***Social Service Employees Union, Local 371,* 77 OCB 35 (BCB 2006)**
[Decision No. B-35-2006] (IP) (Docket No. BCB-2449-05).

Summary of Decision: The Union alleged that ACS retaliated and discriminated against an employee by issuing baseless charges against him, suspending and eventually terminating him, and refusing to reinstate him because he filed numerous grievances and requests for arbitration. The Union also claimed that ACS breached its duty to bargain in good faith when it issued disciplinary charges against this employee in order to undermine the grievance procedures. The City claimed that the Union's claims should be deferred to arbitration, that the Union failed to articulate a claim of retaliation against this employee, and that the City did not violate its duty to bargain in good faith. The Board found that ACS's adverse employment actions against the employee were retaliatory and discriminatory, interfered with the rights of ACS's employees and breached its duty to bargain in good faith. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371
and RALPH VANACORE,

Petitioners,

-and-

THE CITY OF NEW YORK and THE
NEW YORK CITY ADMINISTRATION
FOR CHILDREN'S SERVICES,

Respondents.

DECISION AND ORDER

On January 6, 2005, Social Service Employees Union, Local 371 ("Union"), filed a verified

improper practice petition on behalf of Ralph Vanacore against the City of New York and the New York City Administration for Children's Services ("City" or "ACS") alleging that ACS violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (3) and (4). The Union claims that, in retaliation for Vanacore's filing of grievances and requests for arbitration, ACS: i) issued disciplinary charges against Vanacore in order to thwart an arbitration award, ii) suspended Vanacore, iii) later terminated him, and iv) refused to reinstate him despite an arbitration award ordering reinstatement. The Union also claims that ACS breached its duty to bargain in good faith by issuing disciplinary charges against Vanacore in order to undermine the grievance procedures set forth in the collective bargaining agreement. The City maintains that the matters raised in the Union's petition should be deferred to arbitration; that the Union has failed to articulate *prima facie* violations of NYCCBL § 12-306(a)(1) and (3) since no causal connection exists between Vanacore's protected activity and the disciplinary actions taken; and that ACS was motivated by legitimate business reasons. The City further argues that the Union's claims regarding the breach of the duty to bargain in good faith must also be dismissed because the City is not required to bargain regarding subjects that are within the City's statutory managerial rights. We find that ACS retaliated and discriminated against Vanacore because ACS's decisions to suspend and terminate Vanacore were causally connected to Vanacore's protected activity. We also find that ACS interfered with the rights of its employees and breached its duty to bargain in good faith when it refused to reinstate Vanacore despite an arbitrator's award ordering reinstatement. Accordingly, the petition is granted.

BACKGROUND

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

Prior Relevant Employment History

On April 15, 1999, Vanacore, who was hired by ACS in the job title of Caseworker in 1989, received a letter from the Assistant Commissioner of ACS indicating that Vanacore was indefinitely suspended without pay, without providing a reason for this suspension. About one month later, Vanacore was served with Charges and Specifications, dated May 18, 1999 ("May 1999 Charges"), which alleged that he was discourteous and inconsiderate to a supervisor, and threatened and intimidated this same supervisor by following the supervisor to an off-site location. On August 5, 1999, a Step I Informal Conference was held. The ACS hearing officer found that the May 1999 Charges were substantiated and recommended a seven day suspension. On August 31, 1999, Vanacore appealed this determination to Step II.

On October 20, 1999, a Step II Conference was held. On November 9, 1999, an ACS hearing officer issued a Step II determination finding that the recommended penalty of a seven day suspension did not correspond with the offenses due to the absence of progressive discipline, and reduced the penalty to a four day suspension. The Union rejected the Step II determination and appealed. According to the City, in December 1999, Vanacore was returned to work. However, according to the Union, Vanacore was paid his full salary, minus the four day suspension "to sit home," and collect his money. (Union Exhibit 22.) Vanacore testified that the last time he actually

reported to ACS for work was in April 1999.[1] Furthermore, Vanacore's last performance evaluation in 2000 indicated his rating as "Unratable." On October 17, 2000, a Step III Conference was held.[2] On November 13, 2000, a Step III determination was issued and upheld the four day suspension.[3]

Several months later, Vanacore received a set of Charges and Specifications, dated February 26, 2001 ("February 2001 Charges"). These latest disciplinary charges alleged that, from December 1999 to February 2001, Vanacore: failed to perform his required tasks and duties, failed to obey direct orders of a supervisor, used inappropriate language toward a supervisor, slept on duty, and acted irresponsibly. On April 12, 2001, a Step I Informal Conference was held, and on April 27, 2001, the February 2001 Charges were substantiated and a penalty of termination was recommended.

