original petition, does not specify what remedy he is seeking.

POSITION OF THE PARTIES

Petitioner's Position

Petitioner contends that HRA's categorical denial of Petitioner's right to Union representation at case conferences violates NYCCBL § 12-306(a)(1) because Petitioner is entitled to representation at meetings with management when he reasonably believes that such a meeting will lead to discipline, also known as an employee's *Weingarten* rights. Petitioner reasonably feared discipline would follow these case conferences because he: had been disciplined in 2001 for acts which occurred during case conferences; filed a grievance against his supervisors for failure to comply with the Step II determination; and was informed, via memoranda from his supervisors on

multiple occasions, that his requests for Union representation at case conferences was tantamount to insubordination. Therefore, Petitioner properly invoked his *Weingarten* rights, and HRA's denial of representation violated these rights.

In response to the City's blanket assertion that an employee was never disciplined for events that occurred during a case conference, Petitioner claims that, regardless of the title of a particular meeting, HRA utilized case conferences to threaten Petitioner with discipline. Further, Petitioner insists that a number of HRA employees complained to Kapetanos that they feared being disciplined at case conferences.

Petitioner further claims that by instructing him that his requests for representation at case conferences were unnecessary and detrimental to the operations of BFI, and by threatening him with disciplinary reprisals for his invocation of his *Weingarten* rights, HRA engaged in coercive conduct in further violation of NYCCBL § 12-306(a)(1).

Finally, HRA retaliated against Petitioner, in violation of NYCCBL § 12-306(a)(1) and (3), when it suspended him.[7] HRA had knowledge of Petitioner's protected activities because he invoked his *Weingarten* rights before his supervisors on multiple occasions. The causal connection between

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

* * *

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

NYCCBL § 12-305 provides, in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

HRA's suspension of Petitioner without explanation and his protected activities can be found in the timing of the suspension, three weeks after the filing of the improper practice petition, and his supervisor's constant threats to discipline Petitioner for invoking his *Weingarten* rights.

City's Position

The City contends that HRA did not violate the NYCCBL when it denied Petitioner Union representation at case conferences. Case conferences are a managerial tool used by supervisors in BFI to track and manage the timely processing of discrepant claims made be recipients of social services, provide a forum for supervisors to instruct and critique employees in the proper management of their cases, and never result in discipline. Since *Weingarten* rights are applicable only when an employee has an objectively reasonable belief that discipline may arise from a meeting with management and case conferences are non-disciplinary by nature, Petitioner's invocation of these rights was unreasonable.

The City also contends that Petitioner's refusal to partake in case conferences when his request for Union representation was denied ran contrary to the operational efficiency of the HRA. By refusing to attend these meetings, Petitioner thwarted his supervisors' attempts to manage Petitioner. Further, when Petitioner attended case conferences and received instructions from his supervisors, he failed to implement them, which constituted insubordination. In addition, Petitioner's physical grabbing of Rosario on September 9, 2004 is highly unacceptable behavior, thereby allowing HRA to suspend Petitioner. Thus, the Union's claim that HRA retaliated against Petitioner by suspending him for his attempts exercise his *Weingarten* rights is baseless.

DISCUSSION

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the United States Supreme Court held that the National Labor Relations Act ("Act") accords private sector employees the right to refuse to submit to an employer's interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary measures. In reaching that conclusion, the Court focused on language in § 7 of the Act, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Court found that the action of an employee in seeking to have the assistance of his union representative at a "confrontation" with his employer clearly falls within the literal wording of § 7's guarantee of the right of employees to act in concert for mutual aid and protection. The Court stated:

> This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. (Citation omitted.) The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.

J. Weingarten, Inc., 420 U.S. at 260-61.

The Court also found that an employee's right to the presence of a union representative at an investigatory interview arises only when the employee requests such representation. *Id*. at 257. In *Axelson, Inc.*, 285 NLRB 49 (1987), the National Labor Relations Board ("NLRB") stated:

> Under *Weingarten*, once an employee makes such a valid request for union representation, the employer is permitted one of three options: (1) grant the request,

> (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. Under no circumstances may the employer continue the interview without granting the employee union representation, unless the employee voluntarily agrees to remain unrepresented after having been presented by the employer with the choices mentioned in option (3) above or if the employee is otherwise aware of those choices.

