

***District Council 37, 79 OCB 24 (BCB 2007)***  
[Decision No B-24-2007] (IP) (Docket No. BCB-2552-06)

***Summary of Decision:*** The Union requested clarification of relief as ordered in Board Decision No. B-34-2006 which found that actions by the NYPD which were the subject of the complaint therein constituted a change in sick leave procedures regarding documentation required for the use of leave time for FMLA-qualifying health conditions and that the City failed to bargain to the point of agreement with the Union before unilaterally imposing the changes, in violation of NYCCBL § 12-306(a)(1) and (4). Since the Union has clarified its initial request for relief, this Board modifies the order of relief in Decision No. B-34-2006 with respect to, among other things, expungement of disciplinary records and penalties. ***(Official decision follows.)***

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**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 1549,**

**Petitioners,**

**-and-**

**CITY OF NEW YORK  
and THE NEW YORK CITY POLICE DEPARTMENT,**

**Respondents.**

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**SUPPLEMENTAL DECISION AND CLARIFYING ORDER**

On December 4, 2006, the Board of Collective Bargaining (“Board”) issued Decision No. B-34-2006, which granted an improper practice petition filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1549, (“Union”) against the City of New York and the New York City Police Department (“City” and “NYPD”). On December 29, 2006, the Union filed a notice of motion for clarification of the Board’s determination. The City filed a response letter on February 14, 2007. Since the Union has clarified its initial request

for relief, this Board modifies the order of relief in Decision No. B-34-2006 with respect to, among other things, expungement of disciplinary records and penalties.

### **BACKGROUND**

The Board previously issued *District Council 37*, Decision No. B-34-2006. In that decision, we upheld the Union's claim that the NYPD violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to bargain over unilateral changes in certain departmental procedures for documenting sick leave used under the Family and Medical Leave Act (29 USCS § 2601, *et seq.*) ("FMLA") and instituting disciplinary procedures against members in the civil service titles of Police Communication Technician ("PCT") and Supervising Police Communication Technician ("SPCT") for violation of those departmental procedures. The Board rejected the City's contention that the duty to bargain was not implicated because it did not change procedures for documenting sick leave or instituting discipline through its leave monitoring Step Program but rather merely reiterated pre-existing departmental procedures. The City further contended that the employer's managerial prerogative under NYCCBL § 12-307(b) encompassed the NYPD's lawful unilateral decision to require documentation for certain illness-related absences. The City also argued that the Union's case was time-barred.

In *District Council 37*, Decision No. B-34-2006, this Board found that, with one exception, the NYPD's requirements for documentation by employees seeking to use leave time for FMLA-qualifying health conditions constituted a change in procedures and that the

City failed to bargain with the Union prior to unilaterally implementing the changes in violation of NYCCBL § 12-306(a)(1) and (4). The Board granted the Union's petition with the exception of a change which the Board determined was *de minimis*, specifically, a requirement that documentation be submitted on the "first day" of a succeeding month rather than at the "end" of the previous month.

The Board ordered that the NYPD rescind the changes in the documentation procedures attendant to the use of FMLA leave time, restore documentation procedures in effect prior to the issuance of Communications Division Memos No. 1/17.7 and No. 1/18.3 at issue, and cease and desist from implementing changes in documentation procedures attendant to the use of FMLA leave time until the parties could negotiate the changes.

In its improper practice petition, the Union requested that the Board "remove all PCTs and SPCTs from the Step Program." The plain language of this particular request for relief was not limited to unit members whose placement in the Step Program was pursuant to the unlawfully changed procedures at issue in the improper practice petition. Although the Union asserted that, "[o]n information and belief, over one hundred of the SPCTs and PCTs in the Communications Division, who are on FMLA leave, are currently in PD's Step Program," the Union offered specific allegations of fact with respect to two unit members only, namely, PCT Toni Reid and SPCT Cynthia Hill, who faced potential disciplinary action. Therefore, in its Order, the Board directed the NYPD to expunge disciplinary records of Reid and Hill pertaining to the Step Program to the extent they related to alleged violations of the procedures at issue in the improper practice proceeding. *Id.* at 21.

Subsequent to the issuance of Decision No. B-34-2006, the Union has drawn this

Board's attention to the impact of the procedures found to be violative of the NYCCBL on other employees and has requested that we clarify the impact of our ruling as to such other employees.

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**POSITIONS OF THE PARTIES**

**Union's Position**

In the instant motion, the Union asks the Board to direct the NYPD to expunge disciplinary records of "any and all" PCTs and SPCTs "affected" by the actions found in Decision No. B-34-2006 to have violated the NYCCBL, and further to rescind "any and all disciplinary penalties (including, but not limited to, docked pay, debited annual leave and/or compensatory time). Additionally the Union requests the Board to order the NYPD to rescind below-standard performance evaluations related to Respondents' unlawful FMLA documentation requirement. Again, the Union asserts that its improper practice petition was intended to encompass relief for all these employees, not merely the two people cited by name in the petition.

**City's Position**

The City asserts that an evaluation indicating below-standard employee performance would be subject to expungement under the Board's order if it were admissible as evidence of progressive discipline but, the City continues, a performance evaluation is not a disciplinary tool and is not subject to expungement. The City maintains that no pay has been docked or leave time debited from the employees at issue but, if the Union can point to specific instances in which that has happened, the City avers that the NYPD will restore the

docked pay and credit the debited leave time.

### **DISCUSSION**

This Board has long held that “[p]ursuant to NYCCBL § 12-309(a)(4), it is the duty of the Board to remedy and prevent improper practices,” and that “[h]aving found that an improper practice had been committed, the Board would be remiss were it not to provide a remedy.” *New York State Nurses’ Ass’n*, Decision B-10-04 at 5 (“*NYSNA*”). Further, it is well settled that this Board “possesses broad discretion to order a remedy which is appropriate under the facts of a given case.” *Id.* at 5-6; *citing Communications Workers of America, Local 1180*, Decision No. B-13-88 at 6. As we explained in *NYSNA*,

The remedy in an improper practice case is designed to make whole those affected employees who have been deprived of protected rights as a result of the commission of an improper practice. Clearly, the Board did not intend to leave the aggrieved employees without a remedy.

*Id.* at 6.

In the instant case, a similar outcome is mandated. Having found that the NYPD failed to bargain over the implementation of new procedures with regard to documentation by employees in the title of PCT and SPCT for FMLA-qualifying leave time, the Board, in its Order, directed that relief be granted to the two specified unit members affected by the improper practice, *i.e.*, that the NYPD expunge any disciplinary records of those two specified members as those records pertain to the Step Program and to the extent that those records relate to alleged violations of the procedures at issue in the case. The Board further ordered that the NYPD rescind the changes in documentation procedures attendant to the use

of leave time under the FMLA, restore the documentation procedures in effect prior to the issuance of Communications Division Memo Nos. 1/1676.7 and 1/18.3, and cease and desist from implementing changes in documentation procedures attendant to the use of leave time under the FMLA until the parties negotiate such changes.

The Board did not address, any more than it had in *NYSNA*, the status of unspecified employees who had been subject to the same adverse employment action treatment as those employees who were named in the improper practice petition. However, the Union, in its petition had in fact asserted in a timely fashion the rights of all affected members, and clearly requested that relief be afforded all affected employees. (Petition at ¶ 26, Prayer for Relief (c).) While the Board did not specifically address the circumstances of those unnamed individuals, the necessary implication of the Board's ruling is that the adverse employment actions complained of as to them constitutes the same violation of the NYCCBL as that inflicted upon the two employees named in the petition, and is also subject to remedy. *Id.* at 6. Therefore, the Union's request that the Board order the expungement of disciplinary records is granted as follows.

We grant the Union's request and order that disciplinary records pertaining to affected PCTs and SPCTs subjected to the Step Program be expunged to the extent that those records relate to their placement in the Step Program or in any other way to the new procedures implemented in Memo No. 1/17.7 and Memo No. 1/18.3 that were ordered by the board to be rescinded.

The Union further asks the Board to direct the NYPD to rescind any and all disciplinary penalties (including, but not limited to, docked pay, debited annual leave and/or

compensatory time), as well as below-standard performance evaluations, related to Respondents' unlawful FMLA documentation requirement. Again, the Union asserts that its improper practice petition should be read to encompass relief for all these employees because such relief was requested therein, not merely for the two who were cited by name in the petition. Again, we find that the implications of our opinion in Decision No. B-34-2006 require such a conclusion but find that the Union's request as written sweeps more broadly than the implications of Decision B-34-2006. We grant the Union's request that disciplinary penalties imposed upon any and all PCTs and SPCTs be rescinded to the extent that those penalties arise out of or relate to the procedures at issue in the improper practice proceeding. Any disciplinary penalties imposed upon affected employees, but for reasons unrelated to the improper practice found by this Board, remain unaffected by this decision.

As to the instant motion's request to expunge sub-par performance evaluations in addition to discipline and disciplinary record, the Union had in its initial petition sought such relief. (Petition at Request for Relief [c].) Specifically, the Union, in that petition, sought an order for rescission of "any 'below standard' performance evaluations for FMLA approved leave." Therefore, the request is properly before this Board as part of this motion.

*NYSNA, supra.*

The City's claim that such evaluations do not constitute discipline unless encompassed within a larger scheme of progressive discipline must be addressed. In this respect, this Board has repeatedly held that unsatisfactory performance evaluations that do not form the basis for progressive discipline or are not in some other way linked with a cognizable adverse employment action do not in and of themselves constitute discipline.

*SSEU Local 371*, Decision B-22-03 at , *citing, inter alia, Doctors' Council*, Decision B-18-94 at 16-17; *District Council 37, Local 375*, Decision No. B-12-93 at 14 (relying, in part, upon a critical performance evaluation received at the time the grievant was transferred to a distant and inconvenient location), *aff'd sub nom., New York City Dep't of Sanitation v. MacDonald*, No. 402944/93 (Sup. Ct. N.Y. Co. Dec. 20, 1993), *aff'd*, 215 A.D.2d 324 (1st Dep't 1995), *aff'd*, 87 N.Y.2d 650 (1996).

However, the mere fact that a performance evaluation does not in every case amount to discipline does not end the inquiry; this Board has repeatedly held that negative discussion in a performance evaluation of an employee's having engaged in protected activity may independently constitute an improper practice. *See, e.g., Communications Workers of America*, Decision B-58-87 at 18; *City Employees Union, Local 237*, Decision B-13-2001 at 10-11; *see also, District Council 37*, Decision B-8-89 at 11-14. Conversely, the use of criteria imposed through an unlawful employment practice on a performance evaluation would likewise constitute an improper practice. *See, e.g., Matter of Yonkers Police Ass'n (City of Yonkers)*, 39 PERB ¶ 4580 at \*\* 11-16 (2006); *Matter of Civil Serv. Employees' Ass'n (County of Monroe)*, 38 PERB ¶ 4533 (2005) (negative use of protected activity in performance evaluation contributed to finding of improper practice).

Accordingly, we find that the relief implicit in our previous opinion and order includes the expungement of any negative comments on performance evaluations regarding alleged failure to comply with or conform to the procedures found to constitute an improper practice in our prior decision in this case.

For the reasons stated above, we grant in part and deny in part the Union's instant

motion, as set forth in the Order that follows:

**CLARIFYING ORDER**

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby,

DETERMINED, that the New York Police Department violated NYCCBL § 12-306(a) (1) and (4) by making unilateral changes, as specified herein, in documentation procedures attendant to the use of leave time under the Family and Medical Leave Act, and it is further

ORDERED, that the improper practice petition, Docket No. B-2552-06, filed by District Council 37, on behalf of its affiliated Local 1549, against the New York Police Department and the City of New York, be, and the same hereby is, granted, and it is further

ORDERED, that the New York Police Department rescind the changes in the documentation procedures attendant to the use of leave time under the Family and Medical Leave Act; restore the documentation procedures in effect prior to the issuance of Communications Division Memo Nos. 1/17.7 and 1/18.3; and cease and desist from implementing changes in documentation procedures attendant to the use of leave time under the Family and Medical Leave Act until such time as the parties negotiate such changes; and it is further

ORDERED, that the New York Police Department expunge disciplinary records of any and all PCTs and SPCTs pertaining to the Step Program to the extent that those records relate to violations of the procedures at issue in the instant improper practice proceeding. Disciplinary records *not* related to the violations at issue in the instant improper practice proceeding are not subject to this expungement order; and it is further

ORDERED, that the New York Police Department rescind and expunge disciplinary penalties against any and all PCTs and SPCTs pertaining to the Step Program to the extent that those penalties relate to violations of the procedures at issue in the instant improper practice proceeding. Disciplinary penalties *not* related to the violations at issue in the instant improper practice proceeding are not subject to this expungement order; and it is further

ORDERED, that the New York Police Department expunge sub-par performance evaluations of any and all PCTs and SPCTs pertaining to the Step Program to the extent that those performance evaluations relate to violations of the procedures at issue in the instant improper practice proceeding.

Dated: June 18, 2007  
New York, New York

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

CHARLES G. MOERDLER  
MEMBER

GABRIELLE SEMEL  
MEMBER

I dissent.

M. DAVID ZURNDORFER  
MEMBER

I dissent.

ERNEST F. HART  
MEMBER