Local 924, DC 37, 1 OCB2d 30 (BCB 2008)

(IP) (Docket No. BCB-2655-08).

Summary of Decision: The Union alleged that the City violated NYCCBL § 12-306(a)(1) and (3) when it transferred an employee from one job assignment to another allegedly in retaliation for participation in union activities specifically participating in the contractual grievance process and when it interfered with his rights under NYCCBL § 12-305 to assist his union in the processing of the grievance. The City claimed that the decision to transfer was made without regard to such union activity and that, in any event, it was made for legitimate business reasons due to petitioner's attendance deficiencies. The Board found that the record does not support a finding of anti-union animus or interference and denied the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

LOCAL 924, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On October 3, 2007, District Council 37 ("Union" or "DC 37") filed a verified improper practice petition on behalf of Thomas DeSantis against the City of New York ("City") and the New York City Police Department ("Department" or "NYPD") alleging that the NYPD violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3)

("NYCCBL") § 12-306(a)(1) and (3). The Union claims that the NYPD retaliated against DeSantis for participating in a grievance claiming that the NYPD was not assigning overtime equitably pursuant to the collective bargaining agreement to which the City and the Union are signatories. The Union asserts that, in retaliation for this protected activity, the NYPD changed DeSantis' work assignment after years in his prior assignment and that the commanding officer of the unit to which he was assigned required him to perform work that put his health at risk. The City maintains that the NYPD's actions with respect to DeSantis were not wrongfully motivated under the NYCCBL and that the NYPD had legitimate business reasons for changing his work assignment in any event.

We find that Petitioner has not established that the complained of acts were motivated by anti-union animus in violation of the NYCCBL. Accordingly, we deny the petition in its entirety.

BACKGROUND

Following an evidentiary hearing, the Trial Examiner found that the totality of the record established the relevant background facts to be as follows.

The barrier unit of the NYPD is responsible for storing and deploying wooden and metal barriers for use by the NYPD at crime scenes, parades, street fairs, and the like. The barriers are maintained at the unit's warehouse at 49-49 30th Street, Long Island City. The unit is staffed by five Police Officers, three Sergeants, and a Lieutenant. Lt. John Beckmann has been Commanding Officer of the unit since June 2004. As Commanding Officer of the unit, he is in charge of the operations of the unit, including the coordination and placement of police barriers within the patrol borough, the management of the warehouse where the barriers are maintained, and the uniformed personnel assigned to the command.

During Beckmann's first two years in that capacity, five civilian Laborers were also assigned to the unit. One of them was DeSantis, who began his employment with the City in the title of Laborer in October 1981. In 1995, he was assigned by the NYPD as a Laborer in the fleet services division and then, in December 2005, he was reassigned to the NYPD's barrier unit. His duties and responsibilities included moving wooden and metal barriers within the unit's warehouse and loading and unloading barriers from the NYPD trucks in the warehouse and at assigned locations on the street.

In September 2006, DeSantis asked the Union to pursue a grievance over equal opportunity to work overtime which DeSantis claimed he had been denied. DeSantis contended that the work, which was within his position description, had been assigned to uniformed Police Officers.

On October 30, 2006, Sergeant Joseph Castaldo, who oversaw the Laborers in the unit, prepared a performance evaluation covering DeSantis' work for the period December 5, 2005, through September 15, 2006. Castaldo reported that DeSantis met standards on four of the six tasks on which he was rated. On two of the tasks, he was rated as below standards. They were: "needs to improve his tasks at completing the unloading of barrier trucks . . . becomes distracted while in the middle of an assignment," and "needs to improve his efficiency in constructing barrier configurations." Castaldo also commented overall that DeSantis is an "eager employee" but "needs to show more motivation in his daily tasks" and "needs to improve his tardiness record," or else his future evaluations would be affected. The evaluation reflected supervisory memos for infractions such as leaving the work facility without permission, failing to report to roll-call and complete assignments in timely fashion, reporting for overtime work when instructed not to, and the like. Petitioner claims that he would leave the work facility to obtain nourishment to maintain his blood

sugar level, which was important as he suffers from diabetes. Although Beckmann would testify later, that some co-workers were "not comfortable" working with DeSantis as he loaded and unloaded the barriers, Castaldo's evaluation of DeSantis' work performance made no mention of any such concern. Rather, Castaldo's evaluation stated that, overall, DeSantis met the required performance standards and the evaluation recommended that DeSantis "continue in present assignment." DeSantis received a copy of the evaluation on January 10, 2007.

Beckmann testified that, at an unspecified time in Spring 2007, he became aware of DeSantis' grievance. Beckmann was uncertain whether he told his superior officer, Captain Demitrios Remouliotis, about the grievance at that time. According to Castaldo, Beckmann told Castaldo about the grievance in May.