Id. at 53; *see also U. S. Postal Service*, 241 NLRB 141 (1979).

In *New York City Transit Authority*, 35 PERB ¶ 3029 (2002), *aff'd,* Index No. 45830/02, 2005 N.Y. App. Div. LEXIS 14882 (2nd Dep't Dec. 27, 2005), the New York State Public Employee Relations Board ("PERB") held that a public employee, who is covered by the New York Civil Service Law, Article 14 ("Taylor Law"), which is the New York State equivalent of the Act, has the right to union representation during an investigatory interview when the employee reasonably believes the meeting will lead to discipline. PERB, in considering the *Weingarten* decision, reasoned that the Supreme Court emphasized the concerted nature of the request for union assistance and that no greater emphasis was placed on the words "mutual aid or protection" than on the words "concerted activity." PERB interpreted § 202 of the Taylor Law, which provides that public employees "have the right to form, join, and participate in, or refrain from forming, joining or participating in, an employee organization of their own choosing" and concluded that "there is no clearer expression of participation in an employee organization than the request for union representation at an investigatory interview which may result in discipline, such as an employee's suspension, loss of pay or termination." *Id.*, at 3081.

Following PERB's interpretation of § 202 of the Taylor Law, we interpreted § 12-305 of the NYCCBL in similar fashion and held that New York City employees also have the right to union representation during an investigatory interview which may reasonably lead to discipline, and a

violation of an employee's *Weingarten* rights violates NYCCBL § 12-306(a)(1). *Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003 at 13; *see also Patrolmen's Benevolent Ass'n*, Decision No. B-13-2004 at 11.[8]

Since *Weingarten* rights are recognized under the NYCCBL, we now turn to the particular issue that the instant matter raises, which is whether Petitioner had a reasonable belief that certain case conferences could have resulted in discipline as measured by an objective standard. When examining this issue, NLRB, PERB and the courts have examined all the external evidence and exclude an individual employee's subjective feelings. *Consolidated Edison Co. of New York, Inc*., 323 NLRB 910, 910 (1997); *see also Transit Workers Union, Local 100*, 36 PERB ¶ 3049 (2003) *American Fed'n of Gov't Employees, Local 2544 v. Federal Labor Relations Authority*, 779 F.2d 719, 724 (D.C. Cir. 1985).

In *Consolidated Edison Co. of New York, Inc*., 323 NLRB 910 (1997), NLRB determined that the employer committed an unfair labor practice when it denied its employees union representation because each employee had a reasonable belief that discipline would result from these meetings. In one instance, a senior employee was on the night shift when a major accident occurred and forced the plant to shut down. The accident could have resulted only from employee negligence or carelessness. NLRB stated that when this senior employee was called in for an interview immediately after his shift, his belief that discipline could result was reasonable. *Id.* at 914. Another employee was called into a meeting with his supervisor regarding his alleged failure to perform a

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[8] In accordance with precedence set forth by PERB, this Board previously held that employees of New York City do not enjoy *Weingarten* rights because the phrase "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is absent from the NYCCBL. *DeChabert,* Decision No. B-17-91 at 8-9; *Mellor*, Decision No. B-43-91 at 19.

task he was assigned. NLRB found that this employee had a reasonable belief that discipline could result from the meeting because failure to perform assigned tasks is a disciplinable offense. *Id.* at 915.

In contrast, NLRB has found that *Weingarten* rights do no apply to "such run-of-the-mill shop-floor conversation as . . . the giving of instructions or training or needed corrections of work techniques." *Quality Mfg. Co.*, 195 NLRB 197, 199 (1972). In *Northwest Engineering Co.*, 265 NLRB 190 (1982), NLRB found that an employee who was suspended due to his conduct in a meeting with other employees present, did not have a reasonable belief that discipline could arise from the meeting because the group meeting was designed to discuss plant rules and regulations, the employee knew the topic being discussed, and the supervisor mentioned only one work rule that the employee was suspected of violating while mentioning other employees who violated other work rules as well. NLRB stated that "work performance is a matter of legitimate concern to an employer [who] retains the prerogative of calling a meeting of a group of employees . . . simply to advise them of their employer's valid work performance expectations and to inform them of the possible consequences of noncompliance." *Id.* at 190.

