Communications Workers of America, Local 1180, **77 OCB 20 (BCB 2006)**
[Decision No. B-20-2006] (IP) (Docket No. BCB-2474-05).

Summary of Decision: The Union filed an improper practice petition alleging that HRA violated NYCCBL § 12-306(a)(1) and (3) when, in retaliation for seeking the assistance of the Union concerning a disciplinary grievance, the informal conference holder increased her recommended penalty for the disciplinary matter. This Board denies the petition for want of sufficient factual basis to find that HRA's actions were improperly motivated. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180, AFL-CIO,

Petitioner,

-and-

NEW YORK CITY
HUMAN RESOURCES ADMINISTRATION,

Respondent.

DECISION AND ORDER

On May 6, 2005, Communications Workers of America, Local 1180, AFL-CIO ("Union"), filed a verified improper practice petition on behalf of member Baron Germaine against the New York City Human Resources Administration ("City" or "HRA"). The Union alleges that HRA violated §§ 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") by holding an informal conference at which a penalty for charged disciplinary infractions was to be recommended *in absentia* despite having received a timely request from the Union to adjourn, and then, in retaliation for obtaining a *de novo*

rescheduled informal conference through the Union's intercession, HRA's informal conference holder increased her recommended penalty for his alleged violations of the code of conduct. The City argues that HRA's informal conference holder's actions fell within the scope of her authority to act and that those actions were warranted because the Union failed to notify her agency of the Union representative's inability to attend the first scheduled conference. The City also relies upon the evidence adduced at the rescheduled informal conference as establishing a legitimate business reason for the enhanced penalty. After a hearing, this Board denies the petition for lack of any adverse impact caused by the alleged interference with the right of the employee to be represented by his Union, and lack of sufficient factual basis to establish to find that HRA's actions were motivated by retaliatory animus.

BACKGROUND

Hearings were held on February 21, 2006, and April 13, 2006, before a Trial Examiner designated by the Office of Collective Bargaining.[1] Baron Germaine is a Principal Administrative Associate, Level II, employed by HRA in the Family Independence Administration. On an unspecified date in December 2004, Germaine was served with Charges and Specifications alleging violations of the HRA Code of Conduct ("disciplinary charges"). Germaine was charged with allegedly failing to notify the HRA Administrator/Commissioner in writing that he had been arrested on aggravated harassment charges in the second degree in connection with a December 30, 2003, altercation over Germaine's rental of property to a police officer. Germaine was also charged with

[1] To the extent the Trial Examiner has made credibility findings, as set forth herein, this Board, upon review of the record, hereby adopts them.

failing, on two separate occasions, to report to the Department of Investigations in 2004 to be interviewed with respect to the criminal matter.

Germaine and the Union were both served with notice that the charges would be considered at a meeting, called an informal conference to be held on January 12, 2005, before Charise Latimer-Jackson, designated as the "informal conference holder." HRA's notice, setting forth the contents of Article VI, §5, of the parties' collective bargaining agreement ("Agreement"), provided procedural information about the conference, including a means by which Germaine could accept or contest the penalty recommended by the informal conference holder.[2] The notice recited that Germaine was entitled to have union representation at the conference.

Union Representative Harlan Reid testified at the hearing in the instant improper practice petition that he had planned to attend the conference but that he became ill two days previously, and asked another Union representative, Gina Strickland, to reschedule the conference with HRA's

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[2] Article VI, § 1(e), of the Agreement provides, in relevant part:

> "[a] claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status."

Article VI, § 5, Step A, describes the first step of a four-step procedure as follows:

> Following the service of written charges, a conference with such Employee shall be held with respect to such charges by the person designated by the agency head to review a grievance at Step I of the Grievance Procedure set forth in this Agreement. The Employee may be represented at such conference by a representative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a determination in writing by the end of the fifth day following the date of the conference. . . .

Office of Staff Resources.[3] Strickland testified that on January 11, 2005, she asked Sonji Shehee, who schedules HRA's informal conferences, to reschedule Germaine's conference. Shehee did not provide Strickland with another date. Strickland testified that Shehee said, "Okay, that's not a problem." Shehee did not recollect such a conversation with Strickland. Strickland told Germaine that his informal conference would be rescheduled due to Reid's unavailability and that he should not appear on January 12, 2005.

However, Latimer-Jackson held the informal conference as originally scheduled. As neither Germaine nor Reid was present, Latimer-Jackson considered only the written charges and Germaine's employment history, including a prior disciplinary finding that he had been excessively late in 2001. Based upon what Latimer-Jackson said was "all the evidence presented," she found that the charges had been established and recommended a penalty of five days suspension without pay in a written memorandum decision dated January 21, 2005. When Germaine received this decision and faxed it to Reid, Reid first became aware that the conference had been held *in absentia*.[4]

On January 27, Reid called Shehee who told him that she did not recall Strickland's request that she reschedule Germaine's informal conference. Reid testified that this was not unprecedented; on another occasion with a different Union member, Shehee had forgotten to reschedule an informal conference as the Union had requested.

After Reid spoke with Shehee, he called Latimer-Jackson, who told him that she had no

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[3] A hearing was held on February 21, 2006, and April 13, 2006, by the Trial Examiner designated by the Office of Collective Bargaining. To the extent she has made credibility findings as set forth herein, the Board, upon review, adopts them.

[4] Latimer-Jackson testified that her decisions "usually" denote whether an informal conference is "held *in absentia*"; her decision of January 21, 2005, in Germaine's case does not carry that notation. (Tr. 88-89)

record of anyone from the Union calling to reschedule the conference. Reid asked Latimer-Jackson why she had recommended the five-day suspension when no one from the Union had been present at the conference, and, according to Reid, she replied that she had spoken to Germaine over the phone about his case. Reid told her "that in itself was not acceptable because it is [Germaine's] right to have Union representation as it pertains to the charges" when discussing disciplinary charges. (Tr. 47.)[5] No other testimony, from either Reid or Germaine (who did not testify in this matter) elaborated on this alleged conversation with Latimer-Jackson, and no testimony was adduced as to what weight, if any, Latimer-Jackson afforded the conversation in her original recommendation of a five-day penalty. Latimer-Jackson denied speaking with Germaine or any Union representative in conjunction with the initial informal conference.

On January 28, 2005, Reid phoned Michael Falzarano, the Director of the Employee Discipline Unit ("EDU") at HRA, and explained the situation. Reid testified that Falzarano told him he would look into it, that a new hearing date would be scheduled, and that the five-day suspension would be reversed. According to Reid, at some date after his discussion with Falzarano, Reid encountered Latimer-Jackson, whom he described as seeming "a little disturbed" and explained to Reid that "Falzarano "had chewed us out" with reference to the conversation between Reid and Falzarano. (Tr. 62-63.) Falzarano, who did not recall his discussion with Reid, denied having in any way reprimanded Latimer-Jackson and testified that such rescheduling was common. Latimer-Jackson also denied having been in any way reprimanded, describing rescheduling as a "common, common practice." (Tr. 82-83.)

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[5]Numbers in parentheses preceded by "Tr." denote references to the transcript of the hearings held in this matter on February 21 and April 13, 2006, which are continuously paginated.

The rescheduled informal conference took place on February 3, 2005, with both Reid and Germaine present. Before the conference began, Germaine and Latimer-Jackson engaged in conversation that Reid described as of a personal nature. Reid stated that Germaine and Latimer-Jackson appeared, from their conversation, to have known each other from another work location because they discussed "matters that were not pertaining to the charges." (Tr. 52.) Latimer-Jackson testified, however, that her only prior encounter with Germaine took place in 2001 when he was previously before her on another disciplinary matter and she imposed a penalty. No further testimony was adduced regarding any pre-conference interaction between Latimer-Jackson and Germaine.

At the informal conference, Reid presented the Union's case and responded to Latimer-Jackson's questions. Reid testified that he explained, and Germaine confirmed, that Germaine had not filed a written report of his arrest with HRA because the arrest had taken place onsite, in the presence of Germaine's co-workers and supervisor. Because of that, Germaine had assumed that there was no need to report it, as "everyone in his office had knowledge that he was arrested." (Tr. 49-50.)

Latimer-Jackson testified that the evidence the Union presented at the informal conference had not ameliorated Germaine's violation of the code of conduct, describing the proffered evidence as "more or less court appointment documents," which were "apples and oranges" to the charges before her, that is, Germaine's obstruction of the DOI investigation by failing to appear on two occasions for his interview and to report, as required, his arrest to HRA. (Tr. 83-84.) On cross-examination Latimer-Jackson acknowledged that the documentary evidence was the same presented at both the first, *in absentia*, informal conference, and the second informal conference. She testified

that the reason for the penalty enhancement was Germaine's "attitude and his unwillingness to accept responsibility for . . . the charges against him." (Tr. 95.)

On March 2, 2005, Reid testified he was present at the employee discipline unit on another member's case when Latimer-Jackson arrived at work. Reid went to her desk to inquire about Germaine's case because the decision from the February 3 conference had not yet been received. According to Reid, Latimer-Jackson told him that she had recently mailed it and that she was recommending a seven-day suspension, two days longer than the decision following the January 12 conference. Reid testified that he said, "You are really trying to stick it to me," and that "[s]he just laughed it off," giving him no explanation. (Tr. 54.) Latimer-Jackson testified that she "did not recall that conversation at all." (Tr. 85.) The second decision, issued on March 1, 2005, recommended a penalty of seven days' suspension without pay.

As relief, the Union requests an order directing Latimer-Jackson and the HRA to cease and desist from interfering with and retaliating against Union members, including Germaine, in the exercise of their rights under NYCCBL § 12-305, including the right to insist on compliance with the contractual grievance procedure. The Union also seeks an order of this Board rescinding Germaine's seven-day suspension, expungement of the suspension from his personnel files, a re-hearing *de novo* at an informal conference with a conference holder other than Latimer-Jackson, and a posting.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that, in violation of NYCCBL § 12-306(a)(1), HRA interfered with

Germaine's right to participate in the grievance procedure and the Union's right to represent its members when Latimer-Jackson issued a penalty recommendation without the Union's or Grievant's participation in the January 12, 2005, informal conference.[6] The Union argues that NYCCBL § 12-306(a)(1) was violated also, in that Latimer-Jackson issued the March 1, 2005, decision increasing the recommended suspension by two (2) days after the Union sought a rescheduled informal conference, after holding the January 12, 2005, informal conference *in absentia*. The Union asserts that the increase in penalty was retaliation predicated upon protected Union activity, that is, insisting on compliance with the disciplinary process as set forth in the Agreement, and that the enhancement of the penalty violated NYCCBL § 12-306(a)(3), by interfering with, restraining and coercing Germaine for the Union's insistence that HRA comply with the contractual grievance procedure. In support of this, the Union asserts that Latimer-Jackson had before her the same record on both occasions, notes the close connection in time between the protected activity and the allegedly retaliatory action, and asserts that this Board should credit Reid's testimony that Latimer-Jackson admitted to him that she had been reprimanded by her supervisor. The Union asserts that the Board should conclude that the increased penalty was the result of Latimer-Jackson's anger at having been

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[6] NYCCBL § 12-306(a) 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 . . . .

found responsible for violating Germaine's rights under the Agreement.

City's Position

The City argues that the holding of the initial informal conference *in absentia* did not invalidate the grievance procedure or constitute an interference with Germaine's right to be represented or the Union's right to represent Germaine or any other of its members. It notes that such conferences were frequently held *in absentia*, and that reschedulings were likewise common. In any event, the Union did have an opportunity, at the rescheduled conference, to present its case on Germaine's behalf.

Further, there is no agreement between the parties herein that the informal conference holder reschedule an informal conference if the employee fails to appear and the record does not reflect a request to reschedule. The Union has alleged no conduct by HRA that it prevented the Union from representing its members at informal conferences.

Moreover, Reid was not engaged in protected activity under the NYCCBL because his complaint to Falzarano does not qualify as protected under the NYCCBL. Reid's complaint to Falzarano did not relate to "the employment relationship." Even if the Union could establish that it was engaged in protected activity of which HRA's agents were aware, the Union fails to allege sufficient facts to find a causal connection between HRA's actions and the allegedly protected activity. Latimer-Jackson's decision to recommend a penalty of seven days' suspension was based on Reid and Germaine's failure to present evidence that provided a sufficient defense to the charges brought against Germaine, Germaine's attitude and manner, and the totality of documentary evidence available.