On May 11, 2001, Vanacore appealed this determination to Step II. Due to multiple requests by Vanacore to adjourn the Step II Conference, this meeting was delayed until August 14, 2001, at which time ACS refused to accommodate Vanacore's further requests for adjournments, and held the Step II Conference in *absentia*. On October 4, 2001, the Step II determination was issued. It stated that ACS had substantiated the February 2001 Charges and found that the recommended penalty of termination was appropriate. On October 26, 2001, Vanacore received a letter from the then ACS Commissioner stating that the October 4, 2001 Step II determination had been adopted

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[1] Vanacore's testimony in this matter was extremely limited. He testified as to the service and receipt of the various disciplinary charges and date upon which he returned to work at ACS. He, however, did not testify as to the facts, merits or substance of the various disciplinary charges.

[2] According to the record, it is unclear why there was a year gap between the issuance of the Step II determination and the conducting of the Step III Conference.

[3] The Union, on December 23, 2002, appealed the Step III determination of the May 1999 Charges to arbitration. *See* p. 5, *infra*. On August 24, 2005, these and other disciplinary charges were adjudicated in an arbitrator's determination. *See* p. 9, *infra.*

and Vanacore was terminated effective immediately. At this time, Vanacore was removed from active payroll status. On November 8, 2001, Vanacore appealed to Step III, and on November 13, 2001, a Step III Conference was held, where the Step II determination was upheld.

On January 10, 2002, the Union filed a request for arbitration challenging the termination of Vanacore arising out of the February 2001 Charges. On December 23, 2002, the Union filed another request for arbitration, this time challenging the "penalty of four day suspension without pay," which arose out of the May 1999 Charges. (Union Exhibit 5.)

On May 8, 2003, the first hearing day was held in the arbitration challenging the February 2001 Charges. The second hearing day was scheduled for more than a year later, on May 25, 2004. The City, at some point in time prior to May 25, 2004, requested an adjournment of this second hearing day. "[O]ver the objection of the Union," the arbitrator granted the City's request for an adjournment, and rescheduled the second hearing day for June 7, 2004. (Id.) However, on June 7, 2004, "once again, the City asked for a postponement." (Id.) The arbitrator, who "was reluctant to grant another adjournment to the City," granted the City's request, but "only after the City submitted a written statement advising that ACS would immediately reinstate the Grievant to the payroll, pending the outcome of the arbitration." (Id.) Accordingly, on June 7, 2004, the parties entered into a stipulation agreeing to reinstate Vanacore to payroll immediately, pending the outcome of this arbitration. Nevertheless, despite this agreement, Vanacore was not reinstated by ACS.

On June 16, 2004, the second and final hearing day in this arbitration was held. On July 20, 2004, the arbitrator issued his award ("July 2004 Arbitration Award"). The arbitrator found that ACS failed to prove most of its allegations against Vanacore, that it had failed to perform progressive discipline, and that it failed to communicate to Vanacore proper performance and

behavioral standards required at ACS. Accordingly, the arbitrator found that the penalty of termination was unwarranted.

Specifically, the arbitrator found that [e]ven if they [ACS] had presented proof of most, or all, of the charges, it is very unlikely that its termination of the Grievant [Vanacore] would be upheld" because, "[u]nless there is proof of a very serious offense . . ., immediate discharge is not warranted." (Union Exhibit 12.) The arbitrator stated that Vanacore was difficult to supervise and did not interact well with clients. However, the arbitrator also found that Vanacore's behavior did not rise to level that would warrant termination, as Vanacore did not threaten, intimidate or strike a fellow employee, supervisor or client. Thus, the arbitrator determined that Vanacore "be reinstated with back pay and benefits except for a three-month period which shall be deemed to be a disciplinary suspension." (Union Exhibit 12.) Despite the issuance of the July 2004 Arbitration Award, ACS did not reinstate Vanacore.