Nevertheless, NLRB refuses to deem all work performance meetings non-disciplinary in nature and, rather examines the specific context in which these meetings arise. In *Quazite Corp.*, 315 NLRB 1068 (1994), an employee, who had been previously warned of his low work production, was called into a meeting with his supervisor regarding his production levels. NLRB found that the employee had a reasonable belief discipline could result from this meeting because the employee had been disciplined for a similar offense, the supervisor inquired about how the employee could best improve his production level, and stated that continued low production level would result in future

discipline. *Id.* at 1069.

In *New York City Transit Authority*, 35 PERB ¶ 3029 (2002), an employee was required by his supervisor to submit a written statement in response to an allegation that the employee made a racially insensitive comment to another employee. Even though the employee had requested the assistance of his union representative to draft the statement, the supervisor insisted that the employee draft the statement in front of the supervisor in his locked office and refused the employee's union representative entrance to his office while the employee drafted the statement. PERB found that the employee had a reasonable belief discipline would arise from this closed-door meeting because the employee's alleged comment constituted workplace misconduct that could have resulted in discipline. *Id.*, at 3082.

In our seminal case regarding *Weingarten* rights, *Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003, an employee's supervisor took issue with the manner and efficacy in which the employee was completing the tasks assigned to her and called for a meeting to discuss this subject. The employee abruptly left the meeting prior to its conclusion, and, in response, the supervisor requested that the employee be suspended and demoted. At a subsequent meeting to discuss the previous meeting, she requested, but was refused, union representation. The Board found that the employee who was required to attend the second meeting, had a reasonable belief that disciplinary repercussions could arise out of the second meeting because "her failure to cooperate . . . may have been construed as negative conduct, therefore leading to [the employee's] demotion," and statements made during the second meeting could incriminate the employee. *Id.* at 14.

In the instant matter, we find that Petitioner was experiencing significant problems at work. In 2001, Petitioner was disciplined for failing to complete overdue cases in a timely manner,

insubordination and failing to follow a supervisor's instructions. In September 2003, Petitioner was convinced that he was the only employee in the Food Stamp Division who had two supervisors that reviewed his case load. As a result, he grieved this issue, and, in January 2004, Petitioner received a favorable Step II grievance determination that required the dual supervision to cease. While the parties attempted to schedule a meeting to discuss the implementation of this determination, Petitioner refused to attend two routine meetings with his supervisors to discuss his caseload because he was awaiting implementation.

With these facts in mind, we turn our attention to the specific case conferences where the Union claims Petitioner's *Weingarten* rights were violated. Petitioner received a memorandum from Harvey, dated February 27, 2004, entitled "Failure to Follow Instructions, " which stated that Petitioner's refusal to attend case conferences without Union representation was insubordination and that future incidents of insubordination may result in discipline. Then, in a April 19, 2004 memorandum, again entitled "Failure to Follow Instructions," Harvey wrote that a case conference was scheduled for April 21, 2004 to discuss: the Bossman and Walker cases which had become overdue, Petitioner's continued refusal to attend case conferences without Union representation, and his failure to comply with his supervisor's instructions. Harvey also wrote that Petitioner was being referred for disciplinary action for his continued insubordination, and that future incidents of insubordination may result in additional referrals for disciplinary action. Accordingly, though Harvey characterized the April 21, 2004 meeting as a case conference, the April 19, 2004 memorandum demonstrates that, in addition to possible routine discussions regarding Petitioner's caseload, she would also discuss Petitioner's insubordination, failure to follow instructions, and refusal to attend case conferences without Union representation. Therefore, based upon these

statements by Harvey, the timing of Harvey's statements and the meeting, and the 2001 discipline of Petitioner for failing to follow his supervisors' instructions that he received in case conferences, sufficient external evidence exists to justify a reasonable belief that discipline could flow from the April 21, 2004 meeting. *See Quazite Corp.*, 315 NLRB 1068.

