***Social Service Employees' Union, L. 371 (Abualroub)*, 79 OCB 34 (BCB 2007)**
[Decision No. B-34-2007] (IP) (Docket No. BCB-2606-07).

Summary of Decision**:* Union alleged that, by suspending an employee without pay after her testimony on behalf of a fellow Union member at a disciplinary hearing before OATH, ACS interfered with, restrained, and coerced the employee in the exercise of rights under NYCCBL § 12-305 in violation of NYCCBL § 12-306(a)(1) and discriminated against her in violation of NYCCBL § 12-306(a)(3) to discourage her participation as a member of the Union. The City asserted that the instant matter should be deferred to arbitration, was untimely, and that, in any event the evidence established that ACS properly disciplined the employee based on her false testimony, which casts doubt on her ability to testify on behalf of the agency, one of her job duties. The Board found that disciplining a Union member compelled to testify in a routine disciplinary matter under the circumstances here presented constituted interference, restraint and coercion against protected activity, and granted the petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
and BELEN ABUALROUB,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

Petitioner, Social Service Employees Union, Local 371, ("Union") filed a verified improper practice petition on March 9, 2007 against the City of New York ("City") and the New York City

Administration for Children's Services ("ACS"), asserting violations of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union alleges that its member, Belen Abualroub, was suspended for 60 days without pay as a direct result of her protected union activity, specifically her testimony at a disciplinary hearing at the New York City Office of Administrative Trials and Hearings ("OATH") on behalf of another Union member. The petition charges that, by its actions, ACS interfered with, restrained, and coerced Abualroub in the exercise of rights under NYCCBL § 12-305 in violation of NYCCBL § 12-306(a)(1) and discriminated against her to discourage her participation as a member of the Union, in violation of NYCCBL § 12-306(a)(1) and (3). The City asserts that the instant matter should be deferred to arbitration, or, in the alternative, deemed to be untimely filed or, in the alternative, deemed factually insufficient. Additionally, the City argues that ACS had a legitimate business reason to discipline the employee based on her allegedly false testimony before OATH, which, it asserts, casts doubt on her ability to perform her job duties which require her, on occasion, to testify under oath. The Board of Collective Bargaining ("Board") finds that the Union has pleaded facts sufficient to establish *prima facie* claims of interference, restraint and coercion under NYCCBL § 12-306(a)(1) and of discrimination under NYCCBL § 12-306(a)(3) and that the City has neither controverted those facts, nor established a legitimate business reason sufficient to overcome the *prima facie* case. Accordingly, the petition is granted.

BACKGROUND

Belen Abualroub is employed by ACS in the title of Child Welfare Specialist II in the Adoption Documentation Unit. On October 28, 2005, she appeared before OATH to testify pursuant

to a subpoena issued by the Union in its defense of Jose Rodriguez, another Child Welfare Specialist II, whom she had known for about ten years. (Pet. Ex. B.) Rodrigez was charged with, among other specifications, using inappropriate language towards a supervisor on or about April 27, 2005. (Pet. Ex. C.; *Matter of Jose Rodriguez*, OATH Index No. 264/06.) Abualroub testified that, on that date during the course of her work day, she used a printer located near the office of Lorraine Stephens, then the director of the unit, and that, while at the printer, she heard a conversation taking place in Stephens's office, between Stephens and Rodriguez. Abualroub testified that she did not hear Rodriguez use inappropriate language with which he was charged, or indeed any inappropriate language. On March 7, 2006, the OATH administrative law judge issued her report finding that Rodriguez was guilty of the charges and recommending that Rodriguez be suspended for 10 days.

The OATH administrative law judge declined to credit Abualroub's testimony in the Rodriguez matter, describing it as "unworthy of belief," and explaining that:

> Her presence in the area was questionable given the fact that her desk was some distance from Ms. Stephens' office, and she contradicted the credible testimony of [another witness] who sat right outside of Ms. Stephens' door as the confrontation occurred. Further, Ms. A[b]ualroub's claim that she had no particular friendship with Mr. Rodriguez [transcript citation omitted] was contradicted by the fact that she was the first person Mrs. Rodriguez called after learning of the incident. . . .

(Pet. Ex. C.)

The OATH judge, while choosing to credit the other witness's testimony over that of Abualroub, and finding aspects of her testimony implausible, did not enter any finding that the testimony in question was deliberately false, or that it constituted perjury, or other deliberate effort

to subvert the disciplinary process.

On August 17, 2006, ACS served Charges and Specifications against Abualroub herself arising from her testimony at the OATH hearing on behalf of Rodriguez. The charges alleged in part as follows:

> Respondent falsely testified that she overheard a conversation which took place on or about April 27, 2005, between ACS employees Lorraine Stephens and Jose Rodriguez behind the closed doors of Lorraine Stephen's office.
>
> Respondent falsely testified that, on or about April 27, 2005, she was the only person in the vicinity of Ms. Stephen's office at the time of the conversation between Ms. Stephens and Mr. Rodriguez.
>
> Respondent falsely testified that she and Mr. Rodriguez were strictly co-workers and that she had no ulterior motives in testifying.

(Pet. Ex. D.)

An Informal Conference was held on September 12, 2006, and, on September 15, 2006, the ACS Conference Leader issued her decision finding Abualroub guilty of the charges and recommending termination. On September 20, Abualroub waived her right to a hearing under § 75 of the N.Y. Civil Service Law and chose to have the matter heard through the contractual grievance process. (Ans. Ex. 7.) On October 10, 2006, a Step II hearing was held to review the decision of the Informal Conference Leader. On November 6, 2006, the Step II determination upheld the charges but modified the penalty recommendation to a 60-day suspension without pay. (Ans. Ex. 7.) By letter dated January 9, 2007, ACS Commissioner John Mattingly notified Abualroub that he had adopted the recommended penalty of suspension without pay and directed her to serve the

suspension from January 23 through March 23, 2007. On January 25, 2007, the Union filed a Request for Expedited Arbitration.[1] (Docket No. A-12185-07.) (Ans. Ex. 7.)

At the time the instant petition was filed on March 9, Abualroub was serving the penalty. The petition seeks an order from this Board directing ACS to reimburse Abualroub salary, benefits, leave accruals, and all benefits at the rate at which she was entitled to be paid under the terms of the parties collective bargaining agreement for the period of the suspension. In addition, the petition seeks an order from this Board directing ACS to cease and desist from (i) interfering with, restraining, or coercing or (ii) discriminating against Abualroub or any other Union member from testifying on behalf of any other Union member in any legal proceeding including any disciplinary proceeding before OATH.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union argues that by suspending Abualroub without pay after her truthful testimony on behalf of a fellow Union member at that member's disciplinary hearing before OATH, ACS interfered with, restrained, and coerced her in the exercise of rights under NYCCBL § 12-305 to participate in Union activities, and that ACS's actions thus violated NYCCBL § 12-306(a)(1). In addition, the Union contends that the discipline of Abualroub, who testified pursuant to the Union's subpoena, also constitutes unlawful discrimination against her for her participation in Union activities in defense of other Union members, in violation of NYCCBL § 12-306(a)(3).

[1] As of this writing, no date has been scheduled for the arbitration hearing.

City's Position

The City asserts that the issue of whether ACS imposed wrongful discipline on Abualroub should be deferred to arbitration. Alternatively, the City contends that the instant petition is untimely because the employee knew or should have known prior to the accrual date of the limitations period that ACS was seeking to discipline her and the failure to file the instant petition within that period renders it untimely. In any event, the City argues that the Union has not supported its contention that ACS discriminated against Abualroub because of any protected union activity. Rather, the City maintains that ACS lawfully disciplined Abualroub for providing what it alleges was false testimony at OATH, which, it asserts, cast doubt on her ability to perform her job duties which include, on occasion, testifying under oath on behalf of the City.

DISCUSSION

As a threshold matter, this Board must address two preliminary objections to our considering the merits of this improper practice claim. The first objection is that the instant petition was not timely filed. Pursuant to NYCCBL § 12-306(e) and § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") a petition alleging an improper practice in violation of § 12-306 must be filed within four months of the act or omission alleged to constitute the improper practice, or within four months of the date the petitioner knew or should have known of its occurrence. Here, the City claims that the alleged improper practice took place upon the service of the charges on Abualroub on August 17, 2006, and argues that the asserted claim accrued on that date. By contrast, the Union asserts that the claim did not accrue until the imposition of a 60-day suspension without pay, as to which Abualroub was

notified by ACS by letter dated January 9, 2007. We find that the Union's claim accrued on January 9, the date on which she was notified by ACS that it was imposing the suspension, and that the instant petition, which was filed on March 9, 2007, is timely.

This Board has long held that where, as here, an action is proposed, but its performance remains conditional, that a party may await the performance and file the improper practice charge within four months after the intended action is actually implemented and the charging party is injured thereby. *See District Council 37, Local 1508*, Decision No. B-21-2007 at 18-19; *see also Autorino*, Decision No. B-30-91 at 10 (*quoting Barry v. United Univ. Professions,* 23 PERB ¶ 3024, 3047 (1990); *see also Werner v. Middle Country Teachers Ass'n*, 21 PERB ¶ 3012 (1988).

We have long held that a union may appropriately wait to interpose itself until an action of management has an "immediate impact on the employees represented by the union or necessarily entails such impact in the immediate or foreseeable future." *Autorino*, Decision No. B-30-91 at 9-10. The mere levying of disciplinary charges is distinct from the determination that misconduct occurred and that a penalty should be imposed, and to find that the accrual of the improper practice claim arises prior to that determination would inappropriately treat the disciplinary process agreed upon by the parties as a mere formality. Thus, the Union's decision in this case to await a final agency determination, that is, the receipt of notice of the Commissioner's decision upholding the recommended disciplinary suspension, or the imposition of the actual suspension itself, prior to filing the instant charge, is wholly consistent with our prior decisions concerning accrual of an improper practice claim. Whether we were to consider the accrual date to be January 9, 2007, the date on which Abualroub was notified by ACS that suspension would be imposed, or January 23, 2007, the date on which she actually began serving the suspension, the instant petition, filed on March 9, 2007,

was clearly timely.

The second preliminary objection is the City's contention that the gravamen of this case is a routine discipline claim which should be deferred to arbitration. This Board has deferred claims asserted in improper practice proceedings in which the focus of the improper practice dispute and a question of arbitrability have arisen from and require interpretation of a collective bargaining agreement, and in which it appears that arbitration would resolve both the statutory and the contractual claims. *See District Council 37*, Decision No. B-11-2007; *District Council 37*, Decision No. B-23-2007; *see also District Council 37*, Decision No. B-31-85.

In the instant case, the improper practice claims are articulated as interference, restraint, and coercion as well as discrimination for participation in protected activity under the NYCCBL. Such statutory claims are committed to adjudication under the NYCCBL rather than the arbitral forum. *See, e.g., City Employees Union, Local 237*, Decision No. B-24-2006; *Sergeants' Benevolent Ass'n*, Decision No. B-32-2005. Here, the Union claims that Abualroub was wrongfully disciplined for testifying, at the direction of the Union, on behalf of a fellow Union member and subjected to interference, coercion, and discrimination for it. The claim of wrongful discipline under the parties' collective bargaining agreement is intertwined with the claimed violations of the NYCCBL. We have held that where the facts alleged to constitute a violation of the collective bargaining agreement are inextricably related to a claim of unlawful interference or discrimination, the claim cannot be deferred to be resolved separately in arbitration. *Sergeants' Benevolent Ass'n*, Decision No. B-32-2005 at 8, citing *Connetquot Central School District*, 10 PERB ¶ 3045 (1986). Therefore, we will not defer the portions of the petition which allege that the City interfered with, restrained or coerced, or discriminated against Abualroub for engaging in protected union activity.

Thus, we turn to the substance of the claimed violations of NYCCBL § 12-306(a)(1) and (3) by the imposition of discipline for testimony on behalf of a fellow Union member. To determine if an employer's action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, Decision No. B-51-87. Petitioners 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.

Bowman at 15; *Howe*, Decision No. B-32-2006 at 22.

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute the petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *Id.; see also Local 237, City Employees Union,* Decision No. B-24-2006 at 19.

With respect to the first prong of the *Salamanca-Bowman* test, we have long stated that an activity which the Board would deem to fall within the protection of NYCCBL § 12-305 must be at least indirectly related to the employment relationship between the City and bargaining unit employees. *Correction Officers Benevolent Association*, Decision No. B-17-94 at 11, *citing McNabb*, Decision No. B-48-88 at 13, *quoting Board of Education of Deer Park Union Free School District*, 10 PERB ¶ 4594, at 4689 (1977), *aff'd*, 11 PERB ¶ 3043 (1978). It must at least be in furtherance of the collective welfare of employees, as distinguished from the welfare of an individual. *Id.* at 11. We have previously held that protected activity includes appearances on behalf

of union members in litigation including disciplinary hearings. *See, e.g., Grennock*, Decision B-19-2004 (representation at command discipline hearing protected activity); *McNabb*, Decision No. B-48-88 (petitioner's alleged failure to be promoted because of participation in litigation initiated by union which litigation compelled civil service examinations and establishment of hiring list).[2]

Here, the Union contends that Abualroub was engaged in protected activity when she complied with a subpoena issued by the Union and testified before OATH in defense of another Union member. The City does not deny the Union's contention and concedes, *arguendo*, that Abualroub's participation at OATH under a directive from the Union was protected activity. There is no dispute that Abualroub testified before OATH on behalf of another unit member in compliance with a subpoena issued by the Union. For these reasons, we find that Abualroub was engaged in protected activity and that ACS had knowledge of that protected activity and, thus, that Petitioner has established the first prong of the test. *See Howe,* Decision No. 32-2006 at 21.

In the instant case, a *prima facie* case supporting causation is not genuinely at issue; the City affirmatively alleges that Abualrob's testimony is the basis for the disciplinary charges. Rather, what is at issue is whether the discipline was aimed at the protected act of giving testimony as required by the Union representing another member in a disciplinary case, or, as the City contends, only predicated on the falsity of her testimony, and the concomitant doubt the provision of such false testimony casts on Abualroub's ability to perform her job. We find that, under the circumstances

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[2] This Board's statement, in *Williams*, Decision No. B-48-97 at 8-9, that a union's duty of fair representation does not extend to the representation of its members in disciplinary proceedings pursuant to § 75 of the Civil Service Law was not meant to suggest that participation in such representation, once assumed by a union, is not protected activity under the NYCCBL. Consistent with our decisions in *Grennock* and *McNabb*, *supra*, participation at a union's behest in a § 75 disciplinary hearing clearly is protected activity.

presented here, the City's reasoning for issuing disciplinary charges is more in the nature of a legitimate business reason defense, and not a claim that the Union has failed to state a *prima facie* case. We reach this conclusion in light of the concession that the City is seeking to discipline an employee for the substance of her testimony, and that parsing out that substance from the protected act of merely giving testimony requires us to make an affirmative finding as to the intention with which the City acted here. We have consistently held that the *prima facie* case as to "a causal relationship between protected activity and the complained of action may be proven through the use of circumstantial evidence, absent an outright admission." *Howe*, Decision No. B-32-2006 at 22; *Burton*, Decision No. B-15-2006. Additionally, we have expressed our "willingness to accept indirect evidence of wrongful intent," while requiring more than "mere assertion." *Social Services Employees Union*, Decision No. B-35-2006 at 15; *citing Local 983, District Council 37*, Decision No. B-15-2001 at 6. In this case, in view of the charges' explicit reference to the testimony, we find that the Union has sufficiently grounded its "allegations of improper motivation" in "specific, probative facts rather than on conclusions based upon surmise, conjecture, or suspicion." *Id.*; *citing Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. Accordingly, we find that the Union has stated a *prima facie* case and that the burden of establishing its proffered legitimate business reason rests upon the City.

In this case, we note that the law in New York has long been to distinguish between testimony that is incredible, in that it is held to be not entirely accurate, and testimony that constitutes a wrongful act, that is, testimony that is wilfully deceptive, intended to subvert the process. *See, e.g., People v. Monaco*, 32 A.D.3d 241 (1st Dep't 2006) (to constitute perjury, testimony must be not merely false but knowingly and wilfully false); *Smith v. Lehigh Valley*

Railroad Co., 170 N.Y. 394, 400 (1902) (factual falsity of testimony does not of itself establish intent to deceive); *People v. Rodriguez*, 9 Misc.3d 1127A, 2005 N.Y. Slip Op. 51817U (Sup. Ct. Kings Co. June 25, 2005) (inconsistent testimony between witnesses does not establish perjury, but merely creates an issue of credibility for the trier of fact to determine). In the instant case, the OATH judge was presented with the inconsistent accounts of two witnesses and had to determine which of the two to adopt. In finding that Abualroub's presence in the area was "questionable"and in discounting Abualroub's testimony as in these circumstances "unworthy of belief," the OATH judge determined that the City's witness was more "credible." The OATH judge acted as a trier of fact to resolve the credibility dispute. However, such a routine inquiry should not be transformed, absent more, into a finding of willful and deliberate misconduct, sufficient for the imposition of discipline. *Rodriguez, supra; Smith, supra*.

Our holding gains support from the similar analysis employed by the Public Employment Relations Board ("PERB") in *Plainedge Public Schools*, 13 PERB ¶ 3037 (1980) and its progeny. In that case, PERB stated that "[a]n employee engaged in a protected activity does not lose that protection merely because he makes inaccurate statements that disturb the employer. The employee retains his protection unless his statements are shown to indicate an intent to falsify or maliciously injure the respondent." *Id.* at ¶ 3056; *see also City of Newburgh*, 32 PERB ¶ 4576 (1999) (following *Plainedge*); *New York State [NYS Department of Corrections]*, 35 PERB 4514 (2002) (following *Plainedge*; where explicit finding that grievant's account before arbitrator was explicitly found to be a "deliberate falsehood" by arbitrator, subsequent claim of improper practice dismissed by ALJ).

In this case, where the employer seeks to punish what was, in essence, compelled testimony before OATH that was disbelieved by the trier of fact but not found to be malicious or willfully false,

the City has proffered as its legitimate business reason its conclusion that Abualrob's testimony before OATH raises doubts as to her ability to perform one of her job functions – that is, to testify on behalf of the agency. This purportedly legitimate business reason, however, is unconvincing, on the basis that the City has failed to enunciate how punishing Abualrob for one act – her testimony before OATH – would somehow cure her employer's newfound doubt in her ability to testify for the agency. Indeed, the charges do not even reference her ability to represent the agency in testimony. Nor has the agency identified any reason that the imposition of the suspension at issue here would somehow ameliorate or cure that doubt. Rather, such discipline would only serve to deter Abualrob and other Union members from testifying against the employer, and the Union from calling them.

Where, as here, the proffered reason for discipline and the likely effect of that discipline are incongruous, the business reason should be deemed to constitute "a self-serving *post hoc* justification for retaliatory conduct, and does not warrant belief." *Social Services Employees Union, L. 371*, Decision B-35-2006 at 20; *see Helsam Realty Co. v. H.J.A. Holding Corp.*, 4 Misc.3d 64, 69-70 (App. Term. 2004) (Golia, J., concurring)(where explanation failed to account for wrongful behavior, explanation was properly deemed incredible); *People v. Hymes*, 2001 N.Y. Misc. LEXIS 429 (Sup. Ct. Queens Co. August 16, 2001)(deeming prosecutor's race-neutral explanation for striking juror to be "pretextual" and "incredible" where it was logically incoherent); *see generally Corines v. State Bd. for Professional Med. Conduct*, 267 A.D.2d 796 , 799-800 (3d Dep't 1999)(where explanation for alleged misconduct was "absurd" and thus deemed "incredible" an inference of intent to deceive may be drawn)

Accordingly, we find the claim that discipline here was legitimate unavailing as a defense to the claims of interference, restraint and coercion under NYCCBL § 12-306(a)(1) and

discrimination under NYCCBL § 12-306(a)(3).

Although the Union has pleaded the imposition of the 60-day suspension as a separate claim under NYCCBL § 12-306(a)(1), we have reviewed the allegations pertaining to this claim and find them identical to the allegations pertaining to the § 12-306(a)(3) claim. We, therefore, hold that the claim asserted under § 12-306(a)(1) to be derivative of the § 12-306(a)(3) claim rather than a separate, independent claimed violation of NYCCBL § 12-306(a)(1).

Thus, we grant the instant petition and direct ACS to comply with the Board's Order as follows: to cease and desist from interference, restraint, and coercion of Abualroub or any other Union member from testifying on behalf of any other Union member in any disciplinary proceeding before OATH or in any other legal proceeding; to cease and desist from discrimination against Abualroub or any other Union member from testifying on behalf of any other Union member in any disciplinary proceeding before OATH or in any other legal proceeding; and to restore back-pay, benefits, and leave accruals to which she was entitled under the parties' collective bargaining agreement for the period of the suspension at issue herein.

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 the Social Service Employees Union, Local 371, docketed as BCB-2606-07 be, and the same hereby is granted as follows:

DIRECTED, that ACS cease and desist from interference, restraint, and coercion of Abualroub or any other Union member from testifying on behalf of any other Union member in any disciplinary proceeding before OATH or in any other legal proceeding;

DIRECTED, that ACS cease and desist from discrimination against Abualroub or any other Union member from testifying on behalf of any other Union member in any disciplinary proceeding before OATH or in any other legal proceeding; and

DIRECTED, that ACS restore back-pay, benefits, and leave accruals to which she was entitled under the parties' collective bargaining agreement for the period of the suspension at issue herein.

Dated: October 25, 2007
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

GEORGE NICOLAU
MEMBER

CHARLES G. MOERDLER
MEMBER

ERNEST F. HART
MEMBER