Even if the Union could support its claims of anti-union animus, HRA had a legitimate

business reason for Latimer-Jackson to recommend the higher penalty based on the totality of the evidence presented to her, and it was within the agency's discretion to implement that penalty.

DISCUSSION

This case presents two separate but related issues: (1) whether HRA violated NYCCBL §12-306(a)(1) by interfering with Germaine's right to be represented by the Union and by interfering with the Union's right to represent its members, by holding the January 12, 2005, informal conference in absentia; and (2) whether, after the Union's protest against the imposition of a penalty in the absence of Germaine and the Union representative, HRA retaliated by increasing the penalty, thus violating NYCCBL §12-306(a)(3), and, derivatively, §12-306(a)(1). This Board finds that although the Union has articulated *prima facie* claims of interference and retaliation for protected activity under the NYCCBL, it has failed to sustain its burden of proving that HRA's actions were taken for the purpose of either interfering with or retaliating for protected activity.

1. Interference Claim

Pursuant to NYCCBL § 12-306(a)(1), it is an improper practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. . . ." In this case, the claim of interference is based on the alleged subversion of the disciplinary process by HRA's failure to initially reschedule the informal conference, and Latimer-Jackson's resultant holding of the conference *in absentia*.

In evaluating claims under NYCCBL §12-306(a)(1), this Board has repeatedly held that "[a]ctions which are inherently destructive of important employee rights may constitute unlawful interference even in the absence of proof of improper motive." *Local 1180 Communications*

Workers of America, Decision No. B-28-2003 at 8-9, quoting, *inter alia, Assistant Deputy Wardens Ass'n*, Decision No. B-19-95 at 27; *citing*, *Committee of Interns and Residents*, Decision No. B-26-93, *aff'd sub nom. Committee of Interns and Residents v. Dinkins*, No. 127406/93, slip op. at 47 (Sup. Ct. N.Y. Co., Nov. 29, 1993). *See also*, *District Council 37*, Decision No. B-6-2004 at 10-11. A denial of access to the grievance process constitutes "a *prima facie* interference with employees' rights in violation of §12-306(a)(1) of the NYCCBL." *District Council 37*, at 10 (quoting *Lehman,* Decision No. B-23-82 at 10-12); *see also Local 420, District Council 37*, Decision No. B-11-2002 at 4-7 (distinguishing between pure interference claim under §12-306(a)(1) and intertwined retaliation and interference claim under §12-306(a)(3) of the NYCCBL).

In the instant case, the Union has stated a *prima facie* case of interference. By holding the hearing *in absentia* after receiving notice through Strickland that Reid required an adjournment of the informal conference and by not taking any steps to inform Germaine or Reid that the adjournment was denied, the City clearly caused Germaine to not appear at the informal conference, and the result was the imposition of a penalty absent input either from the employee or his union representative.

The testimony of City witnesses that Shehee could not remember whether Strickland alerted her to Reid's need to adjourn the informal conference and whether Falzarano informed Latimer-Jackson of Reid's request does not in any way undermine the clear and credible testimony offered by Reid and Strickland that management was made aware of the need to adjourn. We need not find any improper motivation here. *Local 1180, Communications Workers of America,* Decision No. B-28-2003 at 8-9. Coupled with Latimer-Jackson's testimony that she was not told of the request, the testimony establishes a breakdown of communications on the part of management that resulted in

the deprivation of Germaine of his right to participate in and be represented by his Union at the informal conference component of the negotiated disciplinary process. Without more, these facts establish a *prima facie* claim of interference pursuant to §12-306(a)(1).

However, in this case, upon being alerted to the communication breakdown and the resultant imposition of a penalty without employee or union participation, management swiftly took action to vacate the penalty assessed and reschedule the hearing. Both parties agree that Reid informed Falzarano on January 28 of the failure to reschedule the hearing as requested by Strickland and that Falzarano issued a letter rescheduling the informal conference that very day. The City asserts, and the Union does not deny, that this rescheduled informal conference was a *de novo* review of the charges and appropriate penalty. Indeed, the Union affirmatively alleged that, at the rescheduled informal conference, the Union presented exculpatory evidence that would "at the least result in a reduction of the five-day suspension, or even in the withdrawal of the charge altogether."