At the April 21, 2004 case conference, Petitioner invoked his right to Union representation. At this juncture, Harvey could have: (1) granted Petitioner's request, (2) discontinued the meeting, or (3) offered Petitioner the choice between continuing the meetings without Union representation, or have no meeting at all. *See Axelson, Inc.*, 285 NLRB 49 at 52. Instead, Harvey rebuffed Petitioner's request stating that "case conferences do not require representation," and then, upon Kapetanos's arrival, denied him access to the meeting. After, Harvey admitted that she continued the meeting, and only stopped it when Petitioner became uncooperative and would not respond to Harvey's questions. Regardless of the duration of the meeting after Kapetanos's departure, we find that once Harvey denied Petitioner's request for Union representation, she should have either: discontinued the case conference or offered Petitioner the option of continuing the interview without Union representation or having no interview at all. *Id.* at 52. By failing to do so, Petitioner's *Weingarten* rights were violated at this particular case conference.

With respect to the May 5, 2004 meeting, Petitioner had a reasonable belief that discipline could flow from this meeting and Harvey again refused to allow Petitioner's Union representative to be present. However, no violation occurred because Petitioner exited Harvey's office as soon as Kapetanos was denied access, thereby terminating the meeting. With respect to the remaining case conferences, we find that HRA did not violate Petitioner's *Weingarten* rights at these other meetings because Petitioner was not compelled to go forward with the meetings without Union representation

present. Petitioner did not attend the case conferences on February 17, February 24, July 26 and August 11, 2004; Petitioner's supervisors allowed Union representation at the July 23 and September 9, 2004 meetings; and the case conference scheduled for September 17, 2004 was cancelled.

Before addressing Petitioner's remaining claims, this Board emphasizes that *Weingarten* rights safeguard both "the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly," and the interests of the individual employee who is subjected to the disciplinary meeting. *J. Weingarten Inc.*, 420 U.S. at 261. Here, Petitioner no longer works at HRA and may have contributed to a difficult work environment. However, we find a violation of NYCCBL § 12-306(a)(1) because HRA's failure to comply with Petitioner's *Weingarten* rights at the April 21, 2004 meeting violated the rights granted to every HRA employee under NYCCBL §12-305. *New York City Transit Authority*, 35 PERB ¶ 3029, at 3081.

Petitioner also claims that HRA engaged in coercive conduct, in violation of NYCCBL § 12-306(a)(1), by instructing him that his requests for representation at case conferences were unnecessary, and by threatening him with discipline if he continued to invoke his *Weingarten* rights. We find HRA did not engage in coercive conduct violative of the NYCCBL.

We have found that NYCCBL §12- 306(a)(1) may be independently violated by improper employer conduct such as threatening employees for exercising their rights under NYCCBL §12-305. *District Council 37, Local 924*, Decision No. B-1-2006 at 11. However, there must be a demonstration that the employer interfered with an employee's exercise of any of these rights. *District Council 37, Local 2021*, Decision No. B-36-93 at 17 (during the bargaining process, threatening to convert certain job titles from full-time to part-time status if the union did not

capitulate to certain concessions during the bargaining of its subsequent contract was not coercive conduct within the meaning of NYCCBL §12-306(a)(1)).

In *Committee of Interns and Residents*, Decision No. B-17-95, the union alleged that threats made by an employee's supervisors at three separate meetings coercively dissuaded the employee from consulting his union. The employee was called into these meetings with his supervisors, and told to resign or face formal disciplinary charges arising out of a failed drug test. They further instructed the employee that "if you made it a union matter it would be the end of your career." *Id.* at 4. Even though the employee eventually consulted with his union, the Board held that these threats constituted coercive conduct under the NYCCBL because such statements discouraged the employee from exercising his protected right to seek union assistance. *Id.* at 9.

Here, the facts herein differ from those in the *Committee of Interns and Residents* case. The meetings Petitioner was required to attend were routinely scheduled for supervisory consultation and case review. The record shows that Petitioner began refusing to attend these routine meetings in February 2004 because of HRA's failure to implement the Step II determination, and because his supervisors refused to allow Petitioner to have a Union representative present. Petitioner' s refusal to attend these meetings could be insubordinate and a basis for discipline.