Approximately one month later, ACS served Vanacore with another set of Charges and Specifications, dated August 13, 2004 ("August 2004 Charges"). These disciplinary charges alleged that Vanacore, between September 17, 2001 and October 5, 2001: used abusive and inappropriate language toward a supervisor, physically threatened and intimidated this supervisor, and undermined the performance of ACS by screaming at and following this supervisor during his evening commute. According to the Assistant General Counsel for ACS, ACS did not issue the August 2004 Charges against Vanacore until three years after their occurrence because "we didn't have jurisdiction to charge him from the time of his termination in the prior case [the February 2001 Charges] until the

time of his reinstatement." (Tr. 67.)[4]

Timely Factual Improper Practice Allegations

On September 7, 2004, the Assistant General Counsel for ACS wrote to Vanacore informing him that, due to the August 2004 Charges, he was suspended without pay for thirty days effective immediately. Soon thereafter, ACS served Vanacore with another set of Charges and Specifications, dated September 15, 2004 ("September 2004 Charges"). These disciplinary charges alleged that, on July 2, 2004, Vanacore went to Personnel Services for ACS to pick-up a payroll check he should have received pursuant to the June 7, 2004 stipulation. According to the September 2004 Charges, as a result of ACS informing him that he was not entitled to any check, Vanacore threatened fellow ACS employees with physical violence, used inappropriate language, failed to be courteous to ACS employees, and engaged in conduct detrimental to ACS.

On September 20, 2004, the Union petitioned the New York Supreme Court, New York County, pursuant to N.Y. Civil Practice Law and Rules ("CPLR"), Article 75, in order to confirm the July 2004 Arbitration Award. The Union, in its submission to the court, stated that ACS was not in compliance with the terms of this award, in that ACS refused to reinstate Vanacore. The Union requested that the court enter judgment on behalf of the Union and confirm this award.

That same day, a Step I Informal Conference was held to discuss the August 2004 Charges. An ACS hearing officer found these disciplinary charges to have been substantiated and recommended termination as a penalty. On September 23, 2004, Vanacore appealed the Step I determination to Step II. On September 28, 2004, a Step II Conference was held. The Step II

[4] "Tr." refers to citations from the transcript of the hearing conducted at the Office of Collective Bargaining.

hearing officer found that Vanacore was guilty of the August 2004 Charges and agreed with the Step I recommended penalty. In the Step II determination, the hearing officer wrote that:

> the only reason they [the August 2004 Charges] were not brought sooner was because of the overwhelming press of concern and confusion in the post 9/11 period when Personnel staff was displaced from 150 William Street [ACS Headquarters]. Mr. Vanacore was then terminated on prior charges [the February 2001 Charges] and Personnel had no need to refer the current allegations for discipline.

(Union Exhibit 16.) On October 6, 2004, the current ACS Commissioner sent Vanacore a letter accepting this Step II determination and terminated Vanacore, effective immediately.

Nevertheless, that same day, October 6, 2004, a Step I Informal Conference was held concerning the September 2004 Charges. An ACS hearing officer found that these disciplinary charges were substantiated and recommended a penalty of termination. Vanacore appealed the Step I determination to Step II.[5]

On October 20, 2004, the Union filed a request for arbitration challenging Vanacore's termination which arose from the August 2004 Charges and was implemented by the ACS Commissioner's letter.[6]

On January 6, 2005, the Union filed the instant improper practice petition alleging that ACS violated NYCCBL § 12-306(a)(1), (3) and (4) for improperly suspending and terminating Vanacore, and for refusing to reinstate him in compliance with the July 2004 Arbitration Award. The Union requested that the termination resulting from the August 2004 Charges be rescinded, that the

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[5] The Step II Conference was held on January 18, 2005, and a determination was issued on February 24, 2005. *See* p. 9, *infra*.

[6] This request for arbitration concerning the August 2004 Charges was consolidated with the request for arbitration dated December 23, 2002, which grieved the four day suspension without pay arising from the May 1999 Charges. *See* p. 5, *supra*.

September 2004 Charges be expunged, and that Vanacore be reinstated with full back pay and benefits.

On February 18, 2005, New York Supreme Court, New York County issued the Decision and Order confirming the Union's petition, dated September 20, 2004, and confirmed the July 2004 Arbitration Award.

On February 24, 2005, ACS issued its Step II determination arising from the September 2004 Charges and found that Vanacore disrupted Personnel Services by shouting and threatening fellow ACS employees, which was consistent with Vanacore's "history of inappropriate and/or threatening behavior." (Union Exhibit 23.) According to this determination, Vanacore was not entitled to a paycheck and benefits based on the June 7, 2004 stipulation because "he could not be reinstated without notification from ELU [Employment Law Unit]." (Id.) Thus, since ACS substantiated the factual allegations against Vanacore, an ACS hearing officer found that Vanacore was guilty of these disciplinary charges and recommended his termination. (Id.)

On April 27, 2005, the ACS Commissioner sent Vanacore a letter accepting the Step II determination and terminating Vanacore, again, effective immediately.[7]

On May 13 and 31, 2005, the Union and ACS appeared before an arbitrator with respect to the May 1999 Charges, the August 2004 Charges, and the September 2004 Charges. Several months later, on August 24, 2005, the arbitrator issued an award concerning these three sets of disciplinary charges ("August 2005 Arbitration Award"). With respect to the May 1999 Charges, in which

[7] The September 2004 Charges, at some point, were consolidated with the Union's request for arbitration, dated December 23, 2002. *See* p. 5, *supra*. Accordingly, the September 2004 Charges, along with the May 1999 Charges and the August 2004 Charges, which had been previously consolidated, *see* p. 6, *supra*, went before an arbitrator for adjudication.

Vanacore was accused of threatening, intimidating, and acting discourteously and inconsiderately toward a supervisor, the arbitrator found that Vanacore "was a nuisance" and pestered the supervisor. (Union Exhibit 22.) However, the arbitrator also found that Vanacore's actions were "a far cry from what the Agency [ACS] alleges," that Vanacore struck, attempted to strike, threatened or intimidated a supervisor. (Id.) Thus, the four day suspension stemming from the May 1999 Charges was reduced to a written reprimand.

Also in the August 2005 Arbitration Award, the arbitrator found that the August 2004 Charges, which allege that Vanacore used abusive and inappropriate language toward a supervisor, physically threatened and intimidated this supervisor, and undermined the performance of ACS by screaming at and following this supervisor during his evening commute, Vanacore's termination was not warranted. The arbitrator stated that Vanacore acted "without regard to customary civilities expected of reasonable adults," but did not use abusive and inappropriate language toward a supervisor, did not physically threaten and intimidate that supervisor, and did not attempt to use force against that supervisor. (Union Exhibit 22.) Accordingly, the arbitrator reduced Vanacore's penalty on these disciplinary charges from termination to a five day suspension.

Finally in the August 2005 Arbitration Award, the arbitrator found that the September 2004 Charges, where Vanacore was charged with threatening fellow ACS employees with physical violence and using inappropriate language, were wholly unsubstantiated, and dismissed them in their entirety. Therefore, in sum, the arbitrator in the August 2005 Arbitration Award found that, even though Vanacore was not blameless with respect to certain elements of the May 199 Charges, the August 2004 Charges, and the September 2004 Charges, the City failed "to establish that the grievant's behavior was so egregious as to justify termination." (Union Exhibit 22.)

On September 19, 2005, after the issuance of the August 2005 Arbitration Award, ACS returned Vanacore to work.

POSITION OF THE PARTIES

Union's Position

The Union claims ACS violated NYCCBL § 12-306(a)(1) and (3) when it retaliated against Vanacore because he filed multiple grievances and requests for arbitration which challenged the disciplinary findings of the agency against him.[8] One month after Vanacore was reinstated pursuant to the July 2004 Arbitration Award, ACS additional issued disciplinary charges against Vanacore in order to thwart this award. He was then suspended and later terminated as a result of these charges. Moreover, ACS refused to reinstate Vanacore, even though the Union and ACS entered into a stipulation that required such reinstatement pending the outcome of the arbitration concerning the February 2001 Charges.

The Union also argues that ACS breached its duty to bargain in good faith, in contravention

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[8] 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;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with a certified or designated representatives of its public employees; . . .

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.

of NYCCBL § 12-306(a)(4), when it issued disciplinary charges against Vanacore in order to undermine the grievance procedures set forth in the parties' collective bargaining agreement ("Agreement"). By issuing these charges against Vanacore and subsequently terminating him as a result of these charges, ACS was thwarting both the July 2004 Arbitration Award and the August 2005 Arbitration Award that required Vanacore to be reinstated. In doing so, ACS was undermining the parties' agreed upon method for resolution of its disputes, and their agreement that arbitration awards are final and binding upon the parties.

City's Position

The City contends that the Union's claims against ACS should be deferred to arbitration because the contractual grievance procedure provides the appropriate means of resolving Vanacore's complaints. Where an improper practice petition contains the same factual basis as a grievant's request for arbitration, the Board defers to the contractual dispute resolution procedure.

The City further argues that the Union has failed to establish a *prima facie* claim of retaliation against ACS. Though the City concedes that the filing of grievances and arbitrations is a protected activity and Vanacore did, in fact, file multiple grievances and arbitration requests, the Union cannot demonstrate that the actions ACS took with respect to Vanacore were causally linked to his protected activity. A number of ACS employees, who were successful in overturning disciplinary charges through the arbitration process, never were targeted for and subjected to additional disciplinary action. (*See* City Exhibits 1-4F.) Since ACS did not engage in any type of retaliation or discrimination with regards to these employees for their successful appeals of their disciplinary charges, it is incongruous that ACS would then engage in that type of behavior with regards to Vanacore, as the Union claims. Therefore, the Union fails to demonstrate any type of causal

connection between Vanacore's protected activity and the disciplinary charges against him.

Furthermore, the City contends that ACS, in accordance with NYCCBL § 12-307(b), has the managerial prerogative to take disciplinary action against its employees when they engage in behavior that is proscribed by the agency.[9] Since ACS has "never brought meritless cases," Vanacore's improper behavior and failure to perform his duties in the proper manner were the impetus for the issuance of the disciplinary charges, not his filing of grievances and requests for arbitration. (Tr. 79.) Therefore, ACS was within its managerial prerogative to discipline this employee for his unacceptable behavior.

Additionally, the City avers that ACS did not commit a violation of NYCCBL § 12-306(a)(4) because the City is not required to bargain with the Union regarding subjects that fall within the City's statutory mandate set forth in NYCCBL § 12-307(b), which grants the City the right to take disciplinary action. The City further contends that ACS had no duty to bargain regarding the issuance of disciplinary charges against Vanacore, nor that ACS had an obligation to negotiate with the Union the penalties levied against Vanacore arising out of these disciplinary charges. Thus, since disciplining employees falls under a statutorily protected managerial prerogative, ACS had no obligation to bargain with the Union on these matters, and thus, the Union's claim that ACS breached its duty to bargain in good faith in this matter is wholly without merit.

Finally, the City contends that this Board must dismiss the instant petition because ACS has

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[9] 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 determine the standards of service to be offered by its agencies; . . . direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization . . . .

provided all the remedies requested by the Union in its pleadings.

DISCUSSION

The twin issues before this Board are whether Vanacore's suspension and termination, as well as ACS's refusal to reinstate Vanacore, constituted unlawful retaliation and discrimination against Vanacore, as prohibited by NYCCBL § 12-306(a)(1) and (3), and whether ACS's conduct amounted to a refusal to bargain collectively in good faith on matters within the scope of collective bargaining in violation of NYCCBL § 12-306(a)(4). Under the facts as established by the record, the Board concludes that the Union has carried its burden of proof as to both claims, and hereby grant the petition in its entirety.

