District Council 37, Local 1508, 79 OCB 21 (BCB 2007)

[Decision No B-21-2007] (IP) (Docket No. BCB-2562-06).

Summary of Decision: The Union filed an improper practice petition on behalf of four employees alleging that the DPR violated NYCCBL § 12-306(a)(1), (3) & (4), and the Citywide Contract when its EEO Officer interviewed employees without union representation and drew adverse inferences from their request for union representation. The Union also alleged that the DPR unilaterally altered the procedures for completing performance evaluations. The City argues that part of the petition must be dismissed as untimely, that this Board should not assert jurisdiction over the alleged contract violations, that the employees were never denied union representation, that the Union have not established any anti-union animus, and that the criteria for performance evaluations are not a mandatory subject of bargaining. The Board dismisses the claim regarding the change in the performance evaluations as criteria for performance evaluations are not a mandatory subject of bargaining, defers the contract based improper practice claims to the parties' contractual grievance process, retains jurisdiction, and holds in abeyance the remaining statutory claims until the resolution of the contractual grievance process. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, LOCAL 1508,

Petitioner,

-and-

CITY OF NEW YORK and THE
NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On August 4, 2006, District Council 37, AFSCME, Local 1508 ("Union"), filed a verified improper practice petition against the City of New York ("City") and the New York City Department

of Parks and Recreation ("DPR"). The Union makes seven improper practice claims on behalf of the four employees, alleging that the DPR violated the Citywide Contract and interfered with, restrained, and coerced the employees in the exercise of their rights granted in § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") in violation of NYCCBL § 12-306(a)(1), discriminated against employees in violation of NYCCBL § 12-306(a)(3), and failed to negotiate with the Union over a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(1) & (4). The first six claims allege that the DPR's Equal Employment Opportunity ("EEO") Officer interfered with the employees' contractual and statutory rights to union representation; the final claim is that the City failed to negotiate with the Union over procedures by which the EEO policy portion of the employee's performance evaluation would be implemented.

The City argues that any claims based on acts occurring prior to April 4, 2006, must be dismissed as untimely, as improper practice petitions must be filed no later then four months from the time that the disputed action occurred. The first six claims should be dismissed as no employee was ever denied access to their union representative, the Union cannot establish any anti-union animus, and cannot prove any facts showing that the DPR interfered with any of the employees' rights or discriminated against them due to union activity. Further, this Board should not assert jurisdiction over the alleged contract violations as they are duplicative of the alleged statutory violations, i.e. NYCCBL § 12-306(a)(1) & (3). The seventh claim must be dismissed because the criteria for performance evaluations is not a mandatory subject of bargaining.

The Board finds the claims to be timely but defers the contract based improper practice claims to the parties' contractual grievance process, as they require the interpretation of the parties'

collective bargaining agreement. The Board dismisses the seventh claim regarding the change in the performance evaluations as criteria for performance evaluations are not a mandatory subject of bargaining. We retain jurisdiction and hold in abeyance the remaining statutory claims until the resolution of the contractual grievance process.[1]

BACKGROUND

Christian

In March or April 2005, the EEO Officer, Ricardo R. Granderson, left a telephone message for Climber and Pruner Lennox Christian. Granderson did not identify himself as an EEO Officer in this telephone message. When Christian returned the call, he was informed that a complaint had been lodged against him. The EEO Officer then proceeded to question Christian, who stated he would not talk to the EEO Officer any further. In response, the EEO Officer informed Christian that he would continue to investigate this matter and would interview his co-workers, at which point Christian discontinued the telephone conversation. Christian and the EEO Officer had no other communications but Christian's supervisor, Principal Park Supervisor Bill Sackel, contacted the EEO Officer on Christian's behalf.

On or about March 13, 2006, Sackel prepared Christian's 2005 Performance Evaluation, which was also signed by Administrative Park and Recreation Manager Rick Zeidler. The EEO section on Christian's Performance Evaluation was left blank as neither Sackel nor Zeidler had been

[1] The Union's request to amend ¶¶ 6, 28, 30, & 31 of the petition to replace "2006" where appearing with "2005" and to replace "Girardi's" in ¶ 26 with "Gervasi's" is granted.

instructed to mark it.[2] Christian and Sackel signed the Performance Evaluation on March 13, 2006.

On or about April 4, 2006, Christian's Performance Evaluation was returned to Sackel. The EEO section had been amended by adding a check mark in the box indicating "Violated EEO Policy" and adding the following handwritten words: "Signature verifies employee is aware of EEO determination. Separate employee response can be attached." (Pet. at Ex. 2.) A post-it note was attached to the front of Christian's returned Performance Evaluation that reads:

> John as we discussed, please share the EEO portion of his eval [sic] w/ Mr. Christian and have him sign it acknowledging he has seen it. He may rebut if desired. Thanks.