Although the statements by Harvey and Rosario acknowledge Petitioner was refusing to attend case conferences because he wanted Union representation, these statements are not coercive because they neither stated that requesting Union representation constituted insubordination nor threatened discipline merely because Petitioner requested Union representation. These statements did not link discipline to the exercise of protected rights. Rather, the evidence shows that the threats of discipline were predicated on Petitioner's refusal to attend the routinely scheduled supervisory

meetings, which were a regular and necessary part of Petitioner's job and not on his assertion of his *Weingarten* rights. In fact, each threat of discipline made by Harvey and Rosario immediately followed Petitioner's failure to appear at a scheduled case conference. Additionally, following the April 21, May 4, July 23, and September 9 case conferences which Petitioner attended and requested Union representation, no discipline or threat of discipline resulted. Accordingly, we cannot conclude that the statements from Harvey and Rosario were coercive or discouraged Union activity. Rather, these statements were warnings that participation in case conferences was compulsory and sought to secure Petitioner's participation.

We now turn to whether HRA engaged in retaliatory conduct when it suspended Petitioner. To determine if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, Decision No. B-51-87. Petitioner must demonstrate that:

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

Here, we find that HRA had knowledge of Petitioner's protected activity because invocation of ones *Weingarten* rights is protected activity under the NYCCBL, *Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003 at 13, and Petitioner's supervisors acknowledged that he repeatedly requested Union representation. Therefore, we find the first prong of *Salamanca* test is satisfied.

Regarding the second prong of the *Salamanca* test, which addresses the motivation behind the employment action in question, typically, this element is proven through the use of circumstantial evidence, absent an outright admission. *City Employees Union, Local 237,* Decision No. B-13-2001

at 9; *Communications Workers of America, Local 1180*, Decision No. B-17-89 at 13. 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. *See Ottey*, Decision No. B-19-2001 at 8; *Correction Officers' Benevolent Ass'n,* B-19-2000 at 8; *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 5-6. If a *prima facie* case is established, then the employer may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct. *See Civil Service Bar Association, Local 237*, Decision No. B-32-2003; *Local 983, District Council 37*, Decision No. B-15-2001.

In the instant matter, Petitioner claims that the impetus for his September 10, 2004 suspension was his persistent and overt Union activity. Specifically, Harvey wrote that "if you again refuse to attend these caseload conferences unless a Union representative is present, I will pursue disciplinary action against you." In addition, Rosario admitted to Petitioner that his repeated refusal to attend case conferences without Union representation constituted a failure to "carry out a direct order expeditiously (insubordination) [and] may lead to disciplinary action." Based upon these statements linking Petitioner's desire for Union representation at case conferences, his supervisors' refusal to accommodate these requests and potential discipline regarding Petitioner's failure to attend case conferences when Union representation has been denied, we find a sufficient causal connection exists to establish a *prima facie* violation of NYCCBL § 12-306(a)(1) and (3).

However, the City contends that Petitioner's retaliation claim arising out of his suspension is without merit because the suspension was a result of Petitioner's physical altercation with Rosario on September 9, 2004. Regarding the divergent accounts of the incident on September 9, 2004, we

credit the testimony of Ortiz because she is not represented by the Union, is not supervised by Rosario, and does not work with Petitioner. Thus, she has no stake in the outcome of the instant matter whatsoever. Her testimony was corroborated by Rosario's testimony, which, in this instance, we also find credible. On September 9, 2004, after the meeting between Rosario, Petitioner and Kapetanos, Rosario attempted to reenter his office, but was prevented from doing so by Petitioner, despite Rosario's instructions "to get his hands off of me." In fact, when Petitioner grabbed Rosario's arm, Kapetanos had to remove Petitioner's grip because Petitioner refused to release Rosario's arm. We find the business reason proffered by the City to explain the impetus behind Petitioner's suspension legitimate because this type of physical contact is a reasonable basis for discipline, and Petitioner was suspended less than a day after the incident occurred. Thus, Petitioner's *prima facie* case cannot survive the City's legitimate business reason.

ORDER

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

ORDERED, that the improper practice petition filed by Pierre Burton docketed as BCB-2423-04 be, and the same hereby is granted in part, as it relates to the violation of Pierre Burton's *Weingarten* rights at the April 21, 2004 case conference; it is further

ORDERED, that the improper practice petition filed by Pierre Burton docketed as BCB-2423-04 be, and the same hereby is dismissed in part, as it relates to all other claims contained therein; and it is further

ORDERED, that the New York City Human Resources Administration cease and desist from interfering with employees' right to request union representation during investigatory interviews which may reasonably lead to their discipline.

Dated: April 4, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

I Dissent. M. DAVID ZURNDORFER
MEMBER

I Dissent. ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER