***District Council 37, Local 1113,* 77 OCB 25 (BCB 2006)**
[Decision No. B-25-2006] (IP) (Docket No. BCB-2524-05).

Summary of Decision: Petitioner alleged that the Department of Finance violated the NYCCBL when it denied an employee's request for Union representation at meetings with supervisors to discuss her allegedly excessive tardiness, engaged in coercive conduct to prevent this employee from requesting Union representation at these meetings, and retaliated against the employee by issuing disciplinary charges for exercising her rights under the NYCCBL. The City claimed that the employee was not entitled to Union representation because these meetings were not disciplinary in nature, and the issuance of the charges were based upon her own insubordination. The Board held that DOF violated McAlpine's right to Union representation at these meetings, interfered with her protected, statutory rights, and retaliated against her for the invocation of her rights. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, LOCAL 1113,

Petitioner,

-and-

THE CITY OF NEW YORK AND THE NEW YORK CITY DEPARTMENT OF FINANCE,

Respondents.

DECISION AND ORDER

On December 7, 2005, District Council 37, Local 1113 ("Union" or "Local 1113") filed an improper practice petition, on behalf of Andrea McAlpine, against the City of New York and the New York City Department of Finance ("City" or "DOF") alleging that DOF violated the New York

City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3). The Union claims that DOF denied her Union representation at two meetings with management, engaged in coercive conduct to prevent her from requesting Union representation, and retaliated against Petitioner by issuing disciplinary charges against her for invoking her right to such representation at these meetings. The City maintains that the Union failed to articulate prima facie claims because McAlpine was not entitled to Union representation at these meetings and DOF, based upon McAlpine's insubordination, demonstrated a legitimate business reason for issuing these charges. We find that DOF violated McAlpine's right to Union representation at these meetings, interfered with her protected, statutory rights, and retaliated against her for invoking her right to representation at these meetings. Accordingly, the petition is granted in its entirety.

BACKGROUND

DOF collects revenues for the City of New York, encourages compliance with the tax and revenue laws for the City of New York, provides a forum for the public to dispute tax matters and parking violations, and maintains property records. In DOF, the Treasury Bureau administers the City of New York's network of bank accounts, manages the cash flow of the banking and investment system for the City of New York, holds all cash bail until it is ordered by the court to be refunded, maintains Public Improvement Liens against contractors employed by the City of New York, and makes payments to all contractors and vendors used by the City of New York.

McAlpine has worked for DOF for the last 19 years, first in the Collections Division, and then in the Treasury Bureau, Client Services Division, where she has been working for the last six

years. Since 2004, McAlpine's immediate supervisor has been Rita Ramirez. Above Ramirez in the chain of command is Deputy Director of Client Services Linda Gerwin, who reports to Director of Client Services Ricky Kwong.

On July 27, 2004, Ramirez issued to McAlpine a Notice of Fourth Lateness, First Warning which documented McAlpine's late arrival to work on four separate occasions within a period of two months. According to this notice, a meeting was held involving McAlpine, Deputy Director Gerwin, and Ramirez, at which McAlpine was "cautioned" concerning her latenesses and McAlpine agreed to "do better and be at work on time." (City's Exhibit 1). Additionally, a copy of this notice was placed in McAlpine's personnel file.

On April 11, 2005, McAlpine received an e-mail from Ramirez concerning her continued failure to arrive to work on time. According to the email, in "the 1st quarter of the year, you were late a total of 6 times. Since the beginning of the 2nd quarter, you've been late 2 times." Then, the email lists the dates and amount of time in which McAlpine was late, and concluded by requesting a conference be held in order "to go over the Department's Lateness Policy." (Respondents' Exhibit 1).[1]

On April 13, 2005, McAlpine was approached by Ramirez at her desk, and requested McAlpine's immediate presence at a meeting with her to discuss DOF's lateness policy. McAlpine then requested that she have Union representation at this meeting. Ramirez, without granting or denying McAlpine's request, went to Director Kwong's office to discuss the request for Union representation. According to Ramirez, Director Kwong refused to permit a Union representative

[1] Hereinafter, "City's Exhibit" will reference documents submitted by Respondents during the hearing procedure, while "Respondents' Exhibit" will reference documents submitted by Respondents in their written submissions."