Id. (emphasis in original). "John" refers to Bronx Chief of Operations John Bachman. The signature on the note is illegible. Christian refused to sign the amended Performance Evaluation. In the section titled "Refused to Sign" Sackel added the following notation: "EEO portion of evaluation which was filled out after evaluation was given to employee." *Id.* Park Supervisor Pedro Rivera signed as a witness to Christian's refusal to sign. *Id.*

On or about April 6, 2006, Christian's Performance Evaluation was returned to Sackel for a second time, this time with a blank signature page and the following note: "Billy, Handle this as if it were a new up to date evaluation and conduct the evaluation conference with the employee.

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[2] As a result of a 2005 Consent Decree that the City and the DPR entered into with the United States Department of Justice, the DPR's Performance Evaluations were amended to include a section titled "EEO" that has three boxes that can be checked next to the following three categories:

> Violated EEO Policy
> Failure to cooperate with EEO office, or (if supervisor/manager) failed in promptly report [sic] any allegation of discriminatory conduct
> Provided exceptional service in support of EEO office

Copies of the DPR's Performance Evaluation form have been filed with the Board in other matters and we take administrative notice of its contents.

R[ick] Z[eidler]." (Pet. at Ex. 3.) (emphasis in original). Sackel and Zeidler signed this version of the Performance Evaluation. Christian refused to sign and instead submitted a rebuttal statement that reads, in pertinent part:

> This is not the original evaluation that I signed. I was given & signed the original on March 13, 2006[,] and received my copy that same day. A couple of weeks later it was given back to me with the EEO portion filled out. The box stating EEO Policy was violated was checked off & a line added for my signature.
>
> There was no explanation given to what policy was violated!
>
> There was a complaint filed against me, approximately one year ago which Mr. Granderson investigated and to my knowledge nothing came of it. I did not receive any notice stating either way what actually was resolved. I did nothing to start with.

Id.

Lynch

On or about May 1, 2006, Principal Park Supervisor Joseph Lynch had an altercation with a Job Training Participant ("JTP"). Soon thereafter, Lynch received a text message instructing him to contact the EEO Officer immediately. Bachman advised Lynch to comply, allegedly opining that the EEO Officer would assume Lynch had something to hide if he did not. Lynch informed Bachman that he would not contact the EEO Officer until he had spoken with Robert Gervasi, the Union Representative ("Union Representative"). The Union Representative advised Lynch to contact the EEO Officer and that, should the EEO Officer try to question him, he should inform the EEO Officer that he wanted union representation. Lynch contacted the EEO Officer and, upon being questioned, informed him of his desire for union representation. The EEO Officer then instructed Lynch to have the Union Representative contact the EEO Officer.

On May 15, 2006, a meeting was held between Lynch, the Union Representative, and the EEO Officer. At this meeting, the EEO Officer stated that he interpreted Lynch's request for a formal meeting with union representation as an indication that Lynch was guilty of wrongdoing and that if Lynch's behavior kept up, he would be forced to proceed to the DPR's Advocate's Office. Then, the EEO Officer stated he did not take it lightly when Supervisors used the words "nigger" or "spic." (Pet at ¶ 22.) The last comment prompted the Union Representative to ask whether the EEO Officer was implying that Lynch used such language and the EEO Officer responded that he was not stating that Lynch used such language. The EEO Officer then asked Lynch if there was any need for further discussions, to which Lynch responded that there was not, and the meeting came to an end.

Morrone

On April 13, 2006, Principal Park Supervisor Vincent Morrone signed his 2005 Performance Evaluation under protest because there was a check mark in the EEO section next to the box indicating: "Failure to cooperate with EEO office, or (if supervisor/manager) failed in promptly report [sic] any allegation of discriminatory conduct." (Pet at Ex. 4.) A handwritten notation appears in the EEO section reading: "as per EEO Office." *Id.* Morrone brought this matter to the attention of the Union Representative, who contacted the EEO Officer and requested that the EEO Officer provide Morrone with the disposition of any investigation of Morrone by the EEO Office as required by the Citywide Contract. In response, on May 1, 2006, the EEO Officer sent the Union Representative an e-mail that reads, in pertinent part:

> Vincent Morrone failed to cooperate with the [EEO] office when contacted on numerous occasions. John Bachman and/or Tom Russo seemed to always respond unless pressured. His failure to cooperate timely resulted in his "non-compliance."
>
> * * *
>
> While there were reports (where there was no violation substantiated), his "non-compliance"

> was specifically for his lack or seeming inability to provide a prompt response. By the way, I am not obligated to disclose reports, but only the findings, i.e. violation of EEO policy, and the basis, e.g. hostile work environment.
>
> If needed, ask Mr. Morrone to send you the emails that were forwarded to him and John Bachman inquiring about why I never heard from him. Mr. Morrone eventually decided that my queries warranted a response, but had already established a history and a pattern of "non-compliance" and unresponsive behavior.

