UFA, 1 OCB2d 10 (BCB 2008)

(IP) (Docket No. BCB-2549-06).

Summary of Decision: The UFA claims that soon after the Union President spoke to the City Council and the press regarding fire apparatus safety issues, a Deputy Commissioner, motivated by anti-union animus, determined that the Union's Health and Safety Officer could no longer attend two types of meetings that he had previously attended. The Union claims that in so doing, the City violated § 12-306(a)(1), (2), (3), and (4) of the NYCCBL. The Board found that the Department was improperly motivated when it took such action, in violation of NYCCBL § 12-306(a)(1) and (3). However, the facts, as pled, were not sufficient to establish that taking such action constituted a refusal to bargain in good faith, in violation of § 12-306(a)(4), or that the City dominated the UFA, in violation of § 12-306(a)(2). Accordingly, the Board ordered that the Department cease and desist from refusing to permit the Union's Health and Safety Officer from attending the specified meetings because of his union activity and that the Department post the attached Notice. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION,

Petitioner,

-and-

CITY OF NEW YORK and the
NEW YORK CITY FIRE DEPARTMENT,

Respondents.

DECISION AND ORDER

On April 21, 2006, the Uniformed Firefighters Association ("UFA" or "Union") filed a verified improper practice petition against the City of New York ("City") and the Fire Department

of the City of New York ("Department"). The Union claims that soon after the Union President spoke to a New York City Council Committee and the press regarding fire apparatus safety issues, a Deputy Commissioner, motivated by anti-union animus, determined that the UFA's Health and Safety Officer could no longer attend two types of meetings that he had previously attended. The Union claims that in so doing, the City violated § 12-306(a)(1), (2), (3), and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City contends that it did not violate the NYCCBL because neither the UFA Health and Safety Officer nor the Union was engaged in protected activity, the City had a legitimate business reason for requesting that he no longer attend those meetings, the request did not interfere with the Union's rights, and it did not dominate the Union or interfere with its administration. After a hearing, this Board finds that the Department was improperly motivated when it took such action, in violation of § 12-306(a)(1) and (3). However, the facts, as pled, are not sufficient to establish that taking such action constitutes a refusal to bargain in good faith, in violation of § 12-306(a)(4), or that the City dominated the UFA, in violation of § 12-306(a)(2). Accordingly, the Board orders that the Department cease and desist from refusing to permit the Union's Health and Safety Officer from attending the specified meetings because of his union activity and that the Department post the attached Notice.

BACKGROUND

After three days of hearing in this matter, the Trial Examiner found that the totality of the

record established the relevant facts as follows.[1]

As a result of the terrorist attack on New York City on September 11, 2001, new fire engines and ladder trucks had to be purchased to replace those that were damaged and/or destroyed. After the City arranged for companies to bid on a contract to manufacture the replacement apparatus, it awarded the contract to the fire apparatus company, Seagrave. Under Seagrave's warranty, it guarantees that it will complete repairs on malfunctioning trucks that are still under warranty within a 30-day period. As of July 2005, 19 pieces of under-warranty ("new") apparatus were out of service due to mechanical problems. The City asserts, upon information and belief, that the average time for Seagrave to complete repairs under warranty ranged between 40 to 60 days. The Union denies the City's stated average time because it asserts that, as of July 2005, some fire companies' rigs were out of service for as long as 180 days. However, it is undisputed that as of July 2005, Seagrave had difficulties complying with the contractual requirement that it repair new apparatus within 30 days.

While repairs are being made to a fire company's assigned vehicles, spare rigs are placed in service. The Union claims that the spares consist of 15 to 20-year old vehicles, that the spares do not function properly, and as of April 4, 2006, at least three fire companies were operating apparatus in violation of National Fire Protection Agency Standards for age and safety. It is undisputed that a spare truck assigned to Ladder 19 in the Bronx had problems with its aerial ladder and was sent in for repair. The Union asserts that firefighters were unable to get the spare rig's ladder to raise at a fire on six different occasions, leaving other firefighters on top of a building without a ladder to

[1] It should be noted that one witness, a Deputy Commissioner, did not complete his testimony. While neither party asked the Board to strike his testimony, the Union urged the Board to draw a negative inference based on his failure to complete testimony, and the City asked that the Board draw no such inference. We discuss this issue on page 16-17.

exit. (Pet. ¶ 8; Union Ex. A(1); Tr. 61-62). The City avers that the spare apparatus had experienced problems but that it was sent for repairs. (Ans. ¶ 8). It is also undisputed that in December 2005, a firefighter fell from a spare truck that was making a left turn. The Union claims that the spare apparatus was an 18 year-old open cab tower ladder in service as a replacement vehicle for one of the newer apparatus, that the door popped open during a left-hand turn, and that it went one way and the firefighter went the other. (Pet. ¶ 7; Tr. 52-54). The City does not deny that the incident occurred, but it disagrees with the Union on the reasons for the incident.

Beginning in July 2005, the Department initiated meetings with Seagrave representatives to address its warranty compliance issues ("Seagrave Meetings"). From July 2005 through March 2006, seven such meetings were held. (City Ex. 1(a) - 1(g)). The Deputy Commissioner in charge of the Department's Technology and Support Services ("Deputy Commissioner") chaired the meetings, and representatives of the Department of Citywide Administrative Services ("DCAS"), the City's Law Department, the UFA, and the Uniformed Fire Officers Association ("UFOA")–including their safety representatives–attended those meetings. The minutes show that the attendees addressed issues such as outstanding repairs and mechanical problems with specific apparatus, ways to improve repair times in general, more aggressive new tower ladder delivery schedules, Seagrave staffing issues, and whether apparatus on order may share similar problems as those of the current apparatus. (City Ex. 1(e)). The UFA's Health and Safety Officer, William Romaka, attended the Seagrave Meetings on behalf of the UFA. It is undisputed that he attended these meetings despite the fact that, in some instances, the distribution list for the minutes and the attendance list did not reflect the fact that he was invited to attend or that he was present. (Tr. 207-212; City Ex. 1(a)-1(g)).

Romaka also attended Technology Oversight Committee meetings ("TOC Meetings") with others, including representatives from the UFOA safety committee. These meetings were chaired by the same Deputy Commissioner. Some of the items listed on the minutes for the TOC Meetings include: "Vehicle Chargers," "Smart Mic," "Post Radios," "Electronic Wireless Command Board," Communications Consultant," "Employee Payroll Information System," "Battalion Voice Recorders," and "In-Line Connector for HazMat suits." (City Ex. 1(h)-1(n)). Most of these items were recurring topics at a series of meetings that occurred between July 20, 2005 and March 15, 2006. (*Id.*) Romaka testified that at these meetings, he would advocate with respect to the safety of firefighters and that he regularly interacted with the Deputy Commissioner on behalf of firefighters. (Tr. 294).

Romaka also attended Personal Safety System Meetings ("PSS Meetings") and firefighter Glove Meetings ("Glove Meetings"), which the same Deputy Commissioner chaired as well. (Tr. 270, 342-344). Romaka testified that there were only a few meetings regarding a new glove that would provide the same amount of protection as the current gloves, while increasing the gloves' dexterity. (Tr. 342). He also testified that the PSS Meetings were held more frequently, at least once a month. (Tr. 343). As UFA Health and Safety Officer, Romaka also attended other Department meetings that were not chaired by the Deputy Commissioner.

The eighth Seagrave Meeting was held on March 31, 2006. According to minutes of the meeting, as taken by a Department employee, a Seagrave employee represented that the company was working on eight apparatus and that the amount of time trucks were in repair averaged approximately 20 days. (City Ex. 1(g)). Also according to the minutes, the Deputy Commissioner stated that this was good progress and that he wanted to keep the amount of time a unit stays out of

service below 30 days, and Romaka and the UFOA representative agreed. (*Id.*).

On April 4, 2006, the UFA and UFOA Presidents testified before New York City Council's Committee on Fire and Criminal Justice Services. The UFA President submitted written testimony to this committee and, during his testimony, answered questions regarding complaints he received from firefighters about new apparatus breaking down and the poor condition of the replacements. (Union Ex. A(1); Tr. 51-61). At the hearing in the instant matter, he testified that he informed the Committee about the Union's concerns with Seagrave's repair record and turnaround time on the new apparatus, problems with spare trucks that were utilized while the new trucks were in for repair, spare tower apparatus malfunctions, the resultant shortage of tower apparatus, their replacement with rear mount or aerial ladders, and problems with the rear-mount ladder at the company in the Bronx, among other things. (*Id.*). He also told the Committee, in part:

> Seagraves is in dire straits and does not have the proper personnel to repair the trucks and return them to us [in] a timely fashion. There are currently 8 new fire rigs sitting in the Seagrave parking lot awaiting repairs . . . What we are seeing is a flawed system of procurement, repair, and oversight.

(Union Ex. A(1)). The UFA President's appearance before this committee was followed by a press conference that received media attention.

During the hearing in the instant matter, the UFA President testified that in preparation for his City Council appearance, he spoke with Romaka, the Union's Executive Board, as well as individuals from the Department's repair shop and the president of the mechanics union. (Tr. 67). Romaka testified that the information he supplied to the UFA President was a compilation of information from firefighters in the field, Seagrave Meetings, and apparatus meetings. (Tr. 307).

On April 5, 2006, the Deputy Commissioner's assistant, at the Deputy Commissioner's

direction, spoke with Romaka on the phone and informed him that the Deputy Commissioner felt his attendance at the Seagrave Meetings was no longer necessary. On April 6, 2006, an employee from within the Bureau of Technology and Support Services was directed by the Deputy Commissioner to notify Romaka that he was no longer permitted to attend TOC Meetings, and did so by leaving a voicemail message. (Tr. 131).

On April 7, 2006, Romaka sent an email to the Deputy Commissioner, asking why he was no longer invited to participate in the Seagrave or TOC Meetings. (Union Ex. A(2)). This email read:

> This is to acknowledge my conversation Wednesday with your assistant, [name redacted]. She indicated to me that you wish that I no longer participate in the Seagrave Meetings. Furthermore on Thursday, your assistant [name redacted] left me a voice mail informing me that you request I do not attend any more of the Technical Oversight Committee meetings; which help to shape the direction of the department and should address the needs of more than 9,000 firefighters.
>
> While I can understand that you may hold an opposing view on a wide range of Health and Safety issues, I have always respected your right to your opinion, even though it may conflict with what I believe is in the best interests of Firefighters. As Sergeant-at-Arms of the UFA, I take the Health and Safety issues of my members seriously. If this is correct, I am a bit disheartened that you don't consider an opinion seeking to protect Firefighters to be valid and worthwhile when it differs from yours.
>
> Thank you for your time and consideration in this matter!

(*Id.*).

The Deputy Commissioner responded on the same day. His e-mail read:

> I'm sorry you feel like that. My intention at these meetings be it TOC, PSS, Seagrave, or Apparatus Design was to make them as useful as possible for not only the Department but all its employees.

> I don't know of any other commissioner who has involved union members, and valued their opinions, as much as I have. You (your union) has taken an idea to bring your point of view out and distort facts to your own use. As you know I have stated to you that I am not a political person and always wanted to do what was best for this Department. Your use of information gained by attending these meetings corrupt the intention and any value you might have brought to the table. It is unfortunate that you (your union) have decided to bring your own agenda and distort the truth for your own political purpose. I do not want to be a part of the press conferences that your union plays which ultimately has taken a good process and attempts to bastardize it to meet your own agendas.

(Union Ex. A(3) (Parentheses in original).

Health and safety officers from UFOA were not told that their appearance at these meetings were now unnecessary, and they continued to attend Seagrave and TOC Meetings after April 4, 2006.

The Deputy Commissioner later testified that although he was not present for the UFA President's testimony before New York City Council or his remarks to the media he saw portions of the content of the UFA President's statements. (Tr. 172-173). He said that after he saw portions of the Union President's testimony and the ensuing press coverage, he was "disturbed" but not "angry." (Tr. 267). The Deputy Commissioner said that during the UFA President's testimony, the UFA President referenced particular statements and statistics that had been mentioned in prior Seagrave Meetings. (Tr. 172). He testified that when the UFA President said that having Seagrave be the sole provider of new apparatus was like "putting our eggs in one basket," the UFA President was using an exact quote from the September 1, 2005 Seagrave Meeting. (Tr. 221-222). The Deputy Commissioner further testified that when the UFA President stated that eight new trucks were sitting in Seagrave's parking lot, and that Seagrave was in dire straits and did not have the proper personnel to repair their trucks, that the information came from Seagrave Meetings. (Tr. 223-224). When

asked about the accuracy of those statements, he answered that the former statement was "probably true" at the time, and that the latter statement "is true." (Tr. 224-225).

The Deputy Commissioner stated that he never prohibited any of the attendees of these meetings from discussing the content of the meetings with outside sources. (Tr. 218). He testified that he felt the meetings primarily focused on technology and vendor compliance. (Tr. 166). When asked if the subjects discussed at the Seagrave and TOC Meetings could have an impact on firefighter safety, the Deputy Commissioner restated that the focus of the meetings was primarily business-related. (Tr. 166-169). When pressed by the Union attorney, he testified that the subjects discussed at the meetings "could" have an impact on safety and it was "possible" that the subjects would have an impact on safety. (*Id*.). He testified that he believed that Romaka's presence at future meetings would hurt his ability as a manager to deal with the vendor in the future and that vendors may be less than candid with him if these matters were disclosed to outside parties. (Tr. 225-226).

At some point after April 4, but in the month of April, the aerial ladder at Ladder 19 in the Bronx again malfunctioned while on a call and was sent for repair. On May 2, 2006, a firefighter fell from a Seagrave truck and was seriously injured. The Union claims that the circumstances of this incident were similar to those of the December 2005 accident.

The Deputy Commissioner testified that Romaka continued to attend PSS and Glove Meetings, some of which the Deputy Commissioner chaired (Tr. 270). Although Romaka testified at one point that he "currently" (as of the October 29, 2007 hearing date) attended both PSS and Glove Meetings, on redirect, he testified that he could not be certain whether there were any Glove Meetings held in 2006, and that the PSS Meetings had finished by the time the Seagrave issues arose. (Tr. 293, 349).

At the beginning of 2007, the Deputy Commissioner testified that, after much consideration, he wanted to invite Romaka back to TOC Meetings again, as long as vendors were not present. (Tr. 272-273). He reiterated that all of the meetings he chaired were regarding innovations, that they were not health and safety meetings, (Tr. 274-275), and that, therefore, he thinks he has the right to decide who he wants to have in a meeting or not. (Tr. 274). The Union claims that indeed, Romaka was invited back at the beginning of 2007, but that meetings were canceled after he indicated that he would attend, and that the February 9, 2007 meeting was scheduled for a day on which a hearing was to be held in this matter. (Union Ex. A(14); A(20)).

In February 2007, the Deputy Commissioner also invited Romaka and other union representatives to attend a February 2007 Seagrave Meeting to receive an update regarding the Department's new tower order. (Tr. 191-192). According to the Deputy Commissioner, the meeting was held to discuss new equipment, not warranty compliance. (Tr. 191).

The Union filed the instant petition on April 21, 2006. As a remedy, the Union asks that the Department be directed to cease and desist from refusing to permit Romaka from attending safety meetings and that conspicuous notices be posted throughout the Department that the City has violated the NYCCBL.

Issues Regarding the Deputy Commissioner's Appearances to Testify

The Deputy Commissioner had been called by the Union as a witness and testified on February 9, 2007. On the day that he testified, the Union's attorney completed part of his direct examination. The City did not cross-examine the witness on that day. Between February and August at least one hearing day was canceled because he was unavailable. The Deputy Commissioner was present on August 2, 2007 when the parties agreed to adjourn the hearing for that

day pending settlement discussions.

The Deputy Commissioner also did not testify on scheduled hearing dates in September. At that time the City represented that the Deputy Commissioner was in ill health, and, with its closing brief the City submitted documentation to show that for the September 6, 2007 hearing date, he was being treated in a doctor's office. (City Brief Ex. 1). Taking the witness's asserted health concerns into account, but wishing no further delay in the proceedings, the Trial Examiner wrote a letter to the parties on September 19, 2007. (Union Ex. A(19)). The Trial Examiner, noting these concerns, selected three dates in October in the hope that the Deputy Commissioner would be able to testify on one of those days.[2] The Trial Examiner wrote that should he be unable to complete his testimony, the hearing would go forward on the last date with the testimony of the final scheduled witness, and that she would ask the parties for written submissions on how to proceed. (*Id.*). The letter indicated that one of the options that would be considered was an earlier request by the Union that the record should be closed and a negative inference drawn because of the failure of the Deputy Commissioner to complete his testimony. (*Id.*). Additionally, on several different occasions, the Trial Examiner offered to have the Deputy Commissioner testify by phone or have the hearing moved to a location that would be more convenient for him.

In October, as each of the selected dates approached, the City represented that the Deputy Commissioner was unable to appear because of his health. The City produced a November 7, 2007 doctor's note in its closing brief that stated that the Deputy Commissioner had been under his care for complaints of chest discomfort and shortness of breath and had coronary artery stenting performed on October 10, 2007. (City Brief Ex. 1). The doctor's note stated that after the stenting,

[2] The parties were consulted about the potential hearing dates, and agreed to those dates.

he continued to complain of exertion symptoms. (*Id.*). The final hearing date was held on October 29, 2007, during which the final witness testified and the hearing was closed. The parties elected to submit their positions on how the partial testimony of the Deputy Commissioner should be treated in their closing briefs. (Tr. 361.) Those positions will be reflected below.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that it has shown, through the totality of the record, that the Department retaliated against Romaka by excluding him from the Seagrave and TOC Meetings, in violation of NYCCBL § 12-306(a)(1) and (3).[3] The record establishes that Romaka and the Union President were engaged in protected activity, that the Deputy Commissioner had knowledge of that activity, that he took action which adversely impacted on the Union, and that there is a nexus between the

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[3] 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;
* * *
NYCCBL § 12-305 provides in pertinent part:
Rights of public employees and certified employee organizations. 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. . . . A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

protected activity and the adverse action. Protected union activity was the motivating factor behind the Department's discriminatory act because the UFA spoke out at a public hearing on issues regarding member safety which impacted on the Deputy Commissioner's credibility as the employee in charge of technical oversight. It contends that the Deputy Commissioner's April 7, 2006 email speaks for itself, as does the continued presence of UFOA representatives at meetings chaired by the Deputy Commissioner. The record evinces definitive facts that show that its allegations are not conclusory assertions based on surmise, conjecture, or suspicion.

The Union questions the City's argument that it had a legitimate business reason for excluding Romaka from attending meetings because representatives of the UFOA continued to attend those same meetings. It contends that the Deputy Commissioner and others acted with intent to exclude the UFA from these meetings for no legitimate reason other than retaliating against the UFA for embarrassing him. Any claim of business justification is a pretext for interference with the UFA's statutory organizational rights.

In evaluating the credibility of the witnesses, the Union argues that the Union President and Romaka had absolutely no motive to lie since their interest in the matter is slight and their testimony was completely consistent. On the other hand, the Deputy Commissioner had many reasons to be untruthful, he absolutely had an interest in the outcome of this matter, he was evasive, and his testimony was inconsistent about crucial issues that were highly relevant to the improper practice petition.

Regarding the City's refusal to bargain over a mandatory subject of bargaining, in violation of NYCCBL § 12-306(a)(1) and (4), the UFA is well aware that, when requesting information from an employer, it must bear the burden of showing that the information it requests is necessary for

purposes of collective negotiations or contract arbitration.[4] The obligation is not dependent upon the opportunity to obtain the information by some other means of disclosure or in some other forum. Here, a Union officer attended meetings at which he collected information regarding certain equipment which has an impact on the safe operation of that equipment and firefighter safety. Romaka's request to be returned to the meetings, which were in-house and with outsiders invited to attend, was so that he could learn about and speak out about Seagrave's repair of vehicles and/or comment on the problems related to spare apparatus. Therefore, his request clearly falls within the area of firefighter safety, which is a mandatorily bargainable term and condition of employment.

As for the Deputy Commissioner's testimony, the Union applies the New York State Court's criteria for analyzing whether a missing witness charge is warranted to the instant matter, as well as a similar standard espoused in the Fifth Edition of *How Arbitration Works* by Elkouri & Elkouri. Here, the Deputy Commissioner was a witness believed to be knowledgeable about a material issue pending in the case, was expected to testify favorably to the opposing party, and the City failed to have him to appear to finish his testimony. A negative inference of his refusal/inability to appear is warranted because of his reticence to testify, his evasiveness, arrogance, and unavailability, his avoidance of dates scheduled for him to testify, and his refusal to cooperate after his initial testimony. The Union's attorney had many more questions for him to answer as well, and was unable to complete his examination of the witness.[5] Therefore, the Board should find an adverse

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[4] NYCCBL § 12-306(a) provides in pertinent part:
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

[5] The UFA submitted numerous questions that it would have asked the Deputy Commissioner, should he have appeared to complete his testimony, in its closing brief.

inference for his uncooperative conduct and credit the UFA with the inferences which can be made by his unavailability to answer subsequent questions.

City's Position

The City argues that the Union's contention that the Department retaliated against the Union by excluding Romaka from Seagrave and TOC Meetings is without merit. First, the mere fact that the Union or Romaka engaged in an activity does not guarantee that such activity is absolutely entitled to protection. Neither the Union President nor Romaka engaged in protected activity. While the Union President testified in his capacity as Union President and Romaka attended Seagrave Meetings in his Union capacity, the Union's use and slanted characterization of information gathered from Seagrave Meetings in its April 4, 2006 testimony before the New York City Council does not constitute protected activity within the meaning of the NYCCBL. The Union President's speech occurred in a setting outside of a collective bargaining forum, did not reference collective bargaining, or include traditional collective bargaining issues. In his testimony, he made disparaging statements and intentionally distorted the amount of progress that the Department and Seagrave made in previous months regarding the repair of damaged apparatus. As the Union did not engage in protected activity, the City requests that the petition be dismissed. Alternatively, if the Board determines that the above activity is protected by the NYCCBL, the City submits that the Department's decision to exclude Romaka from Seagrave and TOC Meetings constitutes a legitimate business reason.

The Deputy Commissioner provided legitimate business reasons for excluding Romaka from the meetings. Specifically, he was concerned that the Union's public disclosure of information obtained in the meetings would impair relationships between the Department and its vendors,

particularly Seagrave. The Deputy Commissioner believed that the Union's public disclosure of the information obtained in Seagrave Meetings would cause vendors to be less than candid with the Department regarding their business relationships. Accordingly, the exclusion of Romaka was proper and justifiable.

The Deputy Commissioner's basis for excluding Romaka from these two meetings is supported further by his decision not to exclude him from the PSS, Glove, or other meetings. The Department only excluded him from meetings where he could potentially adversely affect the Department's business relationships. Indeed, the Deputy Commissioner's lack of anti-union animus is shown by his decision to continue to allow Romaka to attend other meetings and by his original decision to invite Romaka to the Seagrave and TOC Meetings–meetings which union representatives have no standing to attend. The Department's later decision to exclude Romaka from the meetings may have been an unpopular managerial action but it did not violate the Union's statutory rights.

Additionally, Romaka's exclusion by the Department does not intrude upon a matter within the scope of bargaining. Planning capital improvements or expenditures is a managerial prerogative, and the Union has no right to participate in such planning because its failure to participate does not affect its statutory duty to represent its members. The Department is not required to include Union representatives in inter-agency or intra-agency meetings where vendor warranty issues, capital improvements, or technology issues are discussed.

The Seagrave Meetings are internal management meetings scheduled with the Department, DCAS, the City's Law Department, and Seagrave to discuss the progress and quality regarding the vendor's performance and adherence to contractual requirements. The Seagrave Meetings are directly related to the Department's management of capital contracts for fire apparatus. Likewise,

TOC Meetings are internal management meetings that are scheduled to review and evaluate the Department's technology initiatives. Having the unilateral right to convene Seagrave and TOC Meetings, the City argues that there is no concomitant obligation to invite or include the Union in such discussions. Respondents have not abridged their statutory and inherent managerial right to exercise complete control and discretion over its organization and technology of performing its work through a provision in the collective bargaining agreement between the parties.

The City further argues that the Board should not draw an adverse inference from the Deputy Commissioner's inability to complete his testimony due to health issues. He testified on February 9, 2007 and was present on August 2, 2007, when the parties agreed to adjourn the hearing day pending settlement discussions. Unfortunately, documented medical conditions prevented him from testifying at the scheduled September and October hearing dates. The Union's assertion that it needed to question the witness further is without merit and devoid of factual support, especially considering that Union counsel already questioned him extensively on the decision to exclude Romaka from the meetings. As the Union had full opportunity to examine the Deputy Commissioner in February 2006, and in fact did so, his later absence only harmed the City's presentation.

Finally, the Union did not adduce sufficient facts to show that the City's actions constituted an independent violation of NYCCBL § 12-306(a)(1), or a violation of NYCCBL § 12-306(a)(2). Therefore, the City argues that the petition should be dismissed in its entirety.

DISCUSSION

At the outset, this Board must determine whether we should draw a negative inference

because the Deputy Commissioner, who was called as a witness by the Union, did not complete his testimony. Neither party asked the Board to strike his testimony, but the Union urged the Board to draw a negative inference based on his failure to complete his testimony, and the City asked that the Board draw no such inference. Under the circumstances presented, we find that even if the Board were to utilize the standards suggested by the Union, we would not draw a negative inference. The Union urges the Board to use the standard utilized by the New York State courts to determine when a jury should be instructed concerning the adverse inference that may be drawn from a party's failure to produce a witness, commonly known as a "missing witness" charge. *People v. Gonzalez*, 68 N.Y.2d 424 (1986); *People v. Savinon*, 100 N.Y.2d 192, 196-197 (2003). We need not determine to what extent the standard applicable to a "missing witness" charge to a jury which allows, but does not require, the trier of fact to draw an adverse inference can inform our weighing of such an inference because, even applying the standard, we find that the Union has not established that such an adverse inference would be appropriate. *See Lorenz Diversified Corp. v. Falk*, 44 A.D.3d 910, 911 (2d Dept. 2007). Under this standard, the party seeking a "missing witness" charge must establish that an uncalled witness is knowledgeable about a material issue, that such a witness is under the "control" of the party that has failed to produce the witness, and that the witness is available to testify.[6] *Savinon*, 100 N.Y.2d at 197. Should the party seeking the charge meet its burden, it becomes incumbent upon the opposing party to account for the witness' absence or

[6] The standard espoused in *People v. Gonzalez* also includes considerations such as witnesses who have just become known to the opposing party and who have yet to appear for testimony. 68 N.Y.2d at 426. In the instant matter, and by contrast, the Deputy Commissioner here attended hearings and partially completed his testimony, so considerations such as notification to the court of a witness' existence and a failure to call the witness to testify are not relevant here.

otherwise demonstrate that the charge would not be appropriate, in order to defeat the request. *Id.* at 427-428 (citing *United States v. Blakemore,* 489 F.2d 193 (6th Cir. 1973); *United States v. Young,* 463 F2d 934 (DC Cir. 1972)).

Here, the Union has shown several key elements of the *Savinon* standard by establishing that the Deputy Commissioner was a witness believed to be knowledgeable about a material issue pending in the case, that a legal or other cognizable relationship existed such that the City may be deemed in "control" of the witness, and that, as a result, the witness' not appearing at the next hearing date is properly deemed the City's responsibility. However, the City has accounted for the witness' failure to appear by demonstrating that, subsequent to his initial production, he was unavailable to testify, in the pragmatic usage of the term employed by the Court of Appeals in *Savinon*. *Id.* at 198-200. We do note that for some of the early and middle hearing dates on which the Deputy Commissioner was scheduled to testify, he was not available. But as late as August 2, 2007, he was present and available for testimony when the parties agreed to adjourn pending settlement discussions. After this, the City maintained that he was absent from work due to health issues, and, in its closing brief, it submitted sufficient documentation to establish his unavailability due to medical reasons during the time the Trial Examiner attempted to complete testimony. Moreover, the Union did have the opportunity to conduct a direct examination of the Deputy Commissioner, and was able to garner from his testimony information that it used to support its claims herein. Under these circumstances, we will not draw a negative inference from the Deputy Commissioner's failure to complete testimony.[7] The Union's request that the Board employ a

[7] Because the City has requested only the limited relief that this Board not draw an adverse inference, which we have, in fact, granted, we need not determine whether a lack of opportunity to cross-examine a witness under the deprived party's control requires us to

similar standard utilized in the arbitral forum would not mandate a different conclusion for the same reasons as above.

Now we turn to the Union's claim that the City violated NYCCBL § 12-306(a)(1) and (3) by determining that Romaka should be excluded from Seagrave and TOC meetings. 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*, 39 OCB 51 (BCB 1987). A petitioner 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.

Id. at 15; *Howe*, 77 OCB 32, at 22, (BCB 2006).

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, CEU,* 77 OCB 24, at 19 (BCB 2006).

With respect to the first prong of the *Salamanca-Bowman* test, we have long stated that an activity that the Board would deem to fall within the protection of NYCCBL § 12-305 must be related, if only indirectly, to the employment relationship between the City and bargaining unit employees. *SSEU*, 79 OCB 34, at 9 (BCB 2007); *COBA*, 53 OCB 17, at 11 (BCB 1994), citing

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disregard the witness' testimony. *See, e.g. Matter of Wai Lun Fung v. Daus*, 45 A.D.3d 392 (1st Dept. 2007); *Matter of Gordon v. Brown*, 84 N.Y.2d 574 (1994).

McNabb, 41 OCB 48, at 13 (BCB 1988), quoting *Bd. of Educ. of Deer Park Union Free Sch. Dist.*, 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*.

In the instant matter, it is undisputed that Romaka was acting in his official capacity as a Union officer, and, despite the Deputy Commissioner's assertions to the contrary, the issues discussed at the Seagrave and TOC meetings had a relation to on-duty firefighter safety. Therefore, these meetings were directly related to the employment relationship. The evidence is ample that although the Seagrave Meetings involved warranty issues and were titled as such, Seagrave's compliance with the warranty, or lack thereof, would be of concern to the Union, whether it concerned mechanical problems with the "new" rigs or the spares put into use while the new ones were being repaired. Additionally, the testimony and the minutes of the meetings show that the issues discussed at TOC meetings dealt with issues that involved firefighter safety. The minutes show that issues that could involve safety, such as In-Line Connectors for Haz-Mat suits, Smart-Mics, Post Radios, and Electronic Wireless Command Boards were discussed.

With regard to Romaka informing his Union superiors of these issues and the Union President making public statements about those issues, we find that they were both acting in their capacity as Union officers sanctioned by their Union to protect the interests of their members' safety, and that they were not acting in their own interest for the same reasons as above. *Cf. Archibald,* 57 OCB 38, at 19-20 (BCB 1996) (letter to mayor written by union member on behalf of another not protected activity because it could not be identified in form or in content as having been sanctioned by the union).

Though the City points to *Jefferson Standard Broadcasting Co. v. Electrical Workers (IBEW)*

Local 1229, 346 U.S. 464 (1953) for the proposition that speech that is disparaging to an employer is not protected, that decision found that the employees' activity was not protected for other reasons. In that matter, nine technicians of a television station were fired after they distributed 5,000 flyers criticizing the quality of the company's broadcasts, but nothing else, to customers during a strike. In holding that the employees' actions were not protected, the Court stated: "Their attack related itself to no labor practice of the company. It made no reference to wages, hours, or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. . . . The fortuity of the coexistence of a labor dispute affords these technicians no substantial defense." 346 U.S. 464, 476. The Court then held that because the activity was not protected under the National Labor Relations Act, the employer's dismissal of the employees for distributing the disparaging flyers was appropriate. *Id.* The facts in the instant matter are readily distinguishable, considering that the condition and repair of apparatus with mechanical problems could affect firefighter safety while on the job. Thus, Romaka and the Union President's actions related to the business relationship, and were in furtherance of the collective welfare of their members.

Furthermore, we have held that even disparaging speech constitutes protected activity when it is indirectly related to the business relationship and is in furtherance of the collective welfare of employees. *See PBA*, 63 OCB 16, at 8 (BCB 1999) (Union member who placed a sign that protested captain's arrest and summons quotas in his automobile window was engaged in protected activity). Similarly, in this instance, we find that Romaka was engaged in protected activity when he attended the Seagrave and TOC Meetings and conveyed that information to his Union President, and that the Union President was engaged in protected activity when he testified before New York City Council

and held the press conference immediately following. We also note that the City did not show that the comments were inaccurate. Under these circumstances, the fact that the speech may have been disparaging is not determinative of whether the activities in question were protected. The City's view of what constitutes protected activity is too narrow.

We also find that the Union has established that the Deputy Commissioner was aware of these officers' activities, through his April 7, 2006 email, his testimony that he saw press reports related to the Union President's testimony, and his testimony that he recognized that some of the information used by the Union President came from Seagrave meetings that Romaka attended. Accordingly, the Union has satisfied the first element of the *Salamanca* test.

Moving to the second element of the *Salamanca* test, we find that the Union has shown that the Department was motivated by anti-union animus when it determined that Romaka should be excluded from the Seagrave and TOC meetings. In prior decisions, we have stated that a "petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence." *DC* 37, 1 OCB2d 5, at 71 (BCB 2008); *Colella*, 79 OCB 27, at 54 (quoting *Local 1180, CWA*, 77 OCB 20, at 14 (BCB 2006)).

In this matter, we find that the best evidence of the Deputy Commissioner's motivation for his April 2006 actions in excluding Romaka is his April 7, 2006 email. Until shortly before then, Romaka and other Union officials, including members of the UFOA safety committee, had been included in these meetings, presumably because their attendance was warranted. However, immediately after the Deputy Commissioner became aware that the Union President testified before a New York City Council committee and held a press conference about his concerns with Seagrave and replacement apparatus, using information gleaned from Romaka during the Seagrave meetings,

Romaka was abruptly told that his attendance was no longer necessary at those meetings. In the Deputy Commissioner's contemporaneous email, he stated:

> You (your union) has taken an idea to bring your point of view out and distort facts to your own use. As you know I have stated to you that I am not a political person and always wanted to do what was best for this Department. Your use of information gained by attending these meetings corrupt the intention and any value you might have brought to the table. It is unfortunate that you (your union) have decided to bring your own agenda and distort the truth for your own political purpose. I do not want to be a part of the press conferences that your union plays which ultimately has taken a good process and attempts to bastardize it to meet your own agendas.

The tone and content of this email, with phrases such as "you (your union)," chastised a Union officer and his Union for having engaged in protected activity. Additionally, the fact that members of the UFOA safety committee were not told that their appearance at the meetings was unnecessary, shows that the Deputy Commissioner's ire was directed at the UFA. Considering the timing, tone, and content of this email, along with the disparity in treatment between the UFA and UFOA, we find that the Deputy Commissioner was motivated by anti-union animus when he determined that Romaka's presence was no longer warranted at Seagrave and TOC Meetings. The fact that Romaka was invited back to attend some meetings some months afterward does not go to the question of why the Deputy Commissioner initially excluded Romaka from the meetings in April 2006.

Since evidence adduced by Petitioner has established a *prima facie* case of discrimination and retaliation, the burden of going forward shifts to the City to either rebut the prima facie case or to establish that its actions were motivated by a legitimate business reason. *Colella*, 79 OCB 27, at 58 (BCB 2007); *Local 768, DC 37*, 63 OCB 15, at 17 (BCB 1999). The City argues that it had such a legitimate business reason for excluding Romaka from the meetings, a fear that relations between

Seagrave and the Department would be harmed and, therefore, the meetings would not be as candid. The first time that this fear was raised was not in the Deputy Commissioner's April 7 email or at any time shortly thereafter, but in the City's answer to the improper practice petition. This *post hoc* rationale is unsupported by the record because the Deputy Commissioner's contemporaneous email makes no mention of this concern, and the business reason for banning Romaka from the meetings was only asserted after the Deputy Commissioner's actions were challenged. *See SSEU*, 77 OCB 35, at 20 (BCB 2006) ("*Post hoc* rationale to depict as neutral acts that were in fact retaliatory" not worthy of credence). Moreover, the Deputy Commissioner testified that he never prohibited the attendees at the meetings from discussing the content of the meetings with outside sources (Tr. 218)

Additionally, the City's assertion that the Department's relationship with outside vendors could be harmed is purely speculative. Although the Deputy Commissioner did not complete his testimony, he testified that he was not aware of any negative impact on his relations with Seagrave due to the Union President's New York City Council testimony or the resulting press coverage, and the City did not show any potential existence of a negative impact through other means. Therefore, we find the City's after-the-fact assertion of a legitimate business reason for excluding Romaka from the Seagrave and TOC Meetings to be unpersuasive and pretextual. When, as we find here, "a petitioner has established a credible *prima facie* case and there is sufficient evidence to find that the employer's asserted justification is false, we may conclude that the employer engaged in unlawful activity." *Colella*, 79 OCB 27, at 61 (BCB 2007); *Local 371*, *SSEU*, 77 OCB 35, at 20 (BCB 2006). Accordingly, we find that the City violated NYCCBL § 12-306(a)(3). When an employer violates this provision of the NYCCBL, it also constitutes a derivative violation of § 12-306(a)(1). *SSEU*, 79 OCB 34, at 14 (BCB 2007); *DC 37*, 77 OCB 34, at 18 (BCB 2006).

However, we find that even though the UFA has established that the Department violated NYCCBL § 12-306(a)(1) and (3) when it excluded Romaka from the Seagrave and TOC Meetings, it has not established that the City breached its duty to bargain in good faith, in violation of § 12-306(a)(4), when it excluded him. We recognize that safety is a mandatory subject of bargaining, but here, the Union has failed to identify either a demand to bargain or a unilateral change relating to a mandatory subject of bargaining. That matters of safety are incidentally involved in the meetings between the Department and Seagrave is not a sufficient basis to establish either a duty to bargain or a breach of that duty. Therefore, we dismiss the Union's claims regarding NYCCBL § 12-306(a)(4).

The Union also claimed a violation of NYCCBL § 12-306(a)(2) in the petition, but the facts are insufficient to show a *prima facie* violation of this provision.[8] Accordingly, we grant the Union's petition regarding the claimed violations of NYCCBL § 12-306(a)(1)and (3), but dismiss the Union's claimed violation of § 12-306(a)(2) and (4). We order the City to cease and desist from refusing to permit Romaka from attending Seagrave and TOC Meetings, and to post notices that it has violated NYCCBL § 12-306(a)(1), (3), and (4).

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

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[8] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
* * *
(2) to dominate or interfere with the formation or administration of any public employee organization . . .

ORDERED, that the improper practice petition, docketed as BCB-2549-06, filed by the Uniformed Firefighters Association be, and the same hereby is, granted as to claims that the City violated NYCCBL § 12-306(a)(1) and (3) by excluding UFA Health and Safety Officer Romaka from certain meetings, and dismissed to all other claims;

ORDERED, that the Department cease and desist from refusing to permit Romaka from attending Seagrave and TOC Meetings because of union activity; and

ORDERED, that the Department post the attached Notice to All Employees on all bulletin boards where notices to employees are customarily posted.

Dated: March 3, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
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 in the matter of *UFA*, 1 OCB2d 10 (BCB 2008) (Docket No. BCB-2549-06):

The New York City Fire Department committed an improper practice when, in retaliation for union activity, it excluded UFA Health and Safety Officer Romaka from certain meetings.

It is hereby:

ORDERED, that the improper practice petition, docketed as BCB-2549-06, filed by the Uniformed Firefighters Association be, and the same hereby is, granted as to claims that the City violated NYCCBL § 12-306(a)(1) and (3) by excluding UFA Health and Safety Officer Romaka from certain meetings, and dismissed as to all other claims; and

ORDERED, that FDNY cease and desist from refusing to permit Romaka from attending any future Seagrave and TOC Meetings because of union activity.

New York City Fire Department

Dated: _____

(Posted By) **(Title)**

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.