This swift corrective action negated the harm caused by management's action and, therefore, is sufficient to establish that there was no adverse consequence to the improper holding of the informal conference *in absentia*.[7] A mere conflict in scheduling, absent evidence that the conflict precluded the Union performing its representative function and the employee from exercising his rights, does not amount to interference violative of NYCCBL §12-306(b)(1). *See, e.g.*, *District Council 37,* Decision No. B-30-2002 at 6. Absent any concrete, actual interference with the employee's right to participate in the disciplinary process and to be represented therein by his Union, we are unable to find that the improper practice is made out by the Union, and accordingly dismiss

[7] The failure of Latimer-Jackson's January 21, 2005, decision to recite the phrase "held *in absentia*," is of no legal consequence here.

that charge.

2. Retaliation and Retaliatory Interference

Whether an alleged action constitutes retaliation based on anti-union animus and thus violates NYCCBL § 12-306(a)(3) or an alleged interference based upon protected union activity, and thus violates § 12-306(a)(1) derivatively under § 12-306(a)(3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, Decision No. B-51-87. *See Uniformed Sanitation Chiefs*, Decision No. B-32-2001 at 7, (citing *Uniformed Fire Officers Association, Local 854*, Decision No. 17-2001 at 7); *see also United Probation Officers*, B-4-1991 at 14. To establish a claim of retaliation, or, derivatively, unlawful interference, a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. the employee's union activity was a motivating factor in the employer's decision.

Id.; see also District Council 37, Local 376, Decision No. B-12-2006 at 14; *District Council 37 v. City of New York*, 22 A.D.3d 279, 283 (1st Dept 2005). 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. *Id*.

NYCCBL § 12-306(a)(3) provides that it is an improper practice for a public employer to "discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any public employee organization." *See District Council*

37, Local 376, Decision No. B-12-2006 at 14.

The City has not denied that the management was aware that Reid was acting on Germaine's behalf, in his official union capacity, in seeking a vacatur of the penalty imposed *in absentia* and an opportunity to be heard at a rescheduled informal conference at which the appropriate penalty would be addressed *de novo*. It is well established that the participation in a grievance process is considered protected activity under the NYCCBL. *Id; Fabbricante*, Decision No. B-3--2003 at 27; *Doctors Council*, Decision No. B-12-97 at 10; *see also District Council 37*, Decision No. B-27-2003 at 7-8, *citing Rivers*, Decision No. B-32-2000; *United Probation Officers Ass'n*, Decision No. B-53-90; *Fabbricante*, Decision No. B-30-2003 at 27. If "management has knowledge of that [protected] activity, a petitioner establishes the first prong of the test." *District Council 37*, Decision No. B-27-2003 at 7-8. This element has clearly been made out by petitioner.

However, the evidence is far more conclusory and scant for the second prong of the test, requiring a showing of a causal connection between the protected activity and the management action complained of. *Local 376, District Council 37*, Decision No B-12-2006 at 15. The petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of "proximity in time" "together with other relevant evidence." *Social Service Employees Union, Local 371*, Decision No. B-31-2005 at 12-13 (citing *Civil Service Bar Ass'n*, Decision No. B-17-2004 at 18). However, the Board stated unequivocally that some showing of causation is required; '[a]lleging an improper motive without showing a causal link between the management act in question and the union activity does not state a violation of the NYCCBL." *Id.* (*citing, Sergeants Benevolent Ass'n,* Decision No. B-22-2005 at

21; *Civil Service Bar Ass'n*, Decision No. B-17-2004 at 18); *see also District Council 37*, 22 A.D.3d at 285 (endorsing Board's application of test). As the record contains no outright admission of any wrongful motive, proof of the second element must necessarily be circumstantial. *City Employees Union, Local 237,* Decision No. B-13-2001 at 9.

In the instant case, we have carefully considered the testimony and documentary evidence offered by the parties. We find that the evidence is insufficient to establish a causal connection between petitioner's engaging in protected activity and Latimer-Jackson's increased penalty on the disciplinary charges against Germaine after the rescheduled conference.