(Pet. at Ex. 6.) The Union alleges that, contrary to the EEO Officer's conclusions, Morrone regularly responded to the EEO Office in a timely fashion.[3]

On July 2, 2005, the EEO Officer e-mailed Morrone, which reads, in pertinent part:

> Good afternoon Vincent. I am trying to find out the name of the JTP who was the subject of the investigation which alleged your involvement. I believe that it was either [JTP A] or [JTP B]. Please provide her name as I will be recommending to David Terhune that a transfer to a different Bronx location would be the best course of action in light of the allegation (which has not been substantiated). In any event, the perception of an entanglement (which is as bad as an actual affair) has led to accusations regarding unfair treatment and withholding perks and opportunities for other employees.
>
> As this situation is what our Agency is trying to avoid, it will be recommended that [JTP A] ([JTP B]) be transferred to a new Bronx location and away from your direct or indirect command.
>
> Please provide her name within the next couple of days. Thank you for your assistance in this matter.

(Pet. at Ex. 7.) (emphasis in original) (names of employees replaced with JTP A and JTP B).

On October 19, 2005, by e-mail, the EEO Officer notified Morrone that a complaint had been filed against him. In pertinent part, the e-mail reads:

> Good morning Mr. Morrone. Please review the excerpt of a recent case involving poor judgment and unreasonable business practices. Please note the punitive

[3] As support, the Union appended as Exhibits 7 & 8 several e-mails it believes establish that Morrone responded to the EEO Office in a timely fashion. The contents of these e-mails are not relevant to this petition.

> damages (to punish the company for bad business practices)[.] Please call me immediately as an EEO Case has been filed and you have been named as the respondent. My number is 212-360-2782. I look forward to hearing from you.

(Pet. at Ex. 9.) (October 19, 2005) (emphasis in original).[4]

The Union alleges that Morrone called the EEO Officer but would not answer any questions without the Union Representative present. The Union Representative then scheduled a meeting for the EEO Officer to interview Morrone but, according to the Union, Morrone was not notified about the interview and did not attend. In that meeting, the EEO Officer asked the Union Representative if he thought Morrone had ever referred to an African American as a "nigger" or a "muligna." (Pet. at ¶ 31, n. 5.) The City admits that the Union Representative and the EEO Officer had a meeting at which Morrone failed to appear but deny that the EEO Officer asked the Union Representative if he thought Morrone had ever referred to an African American as a "nigger" or a "muligna."

On November 7, 2005, the EEO Officer sent an e-mail to Morrone's supervisor addressing Morrone's failure to attend the meeting. The e-mail reads, in pertinent part:

> By the way, Mr. Morrone did not attend a meeting w/ me and his [U]nion [Representative], Bob Gervasi, on Friday. This willful action of **disrespect** for me and my office will be reflected in his evaluation.

(Pet. at Ex. 10.) (emphasis in original).

Silva

The Union alleges that on or about September 2005, the EEO Officer sent Park Supervisor Juan Silva an e-mail requesting that Silva contact him, and Silva did.[5] The EEO Officer informed

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[4] The excerpt referred to in the e-mail described an award of $20.2 million in punitive damages in a sex discrimination case.

[5] This e-mail is not part of the record and the City denies knowledge and information sufficient to form a belief as to the truth of the allegation.

Silva that a complaint had been filed against him alleging that he had impregnated a co-worker, to which Silva replied that that was impossible. Over the next two weeks, Silva and the EEO Officer had three telephone conversations regarding the complaint. Silva provided the EEO Officer with documentation and the name of a witness, who was interviewed by the EEO Officer. The EEO Officer and Silva had no other contact on this matter.

On March 30, 2006, Department Personnel Director David Terhune e-mailed Chief of Operations Charlie Gili regarding Silva. The pertinent part of the e-mail reads:

> As we discussed, the following employee is to have the indicative box checked on his 2005 performance evaluation:
>
> "Violated EEO Policy"
> Juan Silva
>
> There will be no further written materials provided with this evaluation. If Mr. Silva wishes to rebut the determination, he may provide a separate, written statement. If he needs clarification concerning the violation, he can make an appointment to see the Agency's EEO Officer, Ricardo Granderson.

(Pet. at Ex. 11.) Gili forwarded the e-mail to Deputy Chief of Operations Eric Greene. According to the Union, Silva's immediate supervisor, Principal Park Supervisor Eido Rivas, did not receive a copy of the written directive and did not check the box indicating "Violated EEO Policy" on Silva's 2005 Performance Evaluation. Rivas signed Silva's Performance Evaluation on April 12, 2006, and Greene signed it on April 13, 2006.

The failure to ensure that Silva's Performance Evaluation reflected "Violated EEO Policy" prompted the EEO Officer to contact Gili on May 15, 2006, to inform him that both Greene and Rivas will be deemed to have themselves violated EEO policy. The pertinent part of that e-mail reads:

> Please note that Messrs. Greene and Rivas will be deemed as having violated EEO policy by both wilfully refusing to designate that Mr. Juan Rivas had, in fact, violated Citywide EEO policy. Mr. Greene's argument was that he was not privy to the detail. He did not have to be privy as the substance/contents of EEO investigations are only available to the respondent (Mr. Silva). Mr. Greene arbitrarily decided that he, unlike Commissioners, Chiefs and other managers with employees who had violated policy, would not designate appropriately on Mr. Silva's evaluation.
>
> Mr. Silva, upon review of the determination, could have contacted my office. Mr. Greene could have contacted my office. Mr. Rivas could have contacted my office. But they chose not to. The same gentlemen who regularly allege disrespect chose to wilfully disregarded EEO policy and an instruction that was in accordance with the Consent Decree. Finally, Mr. Greene had to be repeatedly prompted to call my office.
>
> I am of the opinion that in addition to non-compliance with EEO, that Messrs. Greene and Rivas should receive conferences for insubordination. Had Mr. Greene, as Mr. Rivas's superior, had respect for the spirit of the Consent Decree and the EEO division, then he would have called (as good management would have dictated), but he chose not to.
>
> Thank you for your attention to this matter.

(Pet. at Ex. 13.)

To ensure that Silva's personnel file reflected the EEO Office's determination that he had violated EEO policy, a letter was presented to Silva on June 16, 2006. It reads in pertinent part:

> This letter is to inform you that you have been rated as having "Violated EEO Policy" by the agency's EEO Office for the calendar year 2005. Your 2005 performance evaluation inadvertently failed to recognize this.
>
> This rating must be noted in your personnel file, as such, you are required to be notified that this letter will become part of your employee file along with your 2005 performance evaluation. Please note that your overall rating is not changed.

(Pet. at Ex.14.)

A series of e-mails, beginning with a request from the Union Representative that the EEO Officer provide Silva with the disposition of the case investigated in 2005, were exchanged between

the Union Representative, the EEO Officer, and Silva on June 21 and 23, 2006. The EEO Officer responded by sending the Union Representative, with a copy to Silva, a detailed breakdown of the complaint against Silva which concluded:

> When all the evidence, which consisted of the aforementioned and other information, was considered in the light most favorable to Mr. Silva. [sic] The only reasonable conclusion was that it was very likely that Citywide EEO policy, i.e. quid pro quo harassment, had occurred. Thus, the 'non compliance' on his evaluation.

(Pet. at Ex. 16.) (June 21, 2006). Silva's response reads, in pertinent part:

> Please provide me with the date that this allegedly took place according to the complaint. Also, Mr. Gervasi requested that I receive written confirmation of the disposition of an investigation. Why did you see fit to reveal this confidential information to him. [sic] Also, if you care to, please e-mail me a copy of a [sic] formal written complaint and any pertinent relevant information written or otherwise. The essence of a complaint is subject to any interpretation. Written communication clarifies all the confusion that could ensue.

Id. (June 23, 2006). The EEO Officer response reads, in pertinent part:

> Good afternoon Mr. Silva. I hope that you are well. Unfortunately, the Consent Decree does not mandate or require that the agency provide you (or any other respondent/complainant) with the actual report. What is does requore [sic] is that you be aware of the conclusion, i.e. EEO violation because of quid pro quo. In fact, this was just confirmed during my discussion with the Law Department 15 minutes ago.
>
> With regard to the date, Ms. [] did not provide a specific date. I am of the opinion that the date was collateral to the primary issue of a prohibited relationship. If I had to conjecture, then I would say that the date should have been approximately on or about 9 months from the birth of Ms. []'s child. I hope this helps. Have a good day.

Id. (June 23, 2006) (name of complainant deleted). The Union states that Silva denied the allegations in the complainant and appends as Petition's Exhibit 15 documentation from the complainant's paternity suit against Silva. The suit was filed on November 9, 2005, and dismissed on February 21, 2006, after a DNA test established that Silva could not be the father and that the

complainant's legal husband was the biological father. The petition notes that Silva is a party to a class action discrimination lawsuit against the DPR and several of its officials.[6]

EEO Policy

At a Labor-Management meeting held on July 18, 2006, the Union requested an explanation of precisely what the designations in the EEO section of the performance evaluation meant. In response, DPR Director of Labor Relations Joseph Trimble provided the following guidance in a memorandum dated July 24, 2006:

> **Violation of EEO policy** - When there is evidence to suggest the occurrence of facts alleged either by probable cause or preponderance of the evidence, as determined by the EEO Officer and approved by the Commissioner.
>
> **Non-compliance** - When a party to a complaint or respondent, or a named witness[,] fails to respond to communications after repeated requests, as determined by the EEO Officer.
>
> **Supporting the EEO Process** - When an employee consistently and beyond the required obligations assists the EEO Office in the performance of its duties, including, but not limited to demonstrating initiative in supporting the Agency's EEO goals.

(Ans. at Ex. A.) (emphasis in original). The Union alleges various flaws in this guidance, including that the third category of the EEO section does not read "Supporting the EEO Process" but "Provided exceptional service in support of EEO office." Also, there is no category titled "Non-compliance;" rather, the first category of the EEO section is "Violated EEO Policy" and the second is "Failure to cooperate with EEO office, or (if supervisor/manager) failed in promptly report [sic] any allegation of discriminatory conduct."

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[6] The Union disclosed the following information regarding Silva: that he was added to the witness list in this lawsuit on or about August/September 2005; that he took the civil service exam for promotion to Principal Park Supervisor on January 28, 2006; and that he was interviewed by Gili, among others, in a panel promotional interview in February 2006. (Pet. at ¶33, n. 6.)

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the City's actions constitutes seven improper practices in violation of NYCCBL § 12-306(a)(1), (3), & (4).[7] The first, second, and fourth claims allege that the EEO Officer's e-mail and telephone calls to Christian, Lynch, Morrone, and Silva violated the Citywide Contract in a manner that the Union argues also constitutes violations of NYCCBL § 12-306(a)(1).[8]

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[7] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
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> (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 in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees; . . .

NYCCBL § 12-305 provides, in pertinent 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.

[8] Article IX, § 19, of the Citywide Contract provides:

> When a permanent employee is summoned to an interview which may lead to a disciplinary action and which is conducted by someone outside the normal supervisory claim of command, the following procedure shall apply:
>
> a. Employees who are summoned to the appropriate office of their agency shall be notified, whenever feasible, in writing at least two (2) work days in advance of the day on which the interview or hearing is to be held, and a statement of the reason for the summons shall be attached, except where an

Specifically, the first claim is that the e-mails and telephone calls constitute investigatory interviews which were conducted without the employees having access to union representation and thereby violated the employees' statutory and contractual rights. The second claim alleges that the e-mails, text messages, and telephone calls constitute summons to investigatory interviews that could lead to discipline without the contractually required notice of at least two work days or an explanation of why the interview is being held. The fourth claim is that the EEO Officer failed to inform the employees of their contractual right to union representation and did not ensure that the interviews took place in physical surroundings conducive to privacy and confidentiality. The Union acknowledges that Section 205(5)(d) of the New York Civil Service Law ("CSL") prohibits this Board from exerting jurisdiction over contract violations unless the alleged contract breaches also constitute improper practices to which the Board properly can assert jurisdiction as violations of NYCCBL § 12-306(a)(1).[9] The Union argues that since the denial of union representation violates CSL § 75(2), it is also an improper practice within the meaning of CSL § 205(5)(d), and that this

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emergency is present or where considerations of confidentiality are involved.

b. Whenever such an employee is summoned for an interview or a hearing for the record which may lead to disciplinary action, the employee shall be entitled to be accompanied by a Union representative or a lawyer, and the employee shall be informed of this right.

c. Whenever possible, such hearings and interviews shall be held in physical surroundings which are conducive to privacy and confidentiality.

[9] CSL § 205.5(d) provides in pertinent part:

. . . the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

Board should therefore assert jurisdiction.[10]

The Union's third claim alleges that the EEO Officer violated NYCCBL § 12-306(a)(1) by concluding that Lynch's and Morrone's request for union representation, and Morrone's alleged failure to answer e-mailed questions, evidenced guilt.

The Union's fifth claim is that the City's actions restrained Christian, Lynch, Morrone, and Silva from exercising their *Weingarten* rights in violation of NYCCBL § 12-306(a)(1). The Union argues that once an interview has been initiated, the employer is free to discontinue it upon the employee's request for union representation, but the decision whether to continue the interview without representation or to forgo the interview and any benefits that might result lies with the employee. Since the EEO Officer did not notify the employees of their option to continue the interview without union representation, the EEO Officer unilaterally denied them the benefits of the interview.

The Union's sixth claim is that the EEO Officer discriminated against Lynch and Morrone by presuming them guilty based upon their request for union representation, and against Silva by designating him in violation of EEO policy, in violation of NYCCBL § 12-306(a)(3). The Union argues that the EEO Officer was aware of the employees union activity and that the union activity was a motivating factor in the EEO Officer's decision. Regarding Silva, the Union argues that the dismissal of the paternity suit against him supports the inference that the EEO Officer's actions were

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[10] CSL § 75(2) provides in pertinent part:

> An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter [The Public Fair Employment Act] and shall be notified in advance, in writing, of such right.

motivated by Silva's participation in the lawsuit against the DPR, which is concerted employee activity. Alternatively, the Union argues that the EEO Officer's actions – drawing adverse inferences from the assertion of the right to union representation – are inherently destructive. The Union further argues that the above also supports the third and fifth claims.

The seventh claim is that by failing to negotiate with the Union over procedures by which the EEO policy portion of the employee's performance evaluation would be implemented, the City failed to negotiate with the Union over a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(1) & (4). The Union, pointing to the variety of ways the EEO section had been filed out and the inability of the DPR to explain its procedures, argues that these *ad hoc* procedural methods violate NYCCBL § 12-306(4).

Finally, the Union argues that all the claims are timely, even though many of the events occurred in 2005, because it was not until April 4, 2006, at the earliest, that the Union or the employees were on notice of negative impact on their employment and the alleged transgressions of the collective bargaining agreement and the law.

City's Position

The City raises six affirmative defenses. First, the City argues that any claims based on acts occurring prior to April 4, 2006, must be dismissed as untimely, as NYCCBL § 12-306(e) and § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") require that petitions alleging improper practices be filed no later then four months from the time the disputed action occurred.[11] The improper practice claims related to

[11] NYCCBL § 12-306(e) provides, in pertinent part:

A petition alleging that a public employer or its agents or a public employee

Morrone's and Silva's request for union representation are untimely as they occurred in 2005. The seventh claim is untimely because the procedures by which the EEO policy portion of the employee's performance evaluation would be implemented stem from the Consent Decree, which was available to the Union by June 22, 2005. The Consent Decree states that DPR performance evaluations had to indicate violations of EEO policy or the failure to cooperate with the EEO Office.

Second, the City argues that the first, second, and fourth claims must be dismissed because CSL § 205(5)(d) prohibits this Board from exerting jurisdiction over contract violations. To the extent that these alleged contract breaches separately constitute improper practices, they are duplicative of the Union's third, fifth, and sixth claims.

Third, the City argues that the first through sixth claim must be dismissed because the Union's petition fails to allege facts establishing that any employee was denied access to union representation. For there to have been a violation, the employer must have first denied the employee's request for union representation and then continued the interview. Since, as pleaded by

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> organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.
>
> OCB Rules § 1-07(b)(4) provides, in pertinent part:
>
> **Improper practices.** One or more public employees or any public employee organization acting on their behalf or a public employer may file a petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

the Union, no interviews occurred after the employees' request for union representation, there can be no improper practice. The City does not concede that any of the interaction between the EEO Officer and the employees constituted an interview or that any of these employees had a reasonable belief that dealings with the EEO Officer could lead to disciplinary action.

Fourth, the City argues that the first through sixth claim must be dismissed because the Union has not alleged and cannot establish that any of the EEO Officer's actions were motivated by any alleged union activity. All of the alleged actions were motivated by legitimate business reasons – the exercise of the duties of an EEO Officer.

Fifth, the City argues that the NYCCBL § 12-306(a)(4) prong of the seventh claim must be dismissed because the criteria for performance evaluations are not a mandatory subject of bargaining.

The sixth defense is that since there is no violation of NYCCBL § 12-306(a)(4), there can be no derivative NYCCBL § 12-306(a)(1) violation. Therefore the remainder of the seventh claim must be dismissed.

DISCUSSION

As a preliminary matter, we find the petition to be timely.[12] NYCCBL § 12-306(e) and OCB Rules §1-07(d) provide that a petition alleging an improper practice in violation of §12-306 may be filed no later than four months after the disputed action occurred. Where a claim relies solely on factual allegations taking place more than four months prior to the filing of the petition, the petition

[12] This Board need not address whether the contractual claims would otherwise be timely as, by letter dated March 27, 2007, the City stated it was "willing to waive timeliness objections if the Union files a request for arbitration on the contractual issues raised in the [Improper Practice Petition]."

will be dismissed as untimely. *See District Council 37, AFSCME,* Decision No. B-61-91 at 8. However, we have previously held that a "'party may also await performance of an action and file an improper practice charge within four months after the intended action is actually implemented and the charging party is injured thereby.'" *Autorino*, Decision No. B-30-91 at 10 (*quoting Barry v. United Univ. Professions*, 23 PERB ¶ 3024, 3047 (1990)); *see also Werner v. Middle County Teachers Ass'n*, 21 PERB ¶ 3012 (1988).

In the instant case, the earliest petitioners had notice of the negative impact of the EEO investigation upon their Performance Evaluations was April 4, 2006, when Christian's Performance Evaluation was returned to him with the section "Violated EEO Policy" marked. The petition was filed four months later, on August 4, 2006. Monroe and Silva were first notified that their record would reflect that they had violated EEO Policy on April 13 and June 16, 2006, respectively. Lynch's first interaction with the EEO Officer was May 1, 2006. While the Consent Decree did provide the Union some indication as to the changes in EEO Policy, we have held:

> a union appropriately interposes itself only after an action of management has had an immediate impact on the employees represented by the union, or that it necessarily entails an impact in the immediate or foreseeable future.

District Council 37, AFSCME, Decision No. B-61-91 at 8; *see also Correction Offcier's Benevolent Ass'n*, Decision No. B-26-2002 at 6 (knowledge of intended policy revision more than four months prior to filing the petition does not make the petition untimely as it was only upon implementation that the Union had knowledge of definitive acts to put it on notice to complain); *United Probation Officers Ass'n*, Decision No. B-44-86 at 18 (petition regarding guidelines timely when filed within four months of their implementation even though the order providing for those guidelines had been issued nine years prior because until their imminent implementation, the Union did not have "actual

or constructive knowledge of definitive acts which put it on notice of the need to complain").

Next, this Board must decide whether to assert jurisdiction over the alleged contract violations which constitute claims one (interviews conducted without employees having access to union representation), two (interviews conducted without explanation of purpose or two days notice), and four (interviews not conducted in manner conducive to privacy). This Board in *District Council 37, Local 1508*, Decision No. B-11-2007, recently addressed the interplay between contract violations, improper practices, and this Board's deferral policy.

As we held in that case, while this Board has jurisdiction over an alleged breach of contract where the alleged acts would also constitute an improper practice,[13] this Board must also comply with CSL § 205.5(d) and alleged violations of an agreement that do not otherwise constitute improper practices are expressly beyond the jurisdiction of this Board and may not be rectified through the filing of improper practice charges. *Id.* at 9-10 (*citing City Employees Union, Local, 237, I.B.T.*, Decision No. B-24-2006 at 15; *Local 1182, Communications Workers of America,* B-11-2003 at 4; *Local 237, Int'l Bhd. of Teamsters*, Decision No. B-31-98 at 7; *Local 1182, Communications Workers of America,* Decision No. B-8-96 at 11).

This Board finds that to the extent that the DPR allegedly violated the Citywide Contract, such claims should be brought in a grievance/arbitration proceeding, not in an improper practice petition. To the extent these claims can be read as alleging improper practices, the alleged improper practices are intertwined with the alleged contract violations. In such cases, this Board regularly defers the claim to arbitration, to allow for the parties' negotiated dispute resolution procedures to

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[13] *Id.* at 9 (*citing NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 31 n. 7 (1967); *Assistant Deputy Wardens/Deputy Wardens Ass'n*, Decision No. B-4-2003).

function. *Id.* at 10-11 (*citing Local 621, S.E.I.U.*, Decision No. B-16-90; *District Council 37*, Decision No. B-31-85; *Sanitation Officers Ass'n, Local 444*, Decision No. B-10-85; *District Council 37*, Decision No. B-10-80). This Board's deferral policy is well established:

> We defer the dispute to the arbitral forum where the circumstances are such that the contractual arbitration procedure provides an appropriate means of resolving the matter, "consistent with the declared policy of the NYCCBL 'to favour and encourage ... final, impartial arbitration of grievances between municipal agencies and certified employee organization.'"

Id. at 10 (*quoting United Probation Officers Ass'n*, Decision No. B-38-91 at 13 & NYCCBL § 12-302; *citing District Council 37*, Decision No. B-36-2001 at 7) (other citations omitted).

Therefore, this Board finds claims one (interviews conducted without employees having access to union representation), two (interviews conducted without explanation of purpose or two days notice), and four (interviews not conducted in manner conducive to privacy) should be determined in the arbitral forum, while retaining jurisdiction in the event that the arbitration decision does not conform with the NYCCBL. *Id.* at 11 (*citing United Probation Officers Ass'n*, Decision No. B-38-91 at 15) (other citations omited).

As we find that the contractual matters should be evaluated initially in the arbitral forum, we believe that it would be premature, at this point, to adjudicate claims three (drawing adverse inference based upon request for union representation), five (interference with *Wiengarten* rights), and six (discrimination based upon request for union representation), which allege violations of the NYCCBL. The factual determination which the Board would be required to make may overlap with those to be made by the arbitrator and the evidence weighed by the Board would likely duplicate that which will be adduced in the arbitration proceeding and might pose a risk of inconsistent determinations. *Id.* at 11-12 (*citing Local 1930, District Council 37*, Decision No. B-70-90 at 12;

Local 621, S.E.I.U., Decision No. B-16-90 at 12). Therefore, while we will not defer these statutory claims, we will hold their adjudication in abeyance.

This Board will retain jurisdiction over this pending improper practice charge, over which this Board has exclusive jurisdiction, but the disposition of which may be affected by the factual findings of the arbitrator. We shall hold any further proceedings in this matter in abeyance until such time as an arbitrator has issued an opinion and award upon which we may further determine whether an improper practice was committed by the Respondent. *Id.* (*citing Local 1930, District Council 37*, Decision No. B-70-90 at 10-12; *Local 621, S.E.I.U.*, Decision No. B-16-90 at 12).

Finally, this Board finds that the Union's seventh claim that the City failed to negotiate with the Union over procedures by which the EEO policy portion of the employee's performance evaluation would be completed fails to state a claim pursuant to the NYCCBL. Substantive changes, such as changes in criteria and standards, are not subject to bargaining. *Patrolmen's Benevolent Ass'n of the City of New York v. New York City Bd. of Collective Bargaining*, No. 112687/04, slip. op. at 4 (Sup. Ct. N.Y. Co. Aug. 17, 2005), *aff'd,* 2007 NY Slip Op 2674; 2007 N.Y. App. Div. LEXIS 3898 (March 29, 2007) ("imposition of criteria used for evaluation, and substantive changes in that criteria, are areas of managerial prerogative which need not be bargained with an employee organization"); *see also Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 at 12-15 (*discussing Genesee Educ. Ass'n NEA/NY v. Genesee Community College*, 29 PERB ¶ 4594 (1996)*; Suffolk County Bd. of Coop. Educ. Serv., Second Supervisory Dist. v. BOCES II Teachers Ass'n*, 17 PERB ¶ 3043 (1984); & *Elwood Union Free School Dist. v. Elwood Teachers Alliance*, 10 PERB ¶ 3107 (1977)); *see also Patrolmen's Benevolent Ass'n*, Decision No. B-12-2004; *Corrections Officers' Benevolent Ass'n*, Decision No. B-26-2002. Procedural changes, however, are subject to bargaining.

Patrolmen's Benevolent Ass'n of the City of New York, No. 112687/04, slip. op. at 4; *Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 at 12.

Therefore, this Board reviews the changes alleged by the Union to determine if they are substantive or procedural. *Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 at 12. The specific changes the Union alleges to be procedural are: changing of the performance evaluations after they had been signed, such as the handwritten notations on Christian's and Morrone's Performance Evaluations; mandating notations of EEO violations be placed in files when not noted on the performance evaluation form, such as the letter added to Silva's file; and failing to cogently explain the criteria for the EEO designations, such as the differences between the titles of the EEO categories on the performance evaluation form and in Trimble's memorandum.

Changes which require additional acts of an employee are deemed "procedural" in the sense that they do not fall within managerial prerogative. *Patrolmen's Benevolent Ass'n of the City of New York,* No. 112687/04, slip. op. at 6 ("where a new requirement that an employee meet with a supervisor as part of an evaluation process, this proceeding is a procedure that is subject to mandatory bargaining") (emphasis in original); *Suffolk County Bd. of Coop. Educ. Serv.*, 17 PERB ¶ 3043 (requirement that employee participate in additional pre-observation conference prior to evaluation found to be a change in procedure). Where nothing additional is required of the employee, the changes are deemed "substantive" and within managerial prerogative. *Genesee Educ. Ass'n NEA/NY*, 29 PERB ¶ 4594 (new evaluation form and documentation requirement are not procedural changes where performance review process remained unchanged)*; Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 at 15 (changes in performance evaluation process were substantive and not procedural where "the employee is not required to do anything procedurally

different from before").

The changes cites by the Union are substantive, not procedural, changes as nothing additional is required of the employee in the evaluation process. To the extent the Union argues that it is an improper practice for the DPR to fail to cogently explain the criteria for the EEO designations and to operate on an *ad hoc* basis, it is addressed in claims three, five, and six.[14] Therefore, this Board dismisses Petitioners' seventh claim.

[14] The Board offers no opinion as to whether this raises a claim under the Consent Decree.

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 contract based claims in the improper practice petition filed by District Council 37, AFSCME, Local 1508, docketed as BCB-2562-06, and the same hereby is, deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the due process contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL.

ORDERED, that the failure to bargain claim in the improper practice petition, filed by District Council 37, AFSCME, Local 1508, docketed as BCB-2562-06, and the same hereby is denied.

Dated: New York, New York
May 3, 2007

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER