***District Council 37, Local 1113, v. CCRB*, 77 OCB 33 (BCB 2006)**

[Decision No. B-33-2006] (Docket No. BCB-2541-06).

Summary of Decision: The Union alleged that the NYCCBL was violated by CCRB when two Investigators, one of whom was also a Union shop steward, were subjected to critical remarks by supervisors and by members of the CCRB and scrutinized by managerial personnel. The Board finds that the CCRB has interfered, coerced, and restrained these two Investigators in the exercise of their rights under the NYCCBL in violation of § 12-306(a)(1) of the NYCCBL and also that the CCRB has discriminated and retaliated against these two Investigators for their exercise of rights granted under NYCCBL in violation of § 12-306(a)(3). ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME. AFL-CIO,
and ITS AFFILIATED LOCAL 1113,

Petitioners,

- and -
THE CITY OF NEW YORK
and
NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD,

Respondents.

DECISION AND ORDER

On March 15, 2006, District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1113 ("DC 37" or "Union") filed a verified improper practice petition on behalf of Union members Debra Cleaver and Sheena Otto against the New York City Office of Labor Relations and the New York City Civilian Complaint Review Board ("City" or "CCRB"). The Union alleges that the CCRB

violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by reprimanding Cleaver and Otto in retaliation for union activities and in order to discourage participation in activities related membership in the Union. The City does not dispute that Cleaver and Otto have at various times relevant herein taken part in protected union activities but it maintains that Petitioner has failed to demonstrate that Cleaver's and Otto's protected activities were the reasons that supervisory personnel took the actions which are the subject of the claims in the instant petition. Further, the City maintains that, even if the Union could prove anti-union animus, the CCRB had legitimate business reasons for reprimanding Cleaver and Otto in supervisory conference memoranda to both of them and in an interim performance evaluation to Otto.

Upon consideration of all the evidence duly submitted and testimony received during five days of hearing, this Board finds that the CCRB has interfered with, coerced, and restrained Otto and Cleaver in the exercise of their rights under the NYCCBL in violation of § 12-306(a)(1) of the NYCCBL and also that the CCRB has discriminated and retaliated against Otto and Cleaver for their exercise of rights granted under NYCCBL in violation of § 12-306(a)(3).

BACKGROUND

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows. The CCRB is a mayoral agency independent of the Police Department of the City of New York ("NYPD") and is empowered to receive and investigate complaints from members of the public regarding alleged discourtesy, offensive language or conduct, abuse of authority, and the excessive or unnecessary use of force by police officers. Substantiated complaints are forwarded

to the Police Commissioner for any disciplinary action which the Commissioner determines may be warranted.

The CCRB consists of a board of thirteen members of the public appointed by the Mayor, the Police Commissioner, and the City Council. Civilians comprise the CCRB's executive and investigative staff of approximately 140 Investigators, Levels I and II (collectively, "Investigators"). Using Investigative Case Plans ("ICPs"), Investigators are required to apprise their supervisors of their progress in completing witness interviews, document requests, periodic case summaries called "time-trigger reviews," and "closing reports."

Agency protocol calls for ICPs with time-trigger reviews to be filed every four months, but supervisors and Investigators alike agree that, in practice, these update reports have not consistently been required for Teams 1 and 7, the teams to which Otto and Cleaver belonged. A productivity report by the Comptroller of the City of New York, dated June 30, 2006, stated that for the 2005 Fiscal Year ("FY"), ICPs were completed in only one-third of the time. The Comptroller's sampling consisted of 75 of the 6,000 cases which CCRB closed in FY 2005. Kimberly Walters, who supervised Team 7 during the time period covered by the Comptroller's report, and Deputy Executive Director Shari Hyman testified that the Comptroller's report was accurate. Hyman added that CCRB's own larger sampling of 2,500 cases indicated that, during FY 2005, case plans were at least required to be completed in two-thirds of the cases. Hyman added that, every month, she was aware of how many ICPs were not completed and explained that, "in instances there were actually reasons" that ICPs including the time-trigger reviews were not done.

Once cases are ready for board review, they are assigned to board members sitting in three separate panels. Panel members have no interaction with Investigators but occasionally ask the

executive staff – Executive Director Florence Finkle, Deputy Executive Director Hyman, and Assistant Deputy Executive Director Eric Dorsch – to attend panel meetings to answer questions regarding specific cases. Denise Alvarez, Director of Case Management, records the panel meeting minutes which identify the cases under consideration and which note whether the panel agrees or disagrees with the Investigators' recommended findings. It is rare for board members to single out an individual Investigator's work for comment or criticism.

Following the voluntary recognition of the Union as the exclusive bargaining representative for employees in the title of Investigator (CCRB), the Union unsuccessfully moved the New York State Civil Service Commission ("CSC"), in the spring of 2005, to have the title Investigator (CCRB) be classified as competitive under the New York State Civil Service system. When the CSC decision was issued classifying the title as non-competitive, the CCRB informed the Union that the agency planned to terminate all Investigators and rehire only those whom the agency wanted. After extensive high-level negotiations, the CCRB decided to retain all incumbent Investigators. Upon the execution of an agreement between the Union and the agency, those Investigators with more than two years' experience were granted due process rights to contest disciplinary actions. Shop Steward Debra Cleaver was among representatives of the Union who attended these high-level negotiations.

At an unspecified date in the summer of 2005, a labor-management meeting took place involving Union Executive Director Lillian Roberts, Mike Riggio, then assistant director of the Union's white collar division, CCRB Executive Director Finkle, and Deputy Executive Director Hyman. The meeting concerned the aftermath of the CSC determination and the agreement concerning disciplinary, due process rights for employees in the Investigator title.

In September 2005, on Riggio's advice, Sheena Otto ("Otto"), Investigator (Level I), filed

an out-of-title grievance alleging that she was performing the work of an Investigator (Level II). Although members of the administrative staff had filed what Hyman described as "plenty of grievances," Otto's was the first grievance to be filed by an Investigator.

Investigator Sheena Otto

Sheena Otto ("Otto") has been continuously employed by the CCRB as an Investigator, Level I, since August 2001. She was assigned to Team 1, of which Tarik Brown was manager. For her first year at CCRB, Team 1 Investigators were not required to complete time trigger reviews or ICPs. In January 2006, Cecelia Holloway succeeded Brown and also did not require them.

Otto's work from December 2003 through May 2005 was the subject of her first performance evaluation, prepared by Holloway, which Otto received in June 2005. It indicated that although she did conduct witness interviews, she failed to file summaries of those interviews within the three days as which the performance evaluation stated was required by the Tasks and Standards for her title.[1] The evaluation was also critical of her three- and four-month delay in submitting two cases which were ready, in December 2003 and March 2004, to be submitted to supervision for closure. Notwithstanding these flaws in her performance, Otto's overall review was positive; the evaluation praised her for conducting thorough and timely investigations and otherwise managing her caseload effectively from December 2003 to June 2004.

Holloway's assessment of Otto's performance noted that between June and October 2004 there were lapses in the scheduling of interviews and preparation of summaries, closing reports and

[1] The evaluation states that a three-day guideline is mandated by "task II, standard 1," but the Tasks and Standards for Investigator (CCRB) does not recite specific time requirements for completing tasks other than examples of typical tasks for Level I Investigators include "[using] the CCRB case management and organization system to ensure that assigned cases are investigated rigorously and expeditiously."

documentation of information with respect to four of Otto's cases. Otto was on agency-approved leave during much of this time, from July 23 to August 23, 2004, but her supervisors brought up the gaps when they discussed the matter with her on December 20, 2004, and informed her that she "would" face disciplinary action if she failed to produce a "marked improvement in the condition of her docket by her January docket update." By the end of that year, Holloway noted marked improvement in Otto's docket and gave her an overall performance rating of "satisfactory."

Erick Nawrocki became supervisor of Team 1 in February 1, 2005, reporting to Holloway, and started enforcing case plans and time-trigger reviews. Otto testified that her work load made it difficult for her to prepare time trigger reviews but that she always gave supervision advance notice if she could not complete the reviews by the required dates:

> If I saw that I had a deadline coming up for a time trigger or some cases that I could close, I would go to either Cecilia [Holloway] or maybe Erick [Nawrocki] and say, tell them that I could either complete the time trigger or complete the full investigation. They would always prefer to have the full investigation. So if I – honestly, I didn't complete many, if any, time trigger reviews.

A 10-week gap in investigative activity – from March through May 2005 – in one case was occasioned by delays retrieving information from the NYPD's Internal Affairs Bureau ("IAB"). She notified supervisors of the problem. She explained two other gaps in investigative activity as occurring when she was away from the agency on approved personal leave in 2005 – from May 24 to June 23 and from August 15 to September 28, 2005.

Despite Otto's difficulty preparing the time trigger reviews when Nawrocki wanted them, Manager Holloway stated, in the December 2003–May 2005 performance evaluation, that Otto submitted the time trigger reviews and case plans in a timely fashion from February 2005 through

May 2005.

In an e-mail of June 2, 2005, to all Investigators, CCRB Executive Director Finkle reminded them of the two-year commitment which the agency required of them and noted the average number of cases expected to be closed by Investigators of various lengths of tenure with the agency:

> Investigators with 0-6 months tenure: 14 cases on average closed on an annual basis
> Investigators with 7-12 months tenure: 39 cases on average closed on an annual basis
> Investigators with 13-18 months tenure: 44 cases on average closed on an annual basis
> Investigators with 19-24 months tenure: 47 cases on average closed on an annual basis
> Investigators with 24+ months tenure: 52 cases on average closed on an annual basis

During this time and for two years preceding it, Otto was assigned increasingly complex cases concerning search and seizure law. She testified that knowledge of this area of law was important to Investigators in the conduct of their duties. An interviewer without such knowledge, she explained, might require multiple interviews of police officers, resulting in inconvenience to the officers and possible loss of credible evidence. Also during this period of time, the agency asked Otto to train three new Investigators. This consisted of her accompanying them during their field investigations and witness interviews, reviewing interview transcriptions, and instructing them as to matters of legal significance in the processing of the complaints in their cases.

On the basis of the work that she was asked to perform, the Union filed an out-of-title grievance on September 23, 2005, alleging that Otto was performing the work of a Level II Investigator. Level II Tasks and Standards require investigations "in the conduct of more complex and/or sensitive investigations which may require specialized or technical expertise in researching relevant issues, in acquiring testimonial and/or documentary evidence, or in assessing that evidence." A Level II Investigator also "[t]rains other investigators in the techniques and strategies necessary for performance of legal research and the acquisition and analysis of evidence." On September 28,

2005, a Step I hearing was held before Deputy Executive Director Hyman. After consultation with Executive Director Finkle and agency counsel Graham Daw, Hyman testified, "[w]e decided to deny it."

On October 31, 2005, Assistant Supervising Investigator ("ASI") Cory Miller directed Otto to order specific documents in an investigative action when he assigned a case to her. Through her investigation, Otto had earlier determined that certain of the documents which she was directed to order did not exist due to the circumstances of the case and therefore could not be requisitioned and, further, that CCRB already had in its possession certain other documents which she was directed to order.

On November 2, 2005, Daw heard Otto's out-of-title grievance at Step II. Present, in addition to Otto, were Union Representative Renay Williams, Shop Steward Debra Cleaver, CCRB Deputy Executive Director Hyman, Assistant Deputy Executive Director Dorsch, Team 1 Manager Holloway, and CCRB Personnel Director Beth Thompson.

Pending the outcome of the Step II hearing, Otto met with ASI Miller for a routine docket review on November 7. Docket Review Updates dated September 8, 2005, and October 3, 2005, show that deadlines had been extended in five of her cases. It was not unusual for supervisors to extend ICPs, time trigger reviews, case-closing deadlines, and "any deadline in general." It was also not unusual for Otto to be allowed to close cases without filing ICPs at all. "[E]ven today, ICPs aren't done all the time," according to Associate Deputy Executive Director Dorsch. "[T]here were actually reasons in certain instances ICPs were not done," according to Deputy Executive Director Hyman

On November 7, however, Miller stopped allowing Otto to extend her deadlines. Asked to

extend the deadlines once more, Miller told Otto that he could not do it because, according to Otto, "he said he had orders from 'up front,'" which she understood as meaning from the executive staff. The November 7, 2005, Docket Review Update was the first of four Docket Review Updates to show no further extensions. The others were dated December 6, 2005, January 9, 2006, and January 31, 2006.

On November 18, 2005, Daw denied the Step II grievance on grounds that the work Otto was performing was within the job specifications for her Level I assignment. On November 23, 2005, the Union appealed at Step III. (The appeal was received by the Mayor's Office of Labor Relations on November 30, 2005.)

On December 8, 2005, Holloway issued a supervisory conference memo directing Otto to work as much overtime as necessary to complete certain assignments. This included the case in which Miller had directed Otto to order specific documents which Otto determined did not exist or were already in the CCRB's possession. Holloway's memo made no direct reference to disciplinary consequences but it spoke in terms of deadlines that "must be kept," interviews that were "expected to [be] schedule[d]," and investigative steps that she was "required to complete."

That same day, Riggio contacted unspecified CCRB representatives to express the Union's concerns with the memo. The next day, that memo was withdrawn and replaced with a different supervisory conference memo allowing – but not directing – Otto to work paid overtime in order to complete the overdue assignments. The replacement memo of December 9 also extended the deadlines of several cases referenced in the December 8 memo.[2] By the end of 2005, Otto had closed

[2] The case in which Otto was directed to order specific documents was not one with an extended deadline. It was, however, the subject of a directive dated December 17, 2005, by ASI Miller, to request those same documents.

60 cases, nearly 20 percent more than Investigators of her tenure were expected to close, according to Finkle's memo of June 2, 2005. Otto ranked in the top third of some 140 Investigators in terms of cases actually closed.

On January 26, 2006, a Step III hearing was held on Otto's out-of-title grievance. On February 1, 2006, ASI Miller reviewed another case on Otto's docket and directed her to schedule interviews of two Police Officers.

On February 24, 2006, Hyman wrote a memo to Otto and her team supervisors informing them that CCRB panel member Franklin Stone had noted with some concern the number and length of investigative gaps in the case in which Otto had difficulty getting documents from the NYPD's IAB. Although, according to Hyman, the memo was not placed in any "formal file," Otto was moved to respond with a memo to Hyman, Finkle, and her team supervisors. As Manager Holloway had noted in Holloway's evaluation of Otto's first performance evaluation, Otto again explained that the gap was occasioned by delays at the NYPD's IAB. Holloway had accepted the explanation and noted in her evaluation that Otto submitted the time trigger reviews and case plans in a timely fashion from February 2005 through May 2005, the period covering the delay which Stone now criticized. Otto also reminded Hyman, Finkle, and her team supervisors that the other gaps were due in part to her absences during agency leave.

Otto also took exception, in this memo, to the CCRB panel's use of panel minutes to criticize an Investigator's work performance, which, she stated, was "a confidential matter." She added, "I have been here for over four years, and this is only the second time that I have seen an investigator's work criticized in such a public manner." Hyman did not respond to Otto's memo because "[t]here was nothing to respond to." Otto had given her reasons for what Hyman called "investigative

lapses." Moreover, Hyman testified that what the CCRB panel pointed to in Otto's work was "simply [a] note that the case aged initially due to the investigative lapses. Implicit in that," Hyman testified, "is that there was investigative failure and supervisory failure for failure to timely correct the investigative lapses by the investigator."

On March 3, 2006, the Step III decision denied the grievance on the grounds that the duties which Otto was performing fell within the job specifications of a Level I Investigator.

On March 8, 2006, Holloway issued Otto a supervisory conference memo warning that, if not corrected in the future, Otto's "failure to follow supervisory instructions" for the two cases – the ones in which Miller directed Otto to order certain documents and to schedule Police Officer interviews – "could" result in disciplinary action and that the memo would be placed in her personnel file. On March 13, 2006, Holloway issued a second performance evaluation – this one, an interim evaluation – covering the period from July 24, 2005, to March 1, 2006, and referencing these two cases, among others. The evaluation also referenced the case cited by CCRB Panel Member Stone, the one whose period of delay was covered by the first evaluation. In that evaluation, Holloway had stated that Otto's case plans had been submitted in timely fashion. This time, however, Otto's overall performance was rated "conditional."

Interim performance evaluations were described by Hyman as a "very useful method" to put an Investigator on notice of lapses in investigative work which would cause their performance to be downgraded. Beyond that, she testified, "It certainly could be a precursor to following up with some sort of disciplinary charges."

On March 24, 2006, Otto was transferred to Team 8, where she remains employed by CCRB as an Investigator, Level 1.

Investigator Debra Cleaver

Debra Cleaver ("Cleaver") has been employed by the CCRB since May 2004 as an Investigator, Level I, on Team 7. Tarik Brown was also Manager of this team when Cleaver was hired. Kimberly Walters was Supervising Investigator and Jennifer Warren, Assistant Supervising Investigator for Team 7.

In December 2004, Cleaver became the shop steward for Local 1113 at CCRB. Agency Executive Director Finkle informed Deputy Executive Director Hyman of Cleaver's Union appointment as shop steward. At the agency's holiday party, on a date unspecified in the record, Brown congratulated Cleaver and told her, "Now you're really going to be a pain in the butt" and that she "was going to be under a lot of scrutiny" and that her work was "going to have to be on the ball." Brown testified that her appointment as shop steward "wasn't going to be warmly accepted." Brown told her that, with the amount of work that the Investigators had to do, "some members of the executive staff might find this to be problematic."

On February 1, 2005, Hyman sat in on one of Cleaver's witness interviews. She testified that the purpose was to assess "whether things that we had discussed [in training] were coming across" and whether she needed to "tailor the training differently." Cleaver was one of the first two classes of Investigators for whom Hyman was responsible for training. Hyman testified that she sat in on five other Investigators' interviews. Hyman was critical of Cleaver's interrogation technique in that she used leading questions of the witness. Brown reviewed the audio tape of the interview and agreed that some of Cleaver's questions were leading. Brown testified that, before this occasion, when supervisors debriefed new Investigators, the tone was one of constructive criticism but the tone when Hyman debriefed Cleaver on this occasion, on February 1, 2005, was "negative" to the point

of being "hostile." Brown sat in on the debriefing along with Supervising Investigator Walters. Brown testified that Hyman yelled at Cleaver for interrupting Hyman when she attempted to question the witness. Hyman called Cleaver's interrogation technique "fair to poor." Cleaver testified that Hyman asked Cleaver why she had not prepared a list of questions for the interview. Cleaver testified that, not only had she and her fellow Investigators never been told to prepare questions for use in search-and-seizure cases but that Hyman herself had specifically instructed them not to go into an interview with a specific set of questions which could cause them to miss points the witness was communicating and could cause them to extract a statement as opposed to letting the witness relate the events in his or her own words.

Before the debriefing on February 1, 2005, Brown had urged Cleaver to stay calm. As Hyman's critique progressed, Cleaver became increasingly upset. She attempted to regain her composure by fixating on a point outside the office window. Brown said Hyman interpreted that as arrogance. Although Brown agreed with Hyman that Cleaver had used leading questions, Brown disputed Hyman's characterization of Cleaver's response to the criticism as arrogance. Aside from the leading nature of some of Cleaver's questions, Brown said Cleaver performed "very well" among the new hires, she was eager and aggressive in her investigations, and he had no problems with her work performance.

In April 2005, Brown prepared an interim performance evaluation of Cleaver as a routine matter. Brown testified that the practice in preparing performance evaluations for Team 7 was for him to write the first draft and then send it to Hyman who made changes. On one occasion, he said, Hyman directed him to say Cleaver was a biased Investigator, an assessment with which he and other supervisors disagreed. Brown argued with Hyman about it but Hyman insisted, "saying, 'Put this

in there.'" By the time the evaluation was presented to Cleaver in June 2005, it stated that she "overinvestigate[d]" cases in which she was thought to "feel particular sympathy for a complainant and victim" and she was directed to be "wary of asking leading questions" during interviews. She was directed to consult more closely with supervision before taking "extraordinary investigative actions in order to ensure that strained agency resources are efficiently expended." The evaluation stated that, although she was good at managing her docket overall, her investigative techniques hampered her productivity, such as issuing closing reports within two weeks of the last investigative action.

Hyman agreed that she edited Brown's evaluation of Cleaver, suggesting her own language and at one point expanding his single paragraph to at least three paragraphs. Hyman testified that it was "standard" for her to be so involved in preparing performance evaluations. Walters testified that when Hyman evaluated Cleaver, it was the first time that Hyman actively was involved in the Team 7 evaluation process. Walters was also involved in the initial stages of the drafting of this evaluation. She testified that the final version was actually written by Hyman and said it was "unnecessarily harsh" given the fact that, at that time, Cleaver was still a relatively new Investigator.

Brown testified that Hyman showed particular interest in Cleaver's case files, perusing them and calling attention to notes she wrote in them – "editorializing," as he put it, which Hyman wanted removed from the public portion of the files. In addition to going into Cleaver's docket almost every day, Brown testified that Hyman "wanted to know, like, who would come around to Debra's desk almost every day. She wanted to know, like, who on the team really liked Debra, who on the team stayed away from Debra. Stuff like that." Brown testified that Hyman's questioning of him regarding these matters began soon after Cleaver became shop steward. Prior to Cleaver's becoming

shop steward, Brown said, "we really didn't have to worry about a lot of union stuff. We didn't hear a lot about union stuff until Debra was the shop steward." Hyman testified that, at an unspecified time, Brown told her that Cleaver was talking a lot and that he wanted her seated closer to him.

Brown remembered the conversation differently. He stated that he wanted to give a more private cubicle than most Investigators had to the senior-most Investigator, who was not Cleaver, and that when he notified the department within the agency that handled phone line changes, he was called to Hyman's office and told to move Cleaver to that location. As Brown explained:

> Q. So Shari Hyman told you to put Shop Steward Cleaver at the desk closest to you?
> A. Yes.
> Q. Did she tell you why she wanted you to do this?
> A. Yeah. Because it would be easier to monitor who's coming around her desk. I could then say to people to disperse. I could also listen to her phone calls and make sure that she is not on the e-mail doing union business while she's supposed to be working.
> Q. So Shari Hyman told you that it was because of union business that she wanted you close – she wanted Shop Steward Cleaver closest to you?
> A. Yes.
> Q. Did she ask you to monitor Shop Steward Cleaver?
> A. Yes. She found that there was growing – I think that there was growing interest in the Union.

Cleaver testified that she had not requested the move and had in fact "strenuously objected to being moved, because [her] old seat was near the window." She further testified that she had told Tarik Brown, her manager, that she did not want to be seated in an enclosed cubicle away from a window. In response, Brown stated that "Flo [Finkle] wants you moved." When Cleaver asked why Finkle wanted Cleaver moved, Brown replied, "[Y]ou're being moved here so I can keep an eye on you." Cleaver recalled that when she was "leaving the building either that day or the next day, [she] rode the elevator with Flo and she asked me how I liked my new seat."

Brown testified that, in addition to Hyman's inquiry into whether Cleaver's union activity was "affecting her job," Hyman wanted Brown to "write down if she was doing union business on job time. She would also want me to note who was coming by the desk. She wanted to know who was on the team Debra was rallying, was she interfering with anybody else's work. Cleaver testified that she did communicate with other members of the Union via phone and e-mail. But Brown testified that he reported to Hyman that he "couldn't see when [Cleaver] was doing union stuff."

Supervising Investigator Walters testified that, while she was never specifically questioned about Cleaver's being shop steward, Walters was asked by Finkle, on a date unspecified in the record, if Walters had attended one of the shop steward meetings that Cleaver had called. Walters told her that she had not.

Brown testified that Finkle and Board Member Franklin Stone have a "pretty close" relationship in that Stone has supported Finkle's position with respect to various issues and that Finkle has called Stone to discuss a case on occasion. Brown testified that Board Members, in the regular course of their activities, routinely met with Finkle, Hyman and Dorsch immediately after monthly board meetings and he said that executive staff members "can be" present when board members decide the disposition of cases before a panel.

From September 2005, through the end of that year and into 2006, Cleaver assisted Otto with the latter's out-of-title grievance. Cleaver subsequently filed two group grievances on behalf of six dozen Investigators between October 2005 and February 13, 2006, and, at one member's request, attended an informal conference with CCRB supervisors. She also attended several high-level labor-management meetings concerning classification of the Investigator title and disciplinary rights of Investigators.

Having communicated with other Investigators in her role as shop steward, Cleaver was aware that her own caseload was "significantly higher" than the average Investigator's docket. She routinely had at least at least 25 cases, not because her role as shop steward, she said, but rather because her entire team's caseload was higher since it was routinely assigned cases filed over the weekend and referred through the NYPD's Internal Affairs Division. A number of her cases were administratively split into several individual cases as well.

Cleaver testified that she could "count on one hand" the number of e-mails from supervisors prior to Warren requiring time trigger reviews. She added:

> It would be fair to say that we didn't have a procedure for time trigger reviews because the case dockets were so high at all points, much higher than other teams, that we were under a lot of pressure to close cases just so that we would have fewer cases on the docket. And every – all the time you spend working on a time trigger is time you could spend on a closing report. When I started, we definitely didn't do time triggers. At some point, we got a new assistant supervisor . . . and we did time triggers for maybe two weeks before [she] had to admit there was too much work to do to do time triggers. So we didn't have a policy. We just didn't do them.

Walters corroborated Cleaver's testimony. As Supervising Investigator of Team 7 when Cleaver started at CCRB and continuing to June 2006, Walters said that ASI Warren required more extensive and time-consuming work of Investigators in the preparation of their time trigger reviews, including preparing transcriptions of all witness interviews within three days of each interview.

In January 2006, Brown left the agency. On January 26, a couple of events took place of significance. In one, Hyman and Dorsch met with the entire team and informed them that Dorsch would become acting manager in order to help expedite the team's backlog of cases. Dorsch testified that he told the Investigators and their supervisors that time trigger reviews and ICPs would

be required regularly. Dorsch acknowledged that, prior to this, Investigators were not required by team supervision to complete those actions. That same date, Warren sent Cleaver and 12 other Investigators on her team the specific deadlines for the time trigger reviews for certain cases. Warren required that time trigger reviews in three of Cleaver's cases be completed by February 10, three one week later, and four more the week after that.

By February 2, 2006, when Warren held a docket review update with Cleaver, Cleaver had completed one of the three reviews. Cleaver noticed that the review session differed from past sessions in two ways. First, Supervising Investigator Walters was present. Secondly, so was Associate Deputy Executive Director Dorsch, acting as manager in Brown's absence. Third, the meeting was held in Dorsch's office. Prior time trigger reviews had usually been held with the Assistant Supervising Investigator.

At the meeting, Dorsch pointed out that Cleaver had the largest docket of any Investigator in the agency. He issued deadlines in new cases over and above what Warren had assigned her, as well as on-going work in other case assignments, including 24 interviews that needed to be transcribed within three days of interview. Cleaver testified that Dorsch "agreed that perhaps it was a little unreasonable that interview summaries, transcriptions, had to be done within three days. But he wouldn't budge on the deadlines." Cleaver told Dorsch that it would be difficult to complete some of them without working overtime. Dorsch told her that he was not asking her to perform overtime. Cleaver nonetheless worked 20 hours of overtime and succeeded in meeting all the deadlines by Friday, February 10, except for one time trigger review.

As of Monday, February 13, Warren had not received that time trigger review, and, so, on February 14, Dorsch, Walters and Warren met with Cleaver in a supervisory conference. Cleaver

testified that Dorsch told her that "[E]veryone knows how hard you've been working these past few weeks and your output has been phenomenal, because [she] was meeting all of his deadlines, [she] was closing all these cases, and writing all these trunc[ated cases]." He went on to point out that she had "missed one of Jennifer's time trigger deadlines," and then stated, "I had to write you up."

According to Cleaver's unrebutted testimony, she pointed out to Dorsch that she had "closed all these cases," and that he had "just said my work has been phenomenal," leading Dorsch to state "Well, this is really unfortunate." Cleaver then asked him why he was writing her up, leading Dorsch to answer "Well, I have no choice." When Cleaver then asked if "every person at the CCRB who's missed a time trigger has been written up," Dorsch admitted that such was not the case.

Following the meeting, Cleaver received a supervisory conference memo dated February 14. It warned her that failure to comply with a direct order from a supervisor "in the future could result in disciplinary action. " Cleaver spoke with Riggio about it, who told her the memo appeared to be retaliatory to get to her back off on some work-related union issues. He promised to contact the executive staff at the CCRB.

Within a day or two, Riggio spoke first with Hyman, telling her that he believed that the supervisory conference memo was retaliatory for Cleaver's union activity and demanding that the memo be removed from Cleaver's file. Hyman did not respond. Riggio next spoke with Agency Counsel Graham Daw, who told Riggio not to speak with Hyman. Riggio told Daw that the memo was issued in retaliation for Cleaver's being shop steward and to get her to "back off on some issues that she was presenting to [the Union]."

The following week, two other Investigators were issued supervisory conference memos

concerning missed deadlines. Like Cleaver, one of these two Investigators had been issued deadlines on January 26, but unlike Cleaver, a full week longer than hers; additionally, he had missed the assigned deadline for three cases, not the date of the deadline missed by Cleaver. The other Investigator who received a supervisory conference memo for missing deadlines had also been given a longer deadline than Cleaver, by a full week. Finally, this Investigator's deadline concerned a final closing report, which Warren considered a higher priority than the time trigger review for which Cleaver had been written up.

Also on January 26, 2006, CCRB board members met to review cases, including one of Cleaver's. The panel directed the executive staff to discuss the board members' assessment that a legal principle had been misapplied in that case, relying on a criminal law treatise by an attorney.

Walters testified that Cleaver had subsequently asked her how that legal principle had been misapplied by her, and that Walters had told Cleaver that neither she nor Warren found her analysis problematic. Walters further stated that she remembered Hyman assuring the supervisors that they would not be expected to know the legal technicalities involved, and that Walters had asked Hyman how Cleaver could be expected to know the technicalities if the supervisors did not. Walters said she "never really got a response." She testified that Hyman told her she would make whatever changes the board required and didn't feel the need to speak with Cleaver about it. Hyman testified that such a conversation may have taken place but her memory failed on that point; nor did she know whether any other member of the executive staff spoke with Cleaver about it. Both Dorsch and Brown testified that neither had seen a notation on board minutes for such a matter to be discussed directly with the Investigator. Brown added that it is the supervisory staff who are responsible for making sure that legal principles are applied correctly to the facts of CCRB cases. Moreover, he said

that a manager or supervisor is required to sign off on each case that goes to the board for decision.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the CCRB violated NYCCBL § 12-306(a)(1) and (3) when, on January 26 and February 2, 2006, (i) supervisors set shorter work deadlines in some of Cleaver's cases than in other unit members' cases, (ii) when on February 14, 2006, Dorsch issued a supervisory conference memorandum which "could" lead to disciplinary action against Cleaver resulting from her failure to meet one of the shortened deadlines, and (iii) when, on January 26, a CCRB board member publicized Cleaver's purported misapplication of a legal standard in one of her cases.[3]

The Union also asserts that in retaliation for Otto's out-of-title grievance of September 23, 2005, the CCRB violated NYCCBL § 12-306(a)(1) and (3) when, on November 7 and December 6, 2005, and again on January 9 and January 31, 2006, (i) a supervisor refused to continue extending work deadlines for Otto as he had done routinely in the past for her; (ii) when on December 8, 2005,

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[3] 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.

and again on March 8, 2006, Otto was issued supervisory conference memoranda directing her to meet several case deadlines by certain dates or face disciplinary action; (iii) when, on February 24, 2006, a CCRB board member publicized the fact that there were gaps in one of Otto's cases at a meeting of the board (gaps which Otto had explained to supervisors, explanations which she thought they had approved satisfactorily); and finally, (iv) when, on March 13, 2006, supervisors gave Otto a "conditional" performance evaluation. The Union contends that the proximity in time to her grievance hearings of these events is evidence of unlawful retaliation and discrimination under the NYCCBL and was intended to discourage her from participating in the contractual grievance process.

The Union maintains that the agency attempted to obscure retaliatory conduct by disciplining other employees after Cleaver and Otto and that the City's business defense was pretextual. The unwarranted discipline and harassment of Otto and Cleaver in retaliation for protected activity is inherently destructive of one of the most fundamental union rights, that is, the right to file grievances.

City's Position

The City contends that the following claims in the petition are time-barred and may not be considered by the Board: (i) that the CCRBwas wrongfully motivated in critiquing Cleaver's leading questions during an interview on February 1, 2005; (ii) that the agency evinced a wrongful motive when it issued Cleaver an interim performance evaluation of June 2005, which contained negative comments concerning her work performance; and (iii) that the CCRB's actions in assigning Cleaver to a specific seating location shortly after she became shop steward was wrongfully motivated.

The City does not dispute that Cleaver took part in protected activity by serving as Union

shop steward. Nor does the City dispute that Otto took part in protected Union activities by filing a contract grievance. The City insists, however, that the Union has failed to establish that those activities had any causal relationship to CCRB's decision to issue supervisory conference memoranda to these two Investigators for their undisputed failure to meet work-performance deadlines. Further, the City affirmatively asserts that the supervisory conference memoranda were in no way related to the protected activity but were neutral and appropriate reactions by management to performance flaws on the part of Otto and Cleaver.

The City contends that the supervisory conference memoranda issued to Cleaver and Otto were not disciplinary in nature, not related to any Union activity, and were no different from other supervisory conference memos given to other employees for failing to follow written directives provided by their supervisors.

The City contends that the Union has failed to establish by a preponderance of the evidence that the CCRB committed any violation of the NYCCBL in the exercise of the agency's lawful managerial right under NYCCBL § 12-307(b) to correct violations of its rules and regulations, that is, for failure to comply with CCRB policy and directives from supervisory personnel.[4]

Even were the Board to find a violation of the NYCCBL, the CCRB had a legitimate business reason for taking the actions about which the Union complains on behalf of Cleaver and Otto.

DISCUSSION

[4] NYCCBL § 12-307(b) provides, in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, . . . to maintain the efficiency of governmental operations, . . . and exercise complete control and discretion over its organization . . . .

The issue before this Board is whether agents of the CCRB interfered with, restrained, or coerced Investigator Otto and Shop Steward Cleaver in the exercise of their rights under NYCCBL § 12-306(a)(1), or retaliated or discriminated against them for exercising those rights under NYCCBL § 12-306(a)(3), by issuing reprimand memos to them but not to other employees similarly situated; setting them shorter work deadlines than other employees; encouraging CCRB board members to criticize their individual case work; and, in Otto's case, issuing her a negative performance evaluation, based upon alleged performance issues that did not result in similar negative evaluations in earlier reviews or to other employees. Because these adverse actions have been causally linked to Cleaver's and Otto's exercise of protected activity, and because the CCRB's proffered legitimate business reason does not account for the disparate treatment to which these employees were subjected, we find the CCRB's actions violative of the NYCCBL.

As a threshold matter, we must address the City's claim that some of the actions complained of in this case are time-barred. NYCCBL § 12-306(e) requires that an improper practice petition filed within four months of the alleged violation. *Hassay*, Decision No. B-2-2003 at 10. Events outside the statutory limitations period may not form the basis of a finding of violation or remedy, but may be considered as background, evidencing the course of dealings between the parties, and shedding light on motivation. *Rivers*, Decision No. B-32-2000 at 8; *Schweit*, Decision No. B-36-98 at 13.

In the instant case, the evidence establishes that shortly after the Union filed an out-of-title grievance on Otto's behalf in which Cleaver represented her, CCRB supervisors set shorter work deadlines for Otto and Cleaver than for other unit members in December 2005, January 2006 and February 2006, threatened discipline for failure to meet those deadlines, and induced CCRB board

members in January and February 2006 to single out Otto and Cleaver for alleged work deficiencies which were either outside of the employees' scope or had been deemed acceptable. The Union also asserts that in March 2006 CCRB executive staff directed a supervisor to downgrade Otto's performance evaluation as a retaliatory and coercive measure against the exercise of her contractual grievance rights. Claims arising from these actions are timely. Events occurring outside of the limitations period – that is, four months prior to the filing date of March 15, 2006 – such as the Union's allegations that executive staff surreptitiously inquired about union activities and singled out the shop steward for scrutiny – are considered solely as background evidence.

To determine if an employer's 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. *See Lamberti*, Decision No. B-21-2006 at 15–16; *see also Fabbricante*, Decision No. B-30-2003 at 30-31. Under that test, 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.

If a petitioner adduces sufficient proof of these two elements, and thus makes out a *prima facie* case, the employer may attempt to refute this showing on one or both elements or demonstrate that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct. *See Local 237, City Employees Union,* Decision No. B-24-2006; *see also Fabbricante*, at 31; *Rivers*, Decision No. B-32-2000 at 9.

Prima Facie Case

This Board has consistently held that the filing and processing of grievances constitutes protected activity under the NYCCBL, and an employer's participation in those proceedings is sufficient to establish its knowledge of the employee's protected activity. *See City Employees Union, Local 237*, Decision No. B-3-2006 at 11; *Civil Serv. Bar Ass'n*, Decision No. B-24-2003 at 12; *Doctor's Council*, Decision No. B-12-97 at 10. In this case, these elements are clearly met, as the Union, on behalf of Otto, filed an out-of-title grievance, and it is undisputed that Cleaver, acting in her capacity as Shop Steward, represented her in the grievance, as well as participating in other union-related meetings and activities. Nor is it controverted that the CCRB actively participated in these procedures.

In this case, the imputed knowledge through the employer's participation in the grievance process is buttressed by actual knowledge on the part of Finkle, Hyman, and Dorsch, as well as on the part of the supervisors of Teams 1 and 7. Deputy Executive Director Hyman had in fact heard Step I of the grievance filed on behalf of Otto – acknowledged to be the first filed on behalf of an Investigator – and had consulted Executive Director Finkle as well as Agency Counsel on its proper resolution.

Brown's unrebutted testimony that Hyman directed him to monitor Cleaver's union activity necessarily imputes knowledge of Cleaver's union activities, and is consistent with Hyman's acknowledgement that Cleaver attended high-level meetings at which the Union and management explored the scope of due process rights to be afforded CCRB employees. Similarly, Finkle's awareness of Cleaver's union activity is buttressed by credible testimony by Supervising Investigator Walters that Finkle had inquired whether Walters had attended a meeting of the Investigators called by Cleaver in her role as shop steward. Dorsch was undisputedly present at the Step II hearing of

Otto's grievance, and therefore was aware that Otto had filed the agency's first out-of-title grievance by an Investigator and that Cleaver was actively involved in processing that grievance. This evidence suffices to establish the first prong of the Union's *prima facie* case.

The second prong of the *Salamanca* test must normally depend upon circumstantial evidence, absent an outright admission. *Lamberti*, Decision No. B-21-2006 at 16; *District Council 37, Local 376,* Decision No. B-12-2006 at 15. This willingness to accept indirect evidence of wrongful intent does not, however, permit the Union to carry its burden of proof through mere assertion. *See Local 983, District Council 37*, Decision No. B-15-2001 at 6. Rather, allegations of improper motivation must be based on specific, probative facts. *See Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. As part of its evidentiary showing, "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." *Communication Workers of America, Local 1180*, Decision No. B-20-2006 at 14. Thus, where the first prong is satisfied and the petitioner further is able to establish a causal link between the protected activity and management act at issue, then a *prima facie* violation of the NYCCBL has been demonstrated. *See District Council 37, Local 768*, Decision No. B-15-1999 at 16-17.

In the instant case, we find that the Union has established the requisite causal link between the protected activity, the filing and processing of the grievance on behalf of Otto and Cleaver's representation of Otto in the grievance, and the adverse action taken against both members.

i. Otto

The pattern in which protected activity was followed, in relatively close temporal proximity, with management action taken against her took place not once but four times. First, approximately

six weeks after Otto filed her grievance, on September 23, 2005, and a bare five days after the Step II hearing on the grievance on November 2, ASI Miller denied Otto's request for an extension of time to complete work, a request which had been routinely granted to her and to other similarly situated employees. Similarly, the December 8, 2005 reprimand was issued two weeks after the Union appealed the denial of Otto's Step II grievance, and a bare week after the Office of Labor Relations received the appeal. The pattern reasserted itself when, in March, 2006, a supervisory conference memorandum was issued a mere five days after the Step III hearing officer issued his decision denying Otto's grievance. Finally, Holloway's "conditional" rating of Otto in the March 13, 2006, interim performance evaluation followed this decision by a bare ten days. The repetitive sequence of action in the progress of Otto's grievance through the steps of the grievance procedure being followed closely in time by adverse action taken by management against Otto is inherently suspicious.

Moreover, these acts are linked to retaliatory animus by more than mere time alone. The first, the November 7, 2005 denial of an extension of time was attributed by Miller, according to Otto, to orders from "up front." Notably, the City neither cross-examined Otto on this point, nor called Miller to refute her testimony. While this incident is itself time-barred, Otto's credible, unrefuted testimony suggests a link between an exception being made to the then-general rule of flexibility in deadlines at CCRB as applied to Otto and a decision by upper management. *See Local 376, District Council 37*, Decision B-15-04 at 15. That members of upper management were aware of Otto's having filed the first-ever grievance by an Investigator is admitted; in addition to the agency's personnel director, a Union representative, and Shop Steward Cleaver, present at that hearing were Hyman, Dorsch, and Team Manager Holloway.

The timely claims are likewise supported by more than mere temporal proximity to the unfolding of the grievance process. First, the singling out of Otto for disparate enforcement of various administrative deadlines and review procedures which were essentially unenforced at CCRB is especially suspicious in view of the uncontested facts that Otto was performing over the announced expectations of Finkle's memo of June 2, 2005, having closed nearly 20 percent more cases than the memorandum stated Investigators of her seniority were expected to close, and that she ranked in the top third of some 140 Investigators in terms of cases actually closed. The illogical nature of choosing such an employee as the first to be subject to new strictness in enforcing administrative deadlines is, in conjunction with the temporal proximity to developments in her grievance, sufficient to suggest that anti-union animus is at play. *See Local 376, District Council 37*, Decision No. B-12-06 at 16 (evidence of disparate treatment could not be explained by testimony "inconsisten[t] with the rest of the evidence submitted, and by the illogical assumptions on which that testimony rests"). This inference is heightened by the illogical nature of certain of the directives imposed on Otto, such as obtaining documents that either did not exist or were already in the possession of CCRB. Such insistence on futile tasks, in light of the factual record here, is suspicious, and likewise supports our conclusion that the Union has carried its burden of establishing a *prima facie* case as to Otto.

Likewise, Holloway's March 13, 2006 interim performance evaluation of Otto covering the period from July 24, 2005, to March 1, 2006 supports such a conclusion. Hyman herself testified that a interim performance evaluation could be a precursor to disciplinary charges at CCRB. Moreover, Holloway's interim evaluation of Otto was linked to Holloway's March 8 supervisory conference memorandum to Otto, warning the Investigator that disciplinary action could result. The

evaluation also referenced a case, cited by CCRB Panel Member Stone for a gap in investigative activity, which had previously been addressed in Otto's first-ever performance evaluation at the CCRB, some four years into her employment there. At that time, management had accepted Otto's explanation that the delays in getting the NYPD's IAB to respond to her document requisitions had contributed to the delay in the investigation, as had her absence on agency-approved leave. The resurfacing of this previously addressed issue, along with Otto's downgrading from "satisfactory" to "conditional," absent any subsequent development undermining her previously accepted, and presently uncontradicted, explanation is probative of retaliatory intent, in conjunction with the other facts established on the record. Finally, so too was the singling out of a case and an Investigator at a meeting of the CCRB, a practice which was highly unusual, according to Brown, Dorsch and Walters.

Additionally, there is undisputed testimony on the record documenting that management at the CCRB was concerned with the Union's actions, and sought to monitor its growth and the enthusiasm with which its employees viewed its activities and participated in them. These facts, and the related fact that there is no established culture of labor-management resolution of grievances through the collective bargaining process, color the record in this case. *See, e.g., N.L.R.B. v. New York Tel. Co.*, 930 F.2d 1009, 1012-1013 (2d Cir. 1991)("bargaining history and past practices" constitute useful guides to parties' intent); *N.L.R.B. v. Baby Watson Cheesecake, Inc.*, 148 L.R.R.M.2897 (2d Cir. 1994) at *32 (in determining whether management can be charged for allegedly improper acts of supervisor, court addressed background as "events did not occur in a vacuum"). With respect to Otto, all of these factors, but especially the inconsistency in the agency's treatment of her prior to her protected activity, and with its treatment of other employees, as well as

the lack of apparent logic in the agency's actions, combine with the proximity to various stages of the grievance to establish the Union's *prima facie* case.

ii. Cleaver

The Union's *prima facie* case of retaliation against Cleaver is, if anything, stronger than that argued on behalf of Otto. As a threshold matter, the evidence that CCRB management was concerned about the Union's protected activities, discussed in relation to the retaliation claim on behalf ofOtto, directly focused on Cleaver, whose interactions with her members were scrutinized by management. The background facts, in short, point not merely to a hostility toward union activity, but toward's *Cleaver's* union activity, specifically, which informs our findings.

There is no dispute that Cleaver has been involved in Union activities since becoming shop steward in December 2004, seven months after she was hired at the CCRB. Cleaver's former manager Tarik Brown testified that, around that time, Hyman started paying close attention to Cleaver's case work and criticizing her investigative methods, her clothing, and her demeanor. His testimony was not contradicted and we find it credible. Again, such evidence of a temporal proximity between protected activity and heightened scrutiny directed at an employee is probative of, though not itself sufficient to establish, anti-union animus.

The record is replete with further evidence of such heightened scrutiny. Brown's testimony concerning Hyman's efforts to monitor Cleaver's performance of her Union functions, including observing "who on the team Debra was rallying, was she interfering with anybody else's work" and whether she was doing Union business on CCRB time, was credible and forthright. While the concern that union activities not impact job function was legitimate, the inquiry into the protected associational activities of the shop steward and those she was "rallying" suggests a hostility to the

functioning of the Union. *See, e.g., Communications Workers of America, Local 1180*, Decision No. B-58-87 at 18; *compare City Employees Union, Local 237*, Decision No. B-13-2001 at 10-11. This testimony provides background evidence that Hyman had expressed and was motivated by anti-union animus, which sheds light on the events of January 26 and February 2 and 14, 2006. Additionally, this testimony is buttressed by Walters' testimony that she was asked by Finkle if she had attended a meeting that Cleaver had called as shop steward. We find Walters' testimony credible and, while outside of the limitations period, it provides further circumstantial evidence that the CCRB's management was inordinately concerned about Union activity, specifically directing that concern at Cleaver.

CCRB's willingness to act on that concern is strongly supported by Brown's testimony, corroborated by Walters, that Hyman essentially drafted Cleaver's interim performance evaluation in April 2005, four months after Cleaver assumed the role of shop steward. Brown's testimony that such re-writing was not reflective of Hyman's prior practice, and that she had not in fact previously altered evaluations, tends to buttress the link between her conduct and anti-union animus. *See Local 376, District Council 37*, Decision No. B-12-2006 at 16. Again, while not a timely claim, this background fact is salient in terms of our evaluation of the claims that are properly before us.

The Board members' reference at the January 26, 2006 meeting to Cleaver as having misapplied the legal standard in a search and seizure case occurred, suspiciously, on the day of Otto's Step III hearing, and was followed in quick succession with other acts savoring of anti-union animus. With reference to that meeting, Brown, Dorsch and Walters testified credibly that, besides Otto, Cleaver was the only Investigator they could recall whose work had ever been cited by board members as deficient. Again, it bears repeating that such variation from prior office routine in the

wake of protected conduct is indicative of animus. *Local 376, District Council 37*, Decision No. B-12-2006 at 16.

Thereafter, ASI Warren's imposition that Cleaver catch up on administrative work by February 10, 2006, a shorter deadline than Warren required of the other Investigators, constitutes another instance of disparate treatment in the wake of protected activity. Moreover, the February 2 docket review update Warren held with Cleaver likewise differed from past sessions in two ways. First, it involved higher-ranking supervisors – Supervising Investigator Walters and Associate Deputy Executive Director Dorsch, acting as manager in Brown's absence – and, second, it was a more formal meeting held in Dorsch's office.

At that meeting, Cleaver's supervisors put her under greater pressure than Warren had seen fit to do. Dorsch acknowledged that Cleaver had 24 interviews that had to be transcribed and agreed that it was "perhaps . . . a little unreasonable" to require transcriptions to be completed in three days but he insisted nevertheless on the deadlines. This task took 20 hours of overtime – which Dorsch told Cleaver that she would not be paid for – in order to complete the work by Friday, February 10. Cleaver succeeded in this task, except for one time trigger review.

When, on Monday, February 13, Warren reported to Dorsch that she had not received the final time trigger review from Cleaver, Dorsch directed Cleaver to attend a supervisory conference the following day, with Walters and Warren. He acknowledged her "hard work," closing cases and meeting all the deadlines except one, describing her performance as "phenomenal," but nonetheless reprimanded her for missing one time trigger review. The inconsistency of Dorsch's reprimand of Cleaver even as he praised her "phenomenal" productivity must be contrasted with years of previous agency practice permitted Investigators to omit or postpone time trigger reviews in exchange for

closing cases, which was the higher priority. Dorsch's explanation that this was "really unfortunate" begged the question as to why Cleaver was reprimanded for missing a single time trigger review, which many other Investigators had done and which supervisors and executive staff themselves had long allowed as necessary to achieve closure in other cases.

Even more indicative of disparate treatment is Dorsch's uncontested exchange with Cleaver:

> And I said, "Then why are you writing me up?"
> And he said, "Well, I have no choice."
> And I said, "So every person at the CCRB who's missed a time trigger has been written up?"
> And he was, like, "No."
> And then I was, like, "Then why am I being written up?"
> And he was, like, "Because you missed Jennifer's deadline."
> And then I said, "Then why are you writing me up instead of her?"
> And he said, "Because I'm in charge."
> And I said, "But I met your deadline."
> And we went back and forth like this for a while, because no one had ever been written up before me for missing a time trigger deadline.

Coupled with the threat of discipline, Dorsch's reprimand of Cleaver for missing a single time trigger review which, by all witnesses' accounts, is a relatively minor event in the investigation of a CCRB case, displays an inconsistency with the agency's own procedures that raises serious question about the intent behind Dorsch's actions. *See Local 376, District Council 37*, Decision No. B-12-06 at 16 (evidence of disparate treatment could not be explained by testimony "inconsisten[t] with the rest of the evidence submitted, and by the illogical assumptions on which that testimony rests").

Legitimate business reason defense

Once a petitioner establishes a *prima facie* case of retaliation, the burden then shifts to the City to establish that its actions were motivated by a legitimate business reason. *District Council 37, Local 768*, Decision No. B-15-1999 at 17. The employer may attempt to refute the employee's

prima facie 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 Serv. Bar Ass'n, Local 237*, Decision No. B-32-2003; *City Employees Union, Local 237*, Decision No. B-13-2001. When addressing cases involving mixed or dual motive, this Board has determined that "even if it is established that a desire to frustrate union activity is a motivating factor, the employer is nevertheless held to have complied with the NYCCBL where it is proven that the action complained of would have occurred in any event and for valid reasons." *Communications Workers of America, Local 1180*, Decision No. B-17-89 at 17, *quoting Local One, Amalgamated Lithographers of America v. NLRB*, 729 F.2d 172, 175 (2nd Cir. 1984). However, when a public employer offers, as a legitimate business defense, a reason that is unsupported by or inconsistent with the record, the defense will not be credited by this Board. *District Council 37, Local 376*, Decision No. B-12-3006 at 16; *Patrolmen's Benevolent Association*, Decision No. B-25-2003 at 13; *Local 1182, Communications Workers of America*, Decision No. B-26-96 at 23. We find it so here.

The City's proffered legitimate business reasons for reprimanding Otto are simply not persuasive. Simply put, the City has not offered any credible basis for its sudden need to scrutinize an unusually productive employee, performing above agency expectations, and applying a hitherto unprecedentedly strict interpretation of guidelines that have been commonly varied from or waived altogether.

Similarly, with respect to Cleaver, the City has claimed that its treatment of her was not disparate, offering several purported comparators. However, each of these comparators had been given longer deadlines and had failed in tasks that were of a higher priority to the agency than Cleaver's failure to deliver a single time trigger review in a period when the very supervisor

reprimanding her conceded her productivity to be "phenomenal." Moreover, the reprimand of Cleaver for misapplying a legal standard that Hyman said even supervisors find difficult and which is, in the last analysis, the responsibility of the supervisor to apply, is not addressed by any neutral explanation. The City's failure to call Finkle or Miller, or to cross-examine Otto on key points, did not assist its case, as it left much of the Union witnesses' testimony unrebutted, and yet the City's case asks us to reject that testimony.

Where, as here, a petitioner has established a credible *prima facie* case and there is sufficient evidence to find that the employer's asserted justification is not credible, we may conclude that the employer engaged in unlawful activity. *See Sergeants Benevolent Ass'n*, Decision No. B-22-2005 at 25; *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 at 147 (2000) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination") (emphasis omitted).

We hold, therefore, that the actions described herein by agents of the CCRB were retaliatory in violation of NYCCBL § 12–306(a)(3) and, derivatively, of § 12-306(a)(1) as well.

Finally, NYCCBL § 12–306(a)(1) states that it is unlawful 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." *District Council 37, Local 376,* Decision No. B-12-2006 at 20; *Sergeants Benevolent A'ssn*, Decision No. B-22-2005 at 19. We find that the CCRB's institutional antipathy towards the Union, as displayed through the actions of Dorsch, Hyman, and Finkle from December 2004 through the filing of the instant petition on March 15, 2006, is sufficiently coercive as to

discourage and inhibit other Union members from calling on their representatives to assist in the exercise of their contractual grievance rights in the same way that Otto did in this case, thus, violative of NYCCBL § 12–306(a)(1).

For these reasons, we grant the instant petition and direct the CCRB to remove all references of the impermissible reprimands from all documents in the personnel files of both Otto and Cleaver. We also direct the CCRB to cease and desist from retaliating against Otto and Cleaver on the basis of the wrongfully motivated actions described herein. Otto and Cleaver shall be entitled to re-evaluation of their respective work performance for the period of time at issue herein. Such re-evaluation shall be prepared in good faith and without regard to their protected union activity by a supervisor other than Finkle, Hyman and Dorsch.[5]

[5] Hyman left the agency in September 2006.

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, AFSCME, against the New York City Office of Labor Relations and the New York City Civilian Complaint Review Board, docketed as BCB-2541-06, is granted; and it is further

DIRECTED, that the New York City Civilian Complaint Review Board cease and desist from retaliating against Sheena Otto and Debra Cleaver on the basis of the wrongfully motivated actions described herein; and it is further

DIRECTED, that the New York City Civilian Complaint Review Board remove all references of reprimands found impermissible herein from all documents in the personnel files of Sheena Otto and Debra Cleaver; and it is further

DIRECTED, that the New York City Civilian Complaint Review Board, through a supervisor other than Florence Finkle, Shari Hyman or Eric Dorsch, and without input or supervision by them, re-evaluate the performance of Sheena Otto and Debra Cleaver for the at-issue periods of time of their employment at the New York City Civilian Complaint Review board in good faith and without regard to their protected union activity.

Dated: December 4, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE A. SIMON
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST HART
MEMBER