present at this meeting. Ramirez returned to McAlpine's desk, informed her that she would not be allowed to have Union representation present at the meeting, and instructed McAlpine to attend the meeting. McAlpine, insistent that a Union representative be present at this meeting, called her Union representative and Ramirez returned to Director Kwong's office. According to McAlpine, her Union representative told her that she should seek a one day postponement of the meeting to allow for the attendance of the Union representative. After McAlpine got off the phone with the Union representative, Ramirez returned to McAlpine's desk. McAlpine requested the meeting be postponed for one day to allow for the Union representative's attendance, and communicated to Ramirez that she felt "uncomfortable" attending the meeting without the Union representative. (Tr. 15).[2] Ramirez repeated Director Kwong's denial of McAlpine's request for Union representation. At that point, McAlpine informed Ramirez that she would not attend this meeting. Consequently, no meeting was held on April 13, 2005, regarding McAlpine's latenesses.

The following day, April 14, 2005, Ramirez and Deputy Director Gerwin approached McAlpine in the morning. Deputy Director Gerwin informed McAlpine that they needed to meet with her later on in the day to discuss her latenesses and her failure to attend the previous day's meeting. McAlpine responded "I would really feel comfortable with my union rep there." (Tr. 17). The two supervisors then left McAlpine's presence, but returned shortly thereafter, and Ramirez stated: "I [McAlpine] don't need a union rep. It's just a general meeting, and that I need to come into the office; they would like to speak to me at 3:00 o'clock." (Tr. 17).

Ramirez and Deputy Director Gerwin left McAlpine and, according to Deputy Director Gerwin, she then spoke with DOF's Director of Labor Relations regarding McAlpine's request for

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[2] "Tr." refers to citations from the hearing transcript.

Union representation at the meeting scheduled to discuss her latenesses. Deputy Director Gerwin testified that she was informed that McAlpine was not entitled to such representation. Ramirez and Deputy Director Gerwin then returned to McAlpine's desk, and informed her that she had to attend a meeting to discuss her latenesses and her refusal to attend the previous day's meeting, and that no Union representative was necessary. In response, McAlpine stated that she would attend the meeting "under one condition, that the door be left open." (Tr. 18). Ramirez informed McAlpine that "it shouldn't be a problem." (Tr. 18).

Later that day, McAlpine entered Deputy Director Gerwin's office to attend the meeting, but was surprised to see that, in addition to Ramirez and Deputy Director Gerwin, Director Kwong and DOF employee Rosanna Hill[3] were present. According to McAlpine, since she "didn't know it was going to be all of these people there [Deputy Director Gerwin's office]," she wanted her Union representative. However, she admitted that she was willing to attend this meeting without Union representation, if the door was left open. McAlpine testified that Director Kwong refused to leave the door open; however Deputy Director Gerwin testified that, despite McAlpine's request, Deputy Director Gerwin closed the door to her office because they "felt it was in Andrea's [McAlpine's] best interest if they [the DOF employees who worked adjacent to Deputy Director Gerwin's office] didn't hear what was going on, you know. We thought she would want some privacy." (Tr. 51-52). McAlpine responded to the closed door by renewing her request for Union representation. When Director Kwong again refused this request, McAlpine left the room. According to McAlpine, as she left, she overheard Director Kwong instruct Ramirez to write her up for leaving the meeting.

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[3] According to the unrebutted testimony of McAlpine, Ms. Hill is Director Kwong's secretary and "takes notes for [Director] Kwong when people are called into the office." (Tr. 19).

On April 15, 2005, McAlpine received a disciplinary memorandum, entitled "Insubordination for Failing to Attend the Meeting of 4/14/06," from Ramirez which stated that McAlpine's exit from the meeting, without the consent of her supervisors who were present, constituted a failure to follow the instructions of one's supervisor and insubordination. (Petitioner's Exhibit A). Further, the memorandum informed McAlpine that such behavior was "unacceptable" and constituted violations of the DOF Code of Conduct.

On August 29, 2005, DOF served McAlpine with charges and specifications regarding the incidents at issue, charging her with insubordination "for failure to obey a lawful order of a superior in the agency." (Petitioner's Exhibit B). Specification One stated that: "On April 13, 2005 at 3:00 PM, your supervisor scheduled a meeting with you to discuss your lateness record. You refused to attend the conference with your supervisor because you did not have union representation." (Petitioner's Exhibit B). Similarly, Specification Two asserted that on April 14, 2005, McAlpine was asked to "report to a supervisory conference regarding your behavior on April 13, 2005. When you arrived at the office, you asked for union representation and an open [sic] door meeting. The Unit Director, Ricky Kwong, who was also attending the conference, ordered you to proceed with the conference. You refused to proceed with the conference and walked out of the office." (Petitioner's Exhibit B).

On December 7, 2005, the Union filed the instant improper practice petition alleging that DOF denied McAlpine Union representation at the April 13 and 14, 2005 meetings, engaged in coercive conduct to prevent her from requesting Union representation, and retaliated against Petitioner by issuing disciplinary charges against her for invoking her right to such representation at these meetings. The union seeks an order: declaring that DOF violated McAlpine's *Weingarten*

rights and retaliated against McAlpine by serving her with a disciplinary memorandum and charges, and ordering that DOF cease and desist from interfering with employees' rights to request Union representation and expunging McAlpine's personnel file of any disciplinary charges resulting from these incidents.

POSITION OF THE PARTIES

Union's Position

The Union contends that DOF violated the NYCCBL § 12-306(a)(1) when it refused to allow McAlpine to have a Union representative present during the meetings that were scheduled for April 13 and 14, 2005. McAlpine, pursuant to an employee's *Weingarten* rights, was entitled to representation at these meetings because she reasonably believed that such a meeting could lead to discipline. McAlpine needed this representation because she knew her latenesses would be one of the topics addressed, had received previously a written warning regarding her latenesses, was approached multiple times regarding these meetings on these two days, and was called into a meeting with Director Kwong, who was accompanied by his personal secretary. In fact, McAlpine expressed her desire to have a Union representative present many times, informed Ramirez and Deputy Director Gerwin that she felt uncomfortable attending a meeting without a Union representative present, and was subsequently the subject of a disciplinary memorandum and charges predicated on the ground that her requests for Union representation at these meetings were tantamount to insubordination. Therefore, McAlpine properly invoked her *Weingarten* rights, and DOF's denial of representation violated these rights.

Furthermore, the Union avers that DOF violated NYCCBL § 12-306(a)(1) by interfering with

McAlpine's protected rights under NYCCBL § 12-305 when it disciplined her for not attending the April 13, 2005 meeting and for prematurely leaving the April 14, 2005 meeting because DOF denied her legitimate request for Union representation.[4] In addition, the charges brought against McAlpine specifically refer to her invocation of her *Weingarten* rights. Thus, DOF engaged in coercive conduct in further violation of NYCCBL § 12-306(a)(1) when it prevented McAlpine from receiving Union representation.

Finally, DOF retaliated against McAlpine, in violation NYCCBL § 12-306(a)(3), when DOF, with knowledge of McAlpine's protected activities, the invocation of her *Weingarten* rights, brought charges against her for the invoking her right to Union representation at these meetings. The causal connection between DOF's charges against McAlpine and her protected activities is clear from the timing of the charges, the language of the disciplinary memorandum and the charges, and the explicit comment made by Director Kwong to Ramirez when McAlpine left the April 14, 2005 meeting.

City's Position

The City contends that DOF did not violate McAlpine's *Weingarten* rights because the meetings on April 13 and 14, 2005 were not investigatory interviews that may reasonably lead to

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[4] 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.

discipline. Further, due to the innocuous nature of the April 11, 2005 email correspondence, which did not mention any type of penalty, McAlpine could not have a reasonable belief that discipline may result from these meetings.

Finally, with regard to the Union's retaliation claim, the City asserts that the Union has failed to establish that McAlpine was involved in union activity. She was not entitled to Union representation under the circumstances. Further, the Union cannot demonstrate a causal connection between her invocation of her *Weingarten* rights and the charges levied against her. The charges were brought against her due to her insubordinate failure to attend the April 13, 2005 meeting and her refusal to continue with the April 14, 2005 meeting. Since McAlpine failed to obey her supervisors' instructions and orders, she had disciplinary charges levied against her.

DISCUSSION

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows.

The issue in this case is whether DOF interfered with McAlpine's right to Union representation and retaliated against her because of her assertion of rights protected under the NYCCBL. Because this Board finds that DOF violated McAlpine's rights, we grant the Union's petition in its entirety.

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (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 investigatory interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary

measures, and the employee requests such representation. 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 Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984).

Subsequently, the recognition of an employee's rights to a union representative at a meeting where the employee reasonably believes that the interview could result in disciplinary measures was adopted by the New York State Public Employee Relations Board ("PERB") and by this Board. *See New York City Transit Authority*, 35 PERB 3029 (2002), *aff'd*, Index No. 45830/02, 2005 005 N.Y. App. Div. LEXIS 14882 (2nd Dep't Dec. 27, 2005) ("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"); *Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003 at 13 (following the PERB's recognition of *Weingarten* rights for public sector employees).

Since *Weingarten* rights have been recognized under the NYCCBL, the Board must determine whether McAlpine's *Weingarten* rights were violated by management's conduct in connection with the April 13 and 14, 2005 meetings. This Board finds that, based upon the well-established analysis applicable to *Weingarten* rights, the Union has demonstrated such a violation.

First, to properly invoke *Weingarten* protections, an employee must have a reasonable belief that a meeting could have resulted in discipline as measured by an objective standard. When examining this issue, NLRB, PERB and the courts have applied an objective test, that is, examining all the external evidence and excluding 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 our seminal case regarding *Weingarten* rights, *Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003, an employee was called into a meeting to discuss her on-the-job performance. 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 a demotion. Id. at 14; *see Burton*, Decision No. B-15-2006 (employee's belief that discipline could occur during his case conference was reasonable because he previously had been disciplined as a result of his actions at a prior case conference); *Consolidated Edison Co. of New York, Inc.*, 323 NLRB 910, 915 (1997) (an employee had a reasonable belief that discipline could result from a meeting because he failed to perform assigned tasks which constituted a disciplinable offense); *New York City Transit Authority*, 35 PERB 3029 at 3082 (2002) (employee had a reasonable belief that discipline would arise from a closed-door meeting because the employee's alleged comment constituted workplace misconduct that could have

resulted in discipline).

In the instant matter, we find that McAlpine had a reasonable belief that discipline could have resulted from either the April 13 or the April 14, 2005 meeting. On July 27, 2004, McAlpine was counseled by Ramirez regarding her tardiness, and, as a result of such, she received a disciplinary memorandum placed in her personnel file. Subsequently, she was late to work on eight separate occasions, and shortly after her final lateness in April, McAlpine received an email correspondence from Ramirez and was later approached by Ramirez regarding her latenesses. Since arriving late to work is a disciplinable offense, and McAlpine had already received a disciplinary memorandum regarding this particular issue, we find that McAlpine had a reasonable belief that she could have been disciplined at either the April 13 or 14, 2005 meeting.

The next step in the analysis of the *Weingarten* rights is to determine whether the employer complied with its duty to either grant the employee's request for representation, discontinue the interview, or offer the employee the choice between continuing the interview unaccompanied by union representation or having no interview at all. *See Axelson, Inc.*, 285 NLRB 49, 53; *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984); *Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003 at 10; *Burton*, Decision No. B-15-2006 at 16. Specifically at issue in the instant matter is whether management violates an employee's *Weingarten* rights when it rejects an employee's valid request for union representation at a meeting, proceeds with that meeting without explaining to the employee her options, and that employee is subjected to discipline for refusing to participate in that meeting.

According to the NLRB, after an employee invokes her *Weingarten* rights, the employer must inform the employee of the three options available to the employee. *See AK Tube, LLC*, 2004 NLRB

LEXIS 718, 36-37 (2004); *see also Glomac Plastics, Inc.*, 234 NLRB 1309, 1309 (1978). Once the employer rejects the employee's request, it is for the employee to make "the choice between having an interview unaccompanied by his representative or having no interview and foregoing any benefits that might be derived from one." *Sun Petroleum Products, Co.*, 257 NLRB 450 at 451 (1981); *see also Int'l Bhd. of Electrical Workers, Local 236*, 339 NLRB 156 at 1200 (2003). Therefore, an employer cannot "discipline an employee for refusing to accede to the employer's demand that such an interview be conducted in the absence of a union representative." *Glomac Plastics, Inc.*, 234 NLRB at 1309; *see also Int'l Ladies' Garment Workers' Union v. Quality Mfg Co.*, 420 US 276 (1975) (disciplining employee for failure to report to a disciplinary meeting, after denying the request for union representation violates employee's *Weingarten* rights).

Based upon these well-established principles, we find that McAlpine's *Weingarten* rights were violated in connection with both the April 13 and 14, 2005 meetings. On April 13, McAlpine asserted her *Weingarten* rights, and Ramirez failed to apprise McAlpine of her options under *Weingarten*. However, the conversation ended there, and, had management taken no further steps, that failure might not have constituted a violation of *Weingarten*. *See Sun Petroleum Products, Co.*, 257 NLRB at 451. Where, as here, the employee is subsequently charged with insubordination for refusing to participate in that disciplinary interview without representation, that employee's *Weingarten* rights have been violated. In this case, Specification One against McAlpine charged that she refused to participate in the April 13, 2005 meeting "because you [McAlpine] did not have union representation." (Petitioner's Exhibit B). Thus, the very basis for the discipline asserted by management in its formal charges was McAlpine's declining to participate in the meeting without representation. Clearly, McAlpine's *Weingarten* rights were violated.

Similarly, the April 14, 2005 meeting was also violative of McAlpine's *Weingarten* rights. At this meeting, McAlpine's request for Union representation was denied by Director Kwong, and McAlpine left the office. However, none of the three supervisors in attendance informed McAlpine of her three *Weingarten* options. Rather, they insisted that she attend the meeting without such representation, and, as McAlpine was leaving the office, Director Kwong instructed Ramirez to write her up for leaving. Indeed, the formal charges against McAlpine recite that she requested Union representation, and that, without more, Kwong "ordered [her] to proceed with the conference." Management's failure to inform McAlpine of her available options regarding the meeting and representation, and its subsequent discipline for her refusal to attend the meeting without representation were in clear contravention of McAlpine's *Weingarten* rights. Accordingly, we find that DOF violated NYCCBL §12-306(a)(1).

Having found a violation of McAlpine's *Weingarten* rights, we now turn to the issue of remedy. In *Taracorp Industries*, 273 NLRB 221 (1984), the NLRB addressed the issue of whether vacating an employers imposition of discipline, termed a "make-whole" remedy, was appropriate when an employer has violated an employee's *Weingarten* rights. The NLRB held that in "typical *Weingarten* cases" a make-whole remedy is not available because the employee is disciplined, not for the invocation of one's *Weingarten* rights, but rather for whatever underlying offense gave rise to the meeting in the first place. *Id.* at 223. However, a "make-whole" remedy is appropriate where an employee is disciplined for engaging in protected union conduct. *Id.* at 222.

In *Barnard College and Transport Workers Union of America, Local 264*, 340 NLRB 934 (2003), 2003 NLRB LEXIS 697, two employees were called into a meeting with their supervisor concerning allegations that they stole materials from their employer. These employees requested

union representation, were denied such representation, and the meeting proceeded without an union representative present. The employer then suspended the employees, who brought a claim for violation of their *Weingarten* rights and retaliation. The NLRB analyzed such motive-based allegation using the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), which examines the motivation for discipline that has been levied. The NLRB found that the employees' *Weingarten* rights were violated, but upheld the suspension because the employer's imposition of the discipline was not based on the employees' invocation of their *Weingarten* rights, but rather on the underlying allegations of theft. 2003 NLRB LEXIS 697 at **11-12. This Board has endorsed the NLRB's analysis, including the availability in appropriate cases, of a make-whole remedy in *Weingarten* cases. *See DeCharbert*, Decision No. B-17-91 at 8.

Here, we find that the make-whole remedy is warranted because DOF disciplined McAlpine for her invocation of her *Weingarten* rights. It is undisputed that McAlpine requested Union representation multiple times and, on each occasion, was denied such representation by either Ramirez, Director Kwong or Deputy Director Gerwin. It is further undisputed that McAlpine was ordered to attend the two meetings despite her invocation of her *Weingarten* rights, and was not informed of any of her legally permitted options, none of which were permitted by management. McAlpine subsequently received a disciplinary memorandum, entitled "Insubordination for Failing to Attend the Meeting of 4/14/06," which stated that her refusal to attend the meeting without Union representation constituted insubordination. Later, on August 29, 2005, disciplinary charges were levied against McAlpine for refusing to attend the April 13 and 14, 2005 meetings without union representation, and her refusal to attend these meetings was asserted to constitute violations of DOF's Code of Conduct.

Based upon Director Kwong's instruction to Ramirez to write up McAlpine as she left the meeting, the attempt to intimidate McAlpine into not exercising this right, and the disciplinary memorandum and charges which explicitly state that the reason for discipline was McAlpine's failure to attend the April 14, 2005 meeting without Union representation, we find that DOF's motivation for disciplining McAlpine was the invocation of her *Weingarten* rights. Accordingly, following the well-established *Weingarten* jurisprudence, we find that a make-whole remedy is warranted, and, therefore, we will direct that McAlpine's personnel file be expunged of the disciplinary memorandum and charges.

We now turn to whether DOF engaged in retaliatory conduct when it disciplined McAlpine. 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), which was adopted by this Board in *Bowman*, Decision No. B-51-87, and is substantially similar to the standard used by the Board in the *Wright Line* case. 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 DOF had knowledge of Petitioner's protected activity because invocation of one's *Weingarten* rights is protected activity under the NYCCBL, *Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003 at 13, and McAlpine's supervisors acknowledged that she 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. *See District Council 37*, Decision No. B-12-2006 at 15; *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. 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.

In this case, as was true in *District Council 37*, Decision No. B-12-2006 at 15, "the credible testimony establishes the existence of a causal connection in an unusually direct manner, in part through party admissions." The very charges served on McAlpine explicitly link her refusal to participate in the two disciplinary meetings without Union representation to the disciplinary action taken, and establish that on both occasions, management failed to honor McAlpine's *Weingarten* rights. Moreover, the City witnesses did not convincingly testify regarding their behavior and motivations in this case. For example, the City noticeably failed to produce Kwong, but did call Deputy Director Gerwin. Deputy Director Gerwin testified that, despite McAlpine's request and management's prior assurance, Director Kwong ordered the office door to be closed for the meeting. Deputy Director Gerwin, who was not the decision-maker, tried to render this circumstance innocuous during her testimony by stating that "we [Kwong and Gerwin] thought she [McAlpine] would want some privacy." (Tr. 52). This testimony, patently, is untrue; McAlpine had twice requested that the door be left open, and in any event, Deputy Director Gerwin provided no basis for knowing Kwong's intent in ordering the door closed.

As stated above, we find that DOF was motivated by anti-Union animus when it issued the disciplinary memorandum and charges against McAlpine. Thus, DOF retaliated against McAlpine

for her invocation of her *Weingarten* rights, and, therefore violated NYCCBL § 12-306(a)(1) and (3).

Since we have found that DOF acted in a retaliatory manner when it disciplined McAlpine and NYCCBL § 12-306(a)(1) claims are derivative with NYCCBL § 12-306(a)(3) claims, we need not discuss or analyze the Union's independent interference and coercion claim, in violation of NYCCBL § 12-306(a)(1). In such instances, where the interference claim is inextricably intertwined with the finding of retaliation, the finding of retaliation establishes that the employer interfered with the employee's protected statutory rights.

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 District Council 37, Local 1113, on behalf of Andrea McAlpine, docketed as BCB-2524-05 be, and the same hereby is granted; it is further

ORDERED, that the New York City Department of Finance cease and desist from interfering with employees' rights protected under the NYCCBL; and it is further

ORDERED, that the New York City Department of Finance expunge Andrea McAlpine's personnel file of any disciplinary memorandum or charges resulting from the above-stated incidents of April 13 and 14, 2005, and rescind any disciplinary measure levied against Andrea McAlpine for said incidents.

Dated: July 6, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

ERNEST F. HART
MEMBER