As to the first claim, that ACS has retaliated against Vanacore based upon his exercise of protected rights, this Board applies to such claims the familiar test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, Decision No. B-51-87. Under that test, to prevail in a claim of unlawful retaliation or discrimination, an employee 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 an employee alleges sufficient facts concerning these two elements to make 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.

Regarding the first prong of the *Salamanca* test, this Board has consistently held that filing 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 Vanacore, filed several grievances and requests for arbitration, and ACS actively participated in these procedures.[10] Accordingly, we find that the Union has satisfied the first prong of the *Salamanca* test.

Typically, the existence of retaliatory or anti-union animus must be proven indirectly, through the use of circumstantial evidence, absent an outright admission. *See Burton*, Decision No. B-15-2006 at 25-26; *City Employees Union, Local 237,* Decision No. B-13-2001 at 9. 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

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[10] In fact, the Assistant General Counsel for ACS testified that she attended one of Vanacore's arbitrations. (Tr. 52.)

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 Vanacore's protected activity, the filing of grievances and requests for arbitration, and management's actions at issue in the instant matter, ACS's suspension and termination of Vanacore and its failure to reinstate him as ordered by an arbitrator. In so finding, we hold that the proximity in timing between Vanacore's resort to contractually mandated procedures and ACS's adverse employment actions, along with other evidence, is demonstrative of ACS's improper motivation. The July 2004 Arbitration Award, resolving the February 2001 Charges was issued on July 20, 2004; less than a month later, Vanacore was served with the August 2004 Charges, which alleged different acts of misconduct, dating to 2001. In addition, approximately two weeks after the Union petitioned the court to enforce the July 2004 Arbitration Award due to ACS's refusal to comply, an ACS hearing officer held that the September 2004 Charges were substantiated and recommended termination as a penalty. This repeated, suspicious, temporal proximity between successful resort to the grievance process swiftly followed by adverse employment action by the employer is consistent with other facts supporting a finding of retaliation.

The factual allegations contained in the August 2004 Charges were based upon incidents that allegedly occurred in 2001, yet were not raised by ACS until after Vanacore had prevailed on the preceding set of charges, stemming from the same time period. Moreover, the August 2004 Charges were also found by another arbitrator to be largely unsubstantiated, and, to the extent they were substantiated, were found to warrant merely a written reprimand and a five day suspension, not termination. This result replicated the pattern of the July 2004 Arbitration Award, in which the

arbitrator had found the factually similar February 2001 Charges substantially lacking merit, and to warrant, to the extent they could be proven, lesser discipline than termination. Nevertheless, ACS terminated Vanacore a second time for acts of a nature deemed by the July 2004 Arbitration Award not to warrant termination. In both instances, ACS was authoritatively found to have both brought charges upon questionable evidence and to have sought an excessive penalty against Vanacore–facts that are not dispositive in and of themselves, but which are redolent of bad faith in light of the temporal proximity to Vanacore's protected activity.

Nor do these instances stand alone. ACS voluntarily entered into the June 7, 2004 stipulation pursuant to which Vanacore was to be reinstated, pending the outcome of the arbitration proceeding involving the February 2001 Charges. However, ACS disregarded this agreed-upon stipulation and either declined on its own to reinstate Vanacore or misled the Union, Vanacore, and the arbitrator that Vanacore could be reinstated absent action outside of its control. We need not determine which eventuality was, in fact, the case; it is clear that the implied covenant of good faith and fair dealing is applicable to all contracts in New York State, including stipulations. *Ochal v. Television Tech Corp.*, 26 A.D.3d 575, 576 (3d Dept.), *app. dismissed*, 7 N.Y.3d 741 (2006), citing, *inter alia*, *McCoy v. Feinman*, 99 N.Y.2d 295 (2002); *see also Reuschberg v. Town of Huntington*, 16 A.D.3d 568, 569-670 (2d Dept. 2005). Whether ACS promised beyond its ability to perform, or breached its promise, the fact remains that ACS knowingly frustrated the Union's and Vanacore's reasonable expectations based upon the stipulation. *Id.; see also Dalton v. Educational testing Services, Inc.*, 87 N.Y.2d 384, 389 (1995); *511 West 232nd Street Owners Ass'n v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153-154 (2002); *Richbell Information Services, Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288 (1st Dept. 2003). (Union Exhibit 23.)

Another indication of ACS's refusal to abide by the outcome of the grievance process is seen in the September 2004 Charges, which mirror the previous sets of disciplinary charges and again seek the penalty of termination. These charges were deemed to be wholly without merit in the August 2005 Arbitration Award. Accordingly, we find that a repeated pattern of invocation of a protected right on the part of the Union and Vanacore, swiftly followed by adverse employment action, itself found to constitute overreaching by ACS, of seeking to terminate Vanacore for minor offenses. Additionally, we find that ACS relied on dubious evidence and stale charges by ACS to rid itself of this employee, as well as engaging in disingenuous behavior surrounding the stipulation. These facts suffice, taken as a whole, to establish a *prima facie* case that ACS acted with anti-union animus.

Once a petitioner establishes a *prima facie* case of harassment, discrimination and/or retaliation in contravention of the NYCCBL, 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.

In the instant matter, the City contends that ACS had a legitimate business reason for issuing the August 2004 Charges and the September 2004 Charges, and for suspending and then terminating Vanacore. The City contends that Vanacore's use of abusive and inappropriate language, physical threatening of supervisors and other ACS employees, and disruptive and discourteous behavior served as "independent grounds . . . for the Agency's subsequent service of additional disciplinary

charges." (Answer ¶ 49.)

We find that the City's proffered business reason is in this case is a pretext for retaliation in contravention of the NYCCBL. First, the August 2005 Arbitration Award, which addressed the August 2004 Charges and the September 2004 Charges, found most of ACS's proffered independent grounds for discipline to be unsubstantiated. Specifically, the arbitrator ruled that, though Vanacore was a "nuisance" and acted "without regard to customary civilities," he did not use abusive language and did not physically threaten or intimidate any ACS personnel. (Union Exhibit 22.) Despite this finding, ACS terminated Vanacore for actions similar to those at issue in the July 2004 Arbitration Award, and which had been previously deemed not to warrant such penalty. This overly punitive action undermines the legitimacy of ACS's rationale for terminating Vanacore. The legitimate business reason proffered does not address this disproportion, nor does it address ACS's failure to implement the stipulation to reinstate Vanacore pending the outcome of his arbitration.

Moreover, the reason proffered before this Board to justify the service of disciplinary charges against Vanacore three years after the incidents that gave rise to them is different from, and inconsistent with, that proffered by ACS earlier in the grievance process, and these shifting rationales are, in conjunction with the other facts adduced, indicative of their pretextual nature. In the Step II determination, dated September 28, 2004, relating to the August 2004 Charges, the ACS hearing officer explained the delay in the service of these disciplinary charges was due to "the overwhelming press of concern and confusion in the post 9/11 period . . . when staff was displaced." (Union Exhibit 16.) However, at the hearing, ACS explained that the reason for the three year delay in service of the August 2004 Charges was ACS "didn't have jurisdiction to charge him . . . until the time of his reinstatement," since he had already been terminated pursuant to the February 2001

Charges. (Tr. 67.) The offering of shifting and inconsistent rationales for challenged behavior strongly raises the question that either explanation, or both, constitutes a self-serving *post hoc* justification for retaliatory conduct, and does not warrant belief. *See, e.g., Branham v. Lowes Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 324-325 (1st Dept. 2006) (citing *Gloth v. Brusco Equities, LLC*, 1 A.D.3d 294 (1st Dept. 2003)) ; *see also Adams v. Master Carvers of Jamestown, Ltd*., 91 Fed. Appx. 718, 724-725 (2d Cir. 2004); *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 137 (2d Cir. 2000). Against this factual record, replete as it is with suspicious timing, and the undermining of an agreed-upon stipulation, we disbelieve the legitimate business reason proffered by ACS.

Since the August 2005 Arbitration Award found the bases for the August 2004 Charges and the September 2004 Charges to be largely without merit, the punitive action taken against Vanacore was deemed to be excessive and ACS's attempts to explain its conduct are inconsistent in part and do not explain all of the challenged behavior–that is, ACS's violation of the stipulation to reinstate Vanacore–we conclude that these later disciplinary charges were a pretext for improper behavior. 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 false, 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 in original).

Because the Union has set forth a credible and persuasive *prima facie* case and the City's

proffered legitimate business reason fails to controvert in a believable manner the elements of that *prima facie* case, but rather appears to be a *post hoc* rationale to depict as neutral acts that were in fact retaliatory, we find that ACS has violated NYCCBL § 12-306(a)(1) and (3).

We now shift our focus to the Union's allegation that ACS violated NYCCBL § 12-306(a)(4), when, in an attempt to undermine the negotiated grievance procedures set forth in the Agreement, ACS refused to reinstate Vanacore, despite the order of reinstatement contained in the July 2004 Arbitration Award. We have held that systematically disregarding a quintessential aspect of the parties' collective bargaining agreement, such as the grievance procedure, constitutes a deliberate interference with employees rights and amounts to a failure to bargain in good faith. *See District Council 37, Local 1508*, Decision No. B-11-2001 at 6, *citing Addison Central School District*, 17 PERB ¶ 3076 (1984) (repudiation of the grievance procedure, through a pattern of behavior, constitutes a breach of the duty to bargain). This holding does not, however, elevate to the level of a violation of NYCCBL § 12-306(a)(4) any mere isolated act of retaliation or discrimination; rather it is limited to an ongoing course of behavior that essentially *de facto* carves out a provision of a collective bargaining agreement for willful non-enforcement. *Id.*

In the instant matter, we find that ACS engaged in such a pattern of behavior designed to frustrate the contractually-mandated arbitral process component of the grievance procedure. ACS refused to reinstate Vanacore, pursuant to the June 7, 2004 stipulation, even though both parties, upon the direction of the arbitrator, agreed to reinstate him. ACS admitted that it did not or would not honor such a stipulation on the dubious grounds that, without notification to the Employment Law Unit of ACS, such an agreement would be ineffectual. (*See* Union Exhibit 23.) In so doing, ACS deliberately acted to frustrate the Union and Vanacore of the benefit of their bargain, an act that

is indicative of its behavior throughout.

Further, ACS issued the August 2004 Charges and the September 2004 Charges in order to render moot the July 2004 Arbitration Award, by keeping Vanacore from returning to work as ordered by this award. In so finding, we note that ACS did not charge or allege bad acts between the first set of charges and the resolution of those charges, but rather alleged bad acts contemporaneous with those previously charged. Likewise, despite two arbitral determinations that such allegations did not warrant termination even if proved, ACS repeatedly insisted that termination was the only appropriate resolution. These facts in tandem support our finding that ACS subverted the grievance process as applied to Vanacore.

Because ACS engaged in a pattern of behavior that was designed to set at naught and systematically frustrate the grievance procedure set forth in the Agreement, ACS interfered with the rights of its employees and breached its duty to bargain in good faith. Accordingly, we find that ACS committed a violation of NYCCBL § 12-306(a)(1) and (4).

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 Social Service Employees Union, Local 371 and Ralph Vanacore, docketed as BCB-2449-05, be, and the same hereby is granted in its entirety; and it is further

ORDERED, that, to the extent by which previous arbitration awards have not been complied, the New York City Administration of Children's Services shall fully comply with the arbitration awards, dated July 20, 2004 and August 24, 2005; and it is further

ORDERED, that the New York City Administration for Children's Services cease and desist from retaliating and discriminating against Petitioner Ralph Vanacore for union activity, interfering with employees' right to engage in the grievance procedures set forth in the parties' collective bargaining agreement, and breaching its duty to bargain in good faith.

Dated: New York, New York
December 4, 2006

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER

I dissent. ERNEST F. HART
MEMBER