Clearly, the proximity in timing is indicative and could establish, in conjunction with other evidence, a *prima facie* case: Latimer-Jackson reviewed the same documents and record twice, and, after petitioner asserted Germaine's right to be present, and Latimer-Jackson was required to reschedule the informal conference, she increased the appropriate penalty, ostensibly based on Germaine's "attitude." However, the other evidence is far from convincing: Latimer-Jackson testified that she was not in any way criticized by her superiors for the proceeding *in absentia*, a fact that is consistent with the evidence of Shehee and Falzarano that neither of them remembered passing on the information that Reid was unavailable. Thus, it is most likely that the communications breakdown happened with either Shehee or Falzarano, and no evidence was adduced to support Reid's conclusory assertion that Latimer-Jackson was somehow angered by the need to reschedule. Notably, no evidence other than Reid's testimony that Latimer-Jackson told him that Falzarano rebuked her for the rescheduling – a statement denied by Latimer-Jackson – has been introduced by the Union on the issue of Latimer-Jackson's analysis after the

rescheduled informal conference.[8]

Other evidence of causation is lacking as well. For example, Latimer-Jackson was not asked to specify what about Germaine's attitude led her to conclude that he was refusing to accept responsibility for his actions, nor did Reid testify either way as to Germaine's alleged lack of acceptance of responsibility. Additionally, Germaine did not himself testify and thus did not contradict Latimer-Jackson's testimony that his bearing and defense at the informal conference led her to conclude that he failed to recognize, even after having been charged, the concerns that management had with his failure to comply with the requirement that he report his arrest. It is reasonable to draw an adverse inference from Germaine's failure to rebut this testimony. *See Steiner v. DeBuono*, 239 A.D.2d 708, 710 (3d Dept.), *app. den.,* 90 N.Y.2d 808 (1997); *Youssef v. State Bd. for Professional Medical Conduct*, 6 A.D.3d 824 (3d Dept. 2004).

That adverse inference is heightened by the failure, at the rescheduled conference, of Germaine to mount a persuasive defense. According to Reid, he and Germaine told Latimer-Jackson that Germaine had not filed a written report about his arrest with HRA, because the arrest occurred on the job in the presence of his supervisor and his co-workers, and he felt there was no need to do anything else because "everyone in his office had knowledge that he was arrested." [Reid: Tr. 49–50.] However, Reid's presentation to Latimer-Jackson, according to his own testimony, failed to explain why Germaine did not report to DOI as instructed on two

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[8] The Union did not establish who, if anyone, had been held accountable for the need to reschedule. At the hearing in the instant matter, Latimer-Jackson contradicted Reid's testimony. When asked if she had been reprimanded by Falzarano for having to reschedule Germaine's case, she testified, "Not at all." (Tr. 82.) Based upon the weight of the evidence submitted, Latimer-Jackson's testimony on this point is the more credible.

separate occasions. Even if Germaine believed that his own agency was aware of the arrest and that this obviated reporting directly to his own superiors, the instruction to report to DOI was lawful, and Germaine disobeyed it not once but twice. It is well-established under public employment law, including § 75 of the Civil Service Law, that the disobedience of a lawful order is an appropriate basis for discipline *See, e.g., Plante v. Buono*, 172 A.D.2d 81, 83 (3d Dept. 1991); *Matter of Lowery*, 244 A.D.2d 192 (1st Dept. 1997).

Thus, Reid's evidence in mitigation at the informal conference did not address at all either the charges of failure to report to DOI, and this uncontested failure to comply, or Germaine's bearing which could have formed the basis of the enhanced penalty, which Latimer-Jackson said was predicated on Germaine's "attitude and his reluctance to accept responsibility." Moreover, Reid's presentation of a defense – that compliance with the regulation requiring Germaine to report was excused because his arrest was seen by his co-workers – is not self-evident. Latimer-Jackson could permissibly have found that the excuse offered simply failed to obviate any compliance with the regulation. This Board need not speculate, however, as to the basis of Latimer-Jackson's conclusion; it was the Union's burden of establishing, even through indirect evidence, a causal connection between the protected union activity and the complained of action. Petitioner failed to carry its burden of proof, and the claim is dismissed.

Accordingly, for the reasons stated herein, the petition is 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 filed by Local 1180, Communications Workers of America, AFSCME, against the City of New York and the Human Resources Administration, docketed as BCB-2474-05, is denied in its entirety.

Dated: May 30, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER