Local 375, DC 37, 5 OCB2d 27 (BCB 2012)

(IP) (Docket No. BCB-2939-11)

Summary of Decision: The Union alleged that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by issuing a disciplinary memorandum to an employee in retaliation for his emails to fellow Union members regarding a collective bargaining matter. The Union further alleged that, by taking such action, NYCHA interfered with its members' collective bargaining rights. NYCHA contended that the employee was not engaged in protected union activity and that it had a legitimate business reason for issuing the memorandum. The Board found that NYCHA violated NYCCBL § 12-306(a)(1) and (3) when it issued the disciplinary memorandum to the employee in retaliation for his protected union activity. Accordingly, the Board granted the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 375, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On March 22, 2011, Petitioner Local 375, District Council 37, AFSCME, AFL-CIO ("Union"), filed a verified improper practice petition against the New York City Housing Authority ("NYCHA"). The Union alleges that NYCHA discriminated against employee Mitchell Feder by issuing him a disciplinary counseling memorandum ("Counseling Memo" or "Memo") in retaliation for his emails to Union members

regarding a collective bargaining matter. The Union contends that NYCHA's action interfered with its members' collective bargaining rights pursuant to § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). NYCHA argues that Feder's emails did not constitute protected Union activity, that the Union failed to demonstrate that NYCHA's issuance of the Counseling Memo was motivated by Feder's alleged Union activity, and that, even if the Union was able to offer sufficient evidence of these allegations, NYCHA had a legitimate business reason for issuing the Memo. This Board finds that NYCHA violated NYCCBL § 12-306(a)(1) and (3) when it issued the Counseling Memo to Feder in retaliation for his protected union activity. Accordingly, the petition is granted.

BACKGROUND

The Union is an affiliated local of District Council 37, AFSCME, AFL-CIO, and represents employees in various civil service titles at NYCHA, including Feder. At the time of the relevant events in this matter, Feder was employed by NYCHA as an Associate Housing Development Specialist, and he served as the Union's Chapter 25 President.[1] The following facts pertaining to the relevant events in this matter are undisputed.

Prior Proceedings Concerning Use of NYCHA's Computer Systems

NYCHA maintains a "Communications and Business Systems Policy" ("Communications Policy") section in its Human Resources Manual ("HR Manual") which covers, among other things, the use of its computers, email, and internet access

[1] Chapter 25 of the Union represents "technical guild titles" within NYCHA.

("Computer Systems"). NYCHA's Communications Policy and its application has been the subject of improper practice claims in two recent cases. *See DC 37*, 4 OCB2d 47 (BCB 2011); *Feder*, 4 OCB2d 46 (BCB 2011). With regard to all Computer Systems, the Communications Policy states that "[l]imited personal use is appropriate and expected, however such use should be kept to a minimum." *DC 37*, 4 OCB2d 47, at 4. Although neither the HR Manual nor any of NYCHA's other policies defines what is meant by "limited personal use," we concluded that NYCHA considered that term to encompass union-related use. (*Id.* at 20); s*ee Feder,* 4 OCB2d 46, at 50. In addition, we determined that, prior to 2008, NYCHA had permitted limited use of its Computer Systems for union-related business as well as other non-NYCHA purposes as a matter of course. *See Feder,* 4 OCB2d 46, at 52.

On September 18, 2009, NYCHA issued a memorandum to employee Joshua Barnett, another Union representative, entitled "Postings and Communications and Business Systems Policy" ("Barnett Memorandum"). (Pet. Ex. F) The Barnett Memorandum memorialized a discussion that management had with Barnett concerning his use of NYCHA's Computer Systems for union business. It stated that "[c]onducting union business during scheduled work hours or using NYCHA equipment, systems, or property, whether real or virtual at any time for union business, is prohibited," except when NYCHA expressly authorizes it. (*Id*.) It also stated that Barnett's testimony at an internal NYCHA hearing revealed that his inappropriate usage of NYCHA's communications and business systems policies was "excessive." (*Id.*) The Barnett Memorandum further provided:

> This memo will serve as an informational reminder and is not [to] be construed as discipline, nor will it be regarded as

> a counseling memo. It will not be placed in your personnel file. However, if it is determined that disciplinary action against you is warranted in the future because you continue to engage in conduct similar to what you described in your July 30, 2009 testimony, then this memo will be offered in the disciplinary forum as proof that you received notice of the relevant rules and your obligation.

(*Id.*)

Shortly after it issued the Barnett Memorandum, NYCHA issued a memorandum entitled, "Use of NYCHA Communication and Business Systems for Personal, Private or Union Business" ("September 2009 Memorandum"). *DC 37*, 4 OCB2d 47, at 5. Like the Barnett Memorandum, the September 2009 Memorandum prohibited use of NYCHA's e-mail systems for union-related activities, while permitting limited other non-work related usage. In *DC 37*, 4 OCB2d 47, this Board found that NYCHA's policies prior to the issuance of the September 2009 Memorandum did not prohibit use of email for union activity. (*Id.* at 19-20.) Because NYCHA's changed policy singled out union-related usage as unauthorized use, we held that NYCHA's issuance of the September 2009 Memorandum unilaterally altered its Communications Policy in violation of NYCCBL § 12-306(a)(1) and (4).[2] (*Id.* at 20-21.)

NYCHA's Release Time Policy and Disciplinary Policy

Chapter X, Article III.C., § 14, of the HR Manual addresses "Absences for Employee Representatives," and is divided into three categories: § 14(a), "Regularly Designated Representatives;" § 14(b), "Ad Hoc Representatives;" and § 14(c), "Time Off Without Pay." Section 14(b) provides that those unions which have been granted

[2] Moreover, in *Feder*, 4 OCB2d 46, a related case, we held that NYCHA discriminated against Feder when it investigated and disciplined him for his use of NYCHA's Computer Systems to conduct union activity. (*Id.*)

exclusive bargaining rights may designate other employee representatives, on an *ad hoc* basis, to be released with pay for the purpose of:

> Handling grievances at work locations (Shop Steward function)
> Participating in meetings of departmental joint labor-management activities
> Participating in negotiations between the Authority and the employee's certified union

(Ans., Ex. 1) The regulations further provide, among other things, that the *ad hoc* representative must give at least 24 hours written notice to his supervisor before participating in such activities, and may not spend more than 24 hours or have more than eight absences of all or any part of a day from the work location during any calendar month.

The HR Manual also outlines NYCHA's disciplinary policy. Chapter VIII, Article III, entitled "Disciplinary Action," provides, in relevant part:

> A. Counseling.
>
> To bring an employee [up] on charges, prior instructional and counseling memorandum(s) [*sic*] are needed in most cases. The employee should be given written and oral instructional counseling. When presenting a counseling memo to the employee, the supervisor must discuss the memo's contents with the employee and request him/her to sign it. If the employee refuse[s] to sign the memo, the supervisor will obtain a witness who will sign the memo to verify that the employee was given the memo and refused to sign it.

(Pet., Ex. D)

NYCHA's Meetings with the Union

On April 28, 2010 and June 2, 2010, NYCHA held meetings with Union officials and Feder at which the parties discussed NYCHA's release time rules. During the April

meeting, the Union's President designated Feder as an *ad hoc* employee representative, as defined in Chapter X, §14(b) of the HR Manual, and stated that matters affecting the membership at large, such as contract issues, must be brought to NYCHA through the Union, not the *ad hoc* representative, unless the Union advised NYCHA otherwise. In a June 7, 2010 letter to the Union, NYCHA summarized its understanding of the outcome of the parties' discussions with regard to the limitations on Feder's authority as an *ad hoc* representative. The letter indicates that Feder was provided with a courtesy copy.

Feder's October 25, 2010 E-mails and NYCHA's Response

On October 25, 2010, Feder sent an e-mail to James Houlihan, a member of NYCHA's Labor Relations Department, with a "cc" to approximately 92 NYCHA employees. In the e-mail, whose subject line was "Columbus day 10/11/10–Holiday Pay Dispute," Feder expressed his concern that NYCHA administrators had incorrectly interpreted the collective bargaining agreement ("Agreement") to deny payment of cash overtime to Union members who worked on the Columbus Day holiday. Feder quoted a portion of the Agreement and asked Houlihan to remedy the situation. A few minutes later, Feder sent a follow up e-mail to Houlihan, with a "cc" to the same employees. The follow-up email stated, "the twelve listed holidays for time and [a] half are," listed the holidays, and explained, "[i]f the holiday falls on a Saturday or Sunday but is observed on a Friday or Monday, then Comp-Time only will be earned–additional contract language governs other situations, please refer to the contract." (Pet., Ex. A) (emphasis in original).

On November 22, 2010, NYCHA issued a Counseling Memo to Feder. The subject line of the Memo was "Counseling Memo–Failure to Follow Procedure Concerning Release time." (Pet., Ex. B) It stated, in pertinent part:

> The attached June 7, 2010 letter summarizes the limitations of your designation by the [Union] to serve as an ad hoc representative pursuant to the NYCHA Human Resources Manual, Chapter X, Section 14(b). As you know, your union indicated agreement with these interpretations of the NYCHA Human Resources Manual.
>
> Your designation as an ad hoc representative requires that ad hoc release time be approved, in advance, for each individual qualifying instance of release time. Additionally, such designation as an ad hoc representative permits you to engage in only the types of activities clearly defined in Section 14(b), assuming those matters affect only "a few" [Union] members.
>
> On October 25, 2010 at both 11:15 AM and 11:21 AM, without approval of your supervisors and at your NYCHA work location, you utilized NYCHA equipment to send e-mails to a sizeable distribution list of [Union] members. It also appears that you may have improperly distributed an October 6, 2010 memorandum to a sizeable distribution list, including [Union] members, again without prior authorization.[3]
>
> The subject matter of your October 6 and October 25 correspondence was not within the definition of activities in Section 14(b), was not properly within your designated authority, and should have been brought solely to the attention of your union . . . so that proper authorization could be requested, if the union felt this was appropriate.
>
> As you have been advised in the past, this type of misuse of NYCHA's business and communications systems is not permitted under NYCHA Business and Communication Systems Policy, and may be the subject of disciplinary

[3] The parties make no reference in their pleadings to the distribution of an October 6, 2010 memorandum and the record is devoid of further specification of its content.

> action. Finally, as you know, your Union agreed that union activities must be conducted at the Union headquarters . . .
>
> . . . This is also a reminder that use of NYCHA's interoffice mail system to distribute non NYCHA-business materials is not permitted, unless prior approval has been granted.
>
> Please be aware that this memorandum stands as a notice that if you continue to violate these rules and deviate from procedure and the terms and conditions of your ad hoc representative release, you may be subject to disciplinary action.

(*Id.*) Feder signed his name at the bottom of the Memo, following a sentence that stated, "I have read and acknowledge the receipt of this memorandum and understand that copies will be placed in my personnel folder."[4] (*Id.*)

POSITIONS OF THE PARTIES

Union's Position

The Union argues that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by issuing a Counseling Memo to Feder in retaliation for his email correspondence to Union members regarding collective bargaining rights pertaining to holiday pay.[5] It contends

[4] Next to his signature, Feder appears to have written "received will rebut." (Pet., Ex. B)

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

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter . . .
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

that, by taking such action, NYCHA also interfered with its members' collective bargaining rights pursuant to NYCCBL § 12-305.

The Union asserts that it has satisfied both prongs of the *Salamanca/Bowman* test adopted by the Board to demonstrate that an alleged discriminatory or retaliatory act violates NYCCBL § 12-306(a)(3). Feder corresponded to Union members in his capacity as the Union's Chapter 25 President. Moreover, his correspondence addressed the collective bargaining rights of Union members with regard to holiday pay, which is a protected union activity.

In addition, NYCHA had knowledge of Feder's protected union activity because the Counseling Memo specifically addresses such activity. The Memo acknowledges Feder's position as "ad hoc representative" of the Union, as defined by NYCHA's HR Manual, and explicitly addresses the fact that Feder is a "union official" and was acting in that capacity when he sent his October 25, 2010 e-mail correspondence to other Union members. (Pet. Memo of Law, at 9)

Regarding the second prong of the *Salamanca/Bowman* test, the Union argues that there is a clear causal link between NYCHA's issuance of the Counseling Memo and Feder's protected union activity. It contends that the Memo stated that "the subject of your . . . October 25, 2010 correspondence was not within the definition of activities under Section 14(b)" of NYCHA's HR Manual, and put Feder on notice that continued

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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.

violation of NYCHA's Communications Policy and "ad hoc representative" rules may result in future discipline. (Pet. Memo of Law, at 9-10)

This action was improperly motivated and retaliatory because Feder was singled out for discipline for sending emails to Union members, and because issuance of the Counseling Memo represents an adverse employment action that was intended to be disciplinary. The Union contends that the issuance of the Counseling Memo constitutes part of NYCHA's official disciplinary procedure set forth in the HR Manual, and the Memo will become part of Feder's personnel folder.

The Union contrasts NYCHA's action in the instant matter with the action taken in response to a 2009 incident involving Barnett. NYCHA issued a memorandum to Barnett for a similar violation of NYCHA's Communications Policy. In that instance, however, NYCHA deemed the memorandum to be merely an "informational reminder," and specifically stated that it was not to be construed as discipline or a counseling memorandum. Moreover, the memorandum was not placed in Barnett's personnel file. The Union asserts that, in contrast, NYCHA's Counseling Memo to Feder is a "disciplinary warning" and not merely counseling. (Pet. Memo of Law, at 11)

In response to NYCHA's assertion that Feder's emails are not protected under the NYCCBL because they contravene the HR Manual's *ad hoc* representative rules, the Union contends that what constitutes union activity is defined by the NYCCBL and not by what NYCHA deems to be protected. Further, and in response to NYCHA's argument that the decision to take disciplinary action falls within its managerial rights, the Union argues that NYCHA's issuance of the Counseling Memo is an abuse of its managerial

rights because NYCHA is not permitted to arbitrarily designate what constitutes protected activity under the NYCCBL.

NYCHA's Position

NYCHA contends that the Board should dismiss the Union's petition on a number of grounds. First, it argues that the Union failed to allege facts sufficient to support its claim that the Counseling Memo was discriminatory or was issued in retaliation for union activity, in violation of NYCCBL § 12-306(a)(1) and (3). Second, it argues that, even if the Union is able to demonstrate a *prima facie* case of discrimination or retaliation, NYCHA had a legitimate business reason for issuing the Counseling Memo to Feder. Finally, NYCHA argues that the Union failed to demonstrate that the issuance of the Counseling Memo was a disciplinary action.

NYCHA acknowledges that Feder was an *ad hoc* Union representative when he sent the October 25, 2010 email and that his dissemination of the email was the "trigger" that led NYCHA to issue the Counseling Memo. (Ans. ¶ 117) However, NYCHA contends that the Union cannot make a *prima facie* showing of discrimination or retaliation because the Counseling Memo did not address protected union activity. Rather, NYCHA issued the Memo due to Feder's failure to adhere to NYCHA's time and leave regulations, which are the means by which Feder was required to obtain release time to engage in "authorized union activity." (Ans. ¶ 119) NYCHA contends that, by sending the email, Feder was engaged in an activity that "his union specifically told him and NYCHA he was not to engage in while wearing his ad hoc representative cap." (Ans. ¶ 121) It concludes that, because the Counseling Memo did not address activity

that was authorized by either NYCHA or the Union, Feder's issuance of the October 25, 2010 email should not be regarded as protected.

NYCHA next argues that, even if the Union demonstrates a *prima facie* case, NYCHA is able to show that it had a legitimate business reason for issuing the Counseling Memo to Feder. NYCHA asserts that it must enforce its rules and policies related to *ad hoc* representatives, especially where an employee refuses to abide by them. Here, Feder refused to abide by his obligation to secure release time before engaging in union activity. (Ans. ¶ 142) Accordingly, it issued the Counseling Memo to Feder in an effort to compel him to "be attentive to his work assignments and obligations, including the obligation to properly secure his release from those obligations when he planned to engage in authorized union activity." (Ans. ¶ 136) NYCHA asserts that it would have issued the Counseling Memo even if the emails in question addressed a subject unrelated to union activity.

NYCHA contends that the Counseling Memo issued to Feder served the same purpose as the document issued to Barnett. Both memos notified the employees of rules they had violated, reminded them of their workplace violations, and notified them that future violations may be the subject of disciplinary action. In contrast to the Counseling Memo, NYCHA claims that Barnett's memorandum was labeled "informational" because NYCHA had to address a "continuing problem in the context of litigation." (Ans. ¶ 106)

Finally, NYCHA contends that it is within its managerial rights, pursuant to NYCCBL § 12-307(b), to determine whether to discipline an employee who fails to adhere to its rules and regulations. It maintains that the Counseling Memo was not discipline; rather, it contends that it is a means to put an employee on notice of

misconduct and that the misconduct may result in discipline.[6] NYCHA further contends that the only ways it may pursuant disciplinary action under the HR Manual are through the "Local Trials and General Trials process." (Ans. ¶ 70; Pet., Ex. D) NYCHA asserts that the Union has failed to demonstrate either that NYCHA abused its statutory management rights, or that it took disciplinary action against Feder in this instance.

DISCUSSION

The Union contends that NYCHA's issuance of the Counseling Memo to Feder constitutes discrimination and/or retaliation for union activity under NYCCBL § 12-306(a)(1) and (3). To establish discrimination or retaliation under the NYCCBL, we apply the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, such as *State of New York (Division of State Police)*, 36 PERB ¶ 4521 (2003), adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). Pursuant to this test, a petitioner must demonstrate that:

1. The employer's agent responsible for the alleged 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, 39 OCB 51, at 18-19; *see also DC 37*, 1 OCB2d 6, at 29 (BCB 2008). If the petitioner is able to establish a *prima facie* violation of NYCCBL § 12-306(a)(3), the burden shifts to the employer, who may refute the petitioner's showing on one or both elements or demonstrate a legitimate business reason that would have caused the

[6] NYCHA also contends that counseling memoranda are not referenced in the applicable collective bargaining agreement's recitation of disciplinary procedures.

employer to take the action complained of even in the absence of the protected conduct. *See SSEU*, 77 OCB 35, at 18 (BCB 2006).

With regard to the first prong of the *Bowman/Salamanca* test, we have long held that an activity that the Board would deem to fall within the protection of NYCCBL § 12-305 must be related, even if indirectly, to the employment relationship between the City and bargaining unit employees and must be in furtherance of the collective welfare of employees. *See Local 1087, DC 37*, 1 OCB2d 44, at 26 (BCB 2008); *COBA*, 53 OCB 17, at 11 (BCB 1994). If management has knowledge of the protected union activity, then the first prong of the *prima facie* case is met. *See Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004).

Here, we find that Feder was engaged in protected union activity. At all times material to the allegations in this matter, Feder was the Union's Chapter 25 President. Moreover, Feder's October 2010 emails concerned NYCHA's alleged misapplication of the Union's collective bargaining agreement. NYCHA does not dispute that it was aware of Feder's position as a Union official as well as the contents of his October 2010 emails. NYCHA was also aware of Feder's history as a Union official. *See Feder*, 4 OCB2d 46, at 45-46. Accordingly, the first prong of the *Bowman/Salamanca* test has been satisfied.

We reject NYCHA's assertion that Feder's October 2010 emails do not constitute protected activity sufficient to satisfy the first prong of the *Salamanca/Bowman* test because such activity was not "authorized by either [Feder's] employer or his union." (Ans. ¶ 120) In evaluating whether the first prong of the *Salamanca/Bowman* test has been satisfied, we analyze whether the activity at issue falls within the parameters of NYCCBL § 12-305. Whether Feder violated NYCHA's HR Manual rules by failing to

seek release time from NYCHA or lacked his Union's permission to send the emails does not dictate whether he was involved in protected union activity. Similarly, the fact that the parties discussed and may have agreed upon the parameters of an "*ad hoc*" union representative's responsibilities is not determinative of what constitutes union activity protected by the NYCCBL.

In short, union activity or, as in the instant action, Feder's efforts to enforce the collective bargaining agreement, do not lose the protection of NYCCBL § 12-305 simply because management or labor has condemned it, or because management has established its own criteria for determining whether such activity is permitted. Therefore, although NYCHA may have the right to proscribe the use of employee work time for other than NYCHA business, those rules are not determinative of what is protected activity. *See Feder*, 4 OCB2d 46, at 45 (holding that "the statutory authority to create a policy does not render such policy immune from scrutiny under the NYCCBL because such policy can be applied in a discriminatory manner."); *see also SSEU, L. 371*, 3 OCB2d 47, at 18 (BCB 2010) (finding that the agency's adherence to a citywide regulation governing the promotional process did not insulate it from discrimination claims under the NYCCBL because the rule permitted it to exercise discretion in selecting promotional appointees).

Before analyzing NYCHA's motive in issuing the Counseling Memo, we must address NYCHA's claim that its issuance of the Memo did not constitute discipline. Chapter VII of the HR Manual addresses disciplinary actions at NYCHA. The first section of Article III of that Chapter, entitled "Disciplinary Action," specifically addresses counseling and provides, in part, that in order to bring charges against an employee, "prior instructional and counseling memorandum(s) are needed in most cases."

(Pet. Ex. D) NYCHA denies that the HR Manual categorizes the counseling memorandum as a form of discipline. Rather, it contends that a counseling memo is simply a means to put an employee on notice of his misconduct, which may result in future discipline. NYCHA asserts that both the Barnett Memorandum and Feder's Counseling Memo were issued for this purpose and were not disciplinary.

Here, we find that the Counseling Memo was disciplinary. The plain language of the HR Manual reflects that a counseling memo is intended to be a disciplinary measure. The fact that the HR Manual dictates that NYCHA must pursue formal disciplinary action through the "Local Trials and General Trials process" does not negate the disciplinary intent behind the issuance of the Counseling Memo. Moreover, the Memo itself indicates that its intent is disciplinary. Significantly, it explicitly states that it will be placed in Feder's personnel folder. Further, the Memo does not state that it is merely an "informational reminder" nor does it state that it is "not to be construed as discipline," or that it will not be "regarded as a counseling memo," as was stated in the Barnett Memorandum. (Pet., Ex. F) The plain language of the HR Manual, combined with the stark contrast in language and tone between the Barnett Memorandum and the Counseling Memo, compel us to conclude that the issuance of the Counseling Memo was a disciplinary measure.

Regarding the second element of the *Bowman/Salamanca* test, the motivation behind the management action in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *CSTG, L. 375*, 4 OCB2d 61, at 25 (BCB 2011) (quoting *Burton*, 77 OCB 15, at 26 (BCB 2006)). However, to establish motive, "a petitioner must offer more than speculative or conclusory

allegations." *(Id.*) (quoting *SBA*, 75 OCB 22, at 22 (BCB 2005)). Rather, "allegations of improper motivation must be based on statements of probative facts." (*Id.*) (quoting *Ottey*, 67 OCB 19, at 8 (BCB 2001)). In addition, while temporal proximity alone is not sufficient to establish causation, the temporal proximity between the protected union activity and the allegedly retaliatory action, in conjunction with other facts supporting a finding of improper motivation, is sufficient to satisfy the second element of the *Bowman/Salamanca* test. *See Colella*, 79 OCB 27, at 55 (BCB 2008) (citing *SSEU, L. 371*, 77 OCB 35, at 15-16 (BCB 2006)).

We find that there is a clear causal link between NYCHA's issuance of the Counseling Memo and Feder's union activity. Indeed, there is no dispute that NYCHA issued the Counseling Memo in direct response to Feder's email correspondence, which we have held is protected union activity. The Counseling Memo expressly states that Feder was required to obtain prior approval before engaging in "any union activities during . . . scheduled work hours." (Pet., Ex. B) It also states that he is not permitted to utilize "NYCHA's interoffice mail system to distribute non-NYCHA business materials" without prior permission. (*Id.*)

We find no support for the proposition that NYCHA requires employees to obtain *ad hoc* release time in order to send non-NYCHA emails. On its face, Chapter X, Article III, §14(b) of the HR Manual, which addresses *ad hoc* release time for employee representatives, governs absences that take an employee away from his work area.

Feder's October 2010 emails were sent from his desk at his work area. Therefore, we do not find relevant the application of this provision to the emails.[7]

Moreover, we have previously found that NYCHA does not prohibit employees from sending non NYCHA-related emails from NYCHA's computers. Indeed, in *Feder*, 4 OCB2d 46, we found that the Business and Communication Systems Policy allowed for some "limited use" of NYCHA's computer systems for personal and/or union-related business. (*Id.* at 50-51.) In that case, we also noted that non-NYCHA emails were routinely sent from employees' NYCHA-issued computers during work hours. (*Id.* at 9-10, 52.) By stating that Feder should have secured release time prior to sending the October 2010 emails, we find that NYCHA treated union activity differently from non-NYCHA activity. In light of these facts, we conclude that the Union has established a *prima facie* case that NYCHA discriminated against Feder in violation of NYCCBL § 12-306(a)(3).

NYCHA disagrees and contends that the Counseling Memo was issued for a legitimate business reason. Specifically, it argues that it needed to hold Feder accountable for his NYCHA work and get him to refrain from conduct that is disruptive

[7] In this regard, *Cotov,* 53 OCB 16 (BCB 1994), is distinguishable from the instant case. NYCHA cites *Cotov* in defense of its enforcement of its *ad hoc* release time rules against Feder. In *Cotov*, the Board dismissed a union's discrimination claims, finding that the employer, a hospital, had a legitimate business reason for issuing negative performance evaluations against union officials following their failure to adhere to release time rules. In that case, the Board found that the employees at issue left their assigned areas without permission in order to engage in union activity, which adversely affected the patients under their care. The Board determined that such action would presumably have been taken even if the employees had absented themselves for non-union related reasons. In contrast, Feder's action in issuing the emails did not require him to be absent from his workstation nor is there evidence that it adversely affected his job performance. Moreover, there is no evidence that Feder would have been similarly disciplined for sending a non-union related email.

to its operations. It asserts that the Counseling Memo would have been issued even if Feder's emails had been unrelated to union activity. It further contends that the actions it took falls within its managerial rights to determine whether to bring disciplinary action against an employee. [8]

We have previously held that, while we acknowledge that "an employer has the right to promulgate rules and restrictions regarding use of its facilities and resources, rules and/or enforcement of those rules cannot discriminate based on union activity." *Feder*, 4 OCB2d 46, at 49; *see also DC 37*, 3 OCB2d 56, at 15 (OCB 2010) (noting that a rule that is neutral on its face can be applied in a manner that is inimical to the NYCCBL). Here, NYCHA has not demonstrated that it would have issued the Counseling Memo to Feder if his emails had addressed any other non-work related issue. There is no evidence that NYCHA has taken similar measures against other NYCHA employees for sending emails to fellow employees on non-work related issues. Instead, NYCHA singled Feder out because of his union activity. *See DC 37, L. 1113*, 77 OCB 33, at 34-35 (BCB 2006) (finding that the employer's disparate treatment of a union representative displayed an inconsistency with the agency's own procedures, raising a question about the employer's intent). Accordingly, we find that NYCHA violated NYCCBL § 12-306(a)(1) and (3) by its issuance of the Counseling Memo and grant the Union's petition.[9]

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[8] NYCHA also contends that the Union failed to prove that serving the Counseling Memo was "inherently destructive" of rights granted under the NYCCBL. As the Union did not allege that NYCHA's conduct was inherently destructive of NYCCBL rights, we do not reach this issue.

[9] We have stated that violations of NYCCBL § 12-306(a)(3) are also violations of NYCCBL § 12-306(a)(1). *See DC 37, L. 1113*, 77 OCB 25, at 18 (BCB 2006). This is

because conduct that is discriminatory under NYCCBL § 12-306(a)(3) indeed interferes with employee rights embodied in NYCCBL § 12-305, and therefore violates NYCCBL § 12-306(a)(1). Here, the same alleged conduct underlies both the interference and discrimination claims. Accordingly, we have not addressed these claims separately.

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 verified improper practice petition filed by Local 375, District Council 37, AFSCME, AFL-CIO, docketed as BCB-2939-11, be, and the same hereby is, granted; and it is further

ORDERED, that the New York City Housing Authority cease and desist from discriminating against Local 375 members for union activity; and it is further

ORDERED, that the New York City Housing Authority post appropriate notices detailing the above-stated violations of the New York City Collective Bargaining Law.

Dated: July 10, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 5 OCB2d 27 (BCB 2012), determining an improper practice petition between Local 375, District Council 37, AFSCME, AFL-CIO, and the New York City Housing Authority.

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 Local 375, District Council 37, AFSCME, AFL-CIO, docketed as BCB-2939-11, be, and the same hereby is, granted regarding a violation of New York City Collective Bargaining Law § 12-306(a)(1) and (3) related to the New York City Housing Authority's decision to issue a counseling memo in retaliation for a Local 375 member's protected union activity; and it is further

ORDERED that the New York City Housing Authority cease and desist from discriminating against Local 375 members for engaging in protected union activity; and it is further

ORDERED that the New York City Housing Authority post appropriate notices detailing the above-stated violations of the New York City Collective Bargaining Law.

The New York City Housing Authority
(Department)

_____ (Posted By)
(Title)

Dated:

This notice must remain conspicuously posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.