On an unspecified date the first week of July 2007, a Union representative came to the warehouse to speak with DeSantis and Beckmann about a command discipline which Beckmann had issued to DeSantis.[1] On July 6, 2007, prior to roll-call at 8am, DeSantis asked Beckmann for time off to attend a funeral that day. Beckmann denied the request. Beckmann testified that later in the day, DeSantis complained of digestive disorders and left the job site, stating his intention to seek treatment at a hospital, but that DeSantis later returned to the warehouse saying he did not want to wait to be seen at the hospital and would go to his own doctor instead. Beckmann further testified that after DeSantis returned, he left the warehouse again without notifying his supervisor or informing anyone of his condition. (Tr. 100-101). It is unclear from Beckmann's testimony precisely what time DeSantis left the warehouse a second time or whether DeSantis returned to the

[1]Neither the Union nor the City adduced testimony regarding the occasion for the command discipline at the hearing.

warehouse at all later that day. The Union presented no testimony by DeSantis about this incident.

DeSantis testified that, in the early afternoon of July 6, 2007, he made a phone call from the second floor locker room at the barrier unit warehouse to Union Council Representative Chandler Henderson to ask the Union to expedite the processing of the overtime-distribution grievance. DeSantis testified that, some 15 feet away from him in the locker room, and situated behind a row of lockers across from where he was using the phone, was Police Officer Robert Piccardi, who was also assigned to the unit. DeSantis testified that he did not know what Piccardi was doing while DeSantis was on the phone and did not recall whether Piccardi made eye contact with him, or in any other way overtly acknowledged DeSantis' phone conversation with Henderson. DeSantis testified that after he concluded his conversation with Henderson, Piccardi quickly exited the room toward the first floor. DeSantis said he did not believe Piccardi was going downstairs to work with the barriers because "the day was already over at that point." (Tr. 43).

DeSantis testified that he believed that his phone call asking the Union to expedite a previously-filed grievance caused Piccardi to initiate events that resulted in the change of DeSantis' assignment the following work day. DeSantis further testified on cross-examination:

> Prior to the phone call, I had been working loading and unloading trucks. After Rob ran out of the locker room and went downstairs, the very next Monday morning the next time I reported to work, I was permanently assigned to sweeping a floor that has some vile dust, perhaps it's, I don't know, residual 9/11 dust on the floor which had been making me sick, I had problems with my lungs, my sinuses, my throat, all from this dust.
> Q. Let me stop you there. What you had just told me was that Rob had left the room after the phone call and then the next thing you know you're sweeping. What is the connection between the two of those?
> A. I mean, it's what it is. I believe that Rob Piccardi went to the lieutenant [Beckmann] to tell him that I wanted to follow through

with the grievance.

(Tr. 37).

When DeSantis reported for work the following Monday, Castaldo told him that he would no longer be assigned to load and unload trucks but instead would be immediately and permanently assigned only to sweep the floor of the warehouse, or "tarmac," which DeSantis described as one square block in area. DeSantis testified that he had swept the tarmac on prior occasions, but it amounted to less than five percent of his work time.[2] Castaldo testified that, for his part, he had no input into the reassignment decision. (Tr. 132).

DeSantis informed Castaldo that he had several doctors' notes on file stating that he should avoid the dust in his work assignments due to the health problems that it could precipitate; nevertheless, when Castaldo told him about his new assignment within the barrier unit, DeSantis picked up a broom and started sweeping.

Asked on cross-examination if the decision to change DeSantis' assignment from "primarily loading to primarily sweeping and maintaining the warehouse" was his, Beckmann replied:

> Well, I wouldn't say that it was – a laborer has different functions, so to say that his primary function was sweeping is not entirely accurate. What I did, I did not want him on the trucks, to be assigned to the trucks. Some of the other assignments that Tommy, he actually did a pretty good job. When we buy new metal, we put stickers on the sides of the barriers. If there's debris, sometimes people would put stickers or tie things to the metal barriers. Tommy removed it. If there's some kind of assignment that had to be done or something had to be moved within the warehouse and Tommy was available, we used him.

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[2] DeSantis testified that he was allergic to the dust on the floor of the tarmac and that he has experienced continuing asthmatic and bronchitis-like symptoms as a result of exposure to it and that he had to be hospitalized as a result on occasion and that he has been prescribed medication to control the symptoms. (Tr. 44).

(Tr. 120–21).

He further testified that DeSantis' conduct on July 6 precipitated the decision to reassign him to sweeping duties:

> Q. The reason you gave on direct testimony for changing Mr. DeSantis' assignment was because of an incident that occurred on July 6th, is that correct?
> A. That was not the sole reason, no. So that statement is incorrect.
> Q. But that was the precipitating reason?
> A. That was, yes, that would be the reason that convinced me why I should change direction with Laborer DeSantis.

(Tr. 119-120).

Beckmann testified that factors such as "tardiness," "constant" complaints about health, and "general disregard for direction at times" went into the decision to reassign DeSantis. (Tr. 120). The Union did not ask Beckmann whether the "incident on July 6th" referred to the phone call to the Union, or DeSantis' departure for medical attention, his return and his subsequent departure without permission for the rest of the day. Beckmann also was not asked whether, prior to reassigning DeSantis on July 6, he was aware of DeSantis' July 6 call to the Union, which it is uncontested that he did not overhear at the time it was made. On cross-examination, Beckmann acknowledged that he had prepared several memoranda which addressed various attendance issues that NYPD had with DeSantis' attendance on the job from March 2006 through January 2007.

By the time of DeSantis' reassignment, Beckmann and Castaldo had been aware for two months of DeSantis' grievance. Beckmann testified that the decision to reassign DeSantis to sweeping duties within the barrier unit had nothing to do with the grievance that DeSantis was pursuing. (Tr. 125).

Regarding his reassignment, DeSantis testified that he had heard that a Police Officer

assigned to the security booth in the warehouse occasionally swept up but that he had never personally seen anyone – Police Officer, Laborer, or anyone else – sweeping the tarmac as a main task. Beckmann testified that none of the five Laborers under his command were given assignments devoted exclusively to sweeping or maintenance duties in the warehouse. DeSantis testified, however, that when Beckmann gave him his new assignment in July 2007, Beckmann told him, "Your only job is to sweep the floor." (Tr. 20). DeSantis further testified that Beckmann told him at this time he should not expect to return to loading and unloading the trucks for as long as DeSantis was under Beckmann's command. (Tr. 20).

DeSantis was offered and wore a paper dust mask which he claims did little to mitigate the dusty conditions. He testified:

> There were days when it was in the late [*sic*] 90's, like 97 or 98, a couple of days 100 degrees, when it's basically impossible to have a dust mask on your face in the heat and humidity and in an enclosed building that is constantly humid anyway, it's very difficult to keep a dust mask on your face. But in my mind the paper dust mask that I was offered did nothing, absolutely nothing to protect me from whatever it was on the floor, because having worn them I still got sick anyway, even wearing them . . . Even if I were to shave my beard, the dust mask would do little or nothing to protect you from what's on the floor, because it's not designed to protect you from this sort of particulate matter.

(Tr. 52-53).

On September 25, 2007, DeSantis arrived at work and, as he was using the toilet, he testified, "Officer Piccardi decided to stick his cell phone camera over the stall" and take a picture of him. (Tr. 21). Moments later, he continued, DeSantis mentioned the incident to Piccardi, asking to see the photograph. Piccardi handed DeSantis the phone. DeSantis slipped the phone into his pocket. According to DeSantis, Piccardi placed him in a headlock, slammed him into a door, then a wall,

then another wall "as if [DeSantis] was just a piece of paper." (Tr. 64). DeSantis testified that Piccardi then threw him to the floor and that DeSantis started to fall headfirst down the flight of stairs leading from the second floor locker room to the first floor. His heel caught his forward motion and prevented him from falling further, but, he testified, in so doing, injured his knee.

Outside on the sidewalk immediately after the incident, Castaldo spoke with DeSantis for just a matter of "seconds," directing DeSantis to hand over Piccardi's phone. (Tr. 138). DeSantis refused to do so. Castaldo told DeSantis that if he left the premises at that time, he would face suspension. (Tr. 138–139). DeSantis left the premises, fearing further injury at the hands of uniformed personnel on the scene. Castaldo, who had known Piccardi for two years on the job at the time of the incident, did not speak with Piccardi about it. According to DeSantis, he went to the Union office in Manhattan by subway to report the incident to his representatives there and then sought medical treatment for his injuries.

Back at the warehouse, Beckmann called his supervisor, Remouliotis, to inform him of the physical altercation that had occurred. Remouliotis directed Beckmann to notify the NYPD Internal Affairs Bureau ("IAB"). Remouliotis also directed Beckmann to convey the information to DeSantis that DeSantis was being transferred, effective immediately, to the buildings maintenance unit. Beckmann did so. (Tr. 108). Beckmann testified that he did not know what the building maintenance unit was primarily responsible for doing, but he told DeSantis that was where he was being transferred. Piccardi had his shield and firearms removed and was transferred to the detective unit in the Bronx pending investigation by IAB as to his role in the brawl.

Beckmann testified that, in the building maintenance unit, DeSantis' "general function is to maintain the warehouse and the floors," but if they needed him to perform other tasks such as

removing debris from barriers and affixing the NYPD stickers as well as moving barriers within the warehouse, "we would utilize him." (Tr. 115, 124). Beckmann testified that another worker, Laborer Parker, performed similar functions as well.

Beckmann was asked directly if DeSantis' grievance had anything to do with the decision in September 2007 to transfer DeSantis to sweeping duties from within the barrier unit to the building maintenance unit. He testified:

> No. I'm responsible for the personnel assigned to me, I'm responsible for the conduct of that personnel, and they are deployed to the public, and I – that was the basis of my decision.

(Tr. 125).

On September 29, 2007, DeSantis returned to the work site to obtain papers to file for Workers' Compensation benefits for the knee injury. DeSantis testified that the sergeant from whom he requested the papers told him that they were in a locked file to which the key was not available, and thus DeSantis would not be able to obtain them. DeSantis managed to obtain them through an attorney but, as of the date of his testimony in the instant matter, April 8, 2008, he had not received Workers' Compensation benefits for the incident. In addition, DeSantis testified that he was told by a sergeant at IAB that authorization which DeSantis had submitted on two separate occasions for IAB to obtain his medical records had not been forwarded to the NYPD's employee benefits department for processing. In all, DeSantis testified that he sought "at least six times" to file for Workers' Compensation benefits and each time was prevented from doing so for a variety of reasons, including being ordered to "go to meal," or "the file cabinet is locked." (Tr. 52). DeSantis testified that the injuries have prevented him from performing any kind of work.

POSITION OF THE PARTIES

Union's Position

The Union contends that the NYPD retaliated against DeSantis for his participation in Union activities, specifically the filing of a contract grievance about distribution of overtime work, by transferring him to an assignment that only minimally related to his position description yet significantly injured his health.[3] The Union argues that said retaliation violates NYCCBL § 12-306(a)(1) and (3).

Specifically, the Union asserts that for his entire service as a Laborer in the barrier unit, DeSantis had loaded and unloaded barriers from the NYPD trucks, working overtime on occasion, but that when he sought to pursue the grievance through the contractual dispute resolution procedure, he was transferred to duties consisting of nothing more than sweeping the floor of the warehouse of dirt containing dust from the World Trade Center debris, exposure to which he contended caused him irreparable physical harm. The Union maintains that, in changing DeSantis' assignment, the NYPD singled him out and treated him differently from other workers in the same title for the purpose of discouraging, and therefore interfering with, his participation in the grievance process.

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[3] NYCCBL § 12-306(a)(1) 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 relevant 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.

Although its pleadings do not assert an independent claim of interference, the Union's post-hearing brief states that "[t]he agency's conduct constitutes interference with a public employee in the exercise of his right to join or assist his employee organization, and discrimination against DeSantis because of his membership in and participation in the activities of Local 924, in violation of NYCCBL § 12-306(a)(1) and (3)."

City's Position

The City does not dispute that the filing of a contract grievance or the pursuit of such a grievance by DeSantis is protected activity under the NYCCBL, but argues that the Union has failed to demonstrate any causal connection between DeSantis' grievance activity and his reassignment. Beckmann's decision to reassign him to sweeping duties was based upon DeSantis' "tardiness," "constant" complaints about health, "general disregard for direction at times" and safety concerns loading and unloading the barriers.

As for the decision in September 2007 to transfer DeSantis from the barrier unit to the building maintenance unit, the City contends that it was Beckmann's superior officer, Remouliotis, who made the ultimate decision because of the altercation between DeSantis and Piccardi. The City contends that, at the time he made the decision, Remouliotis was not even aware of the grievance. Thus, the City argues, the Union has failed to establish that the NYPD violated NYCCBL § 12-306(a)(3) or (1) either derivatively or independently with respect to any conduct by DeSantis in the pursuit of that grievance.

The City contends that the two supervisors who knew of the grievance, Castaldo and Beckmann, played no role in the transfer decision. It also argues that DeSantis' reassignment from primarily loading to other duties was no different from other Laborers who were assigned to sweep

the warehouse, thus, there was no discriminatory treatment of DeSantis. The reassignment was for legitimate business reasons and would have taken place even in the absence of DeSantis' grievance activity.

DISCUSSION

In deciding the instant matter, we must determine whether sufficient probative evidence has been presented to establish that the adverse employment actions against DeSantis were taken in retaliation for his protected activity of calling the Union to assist him with a grievance, and in so doing interfered with the exercise of his right to participate in union activity, specifically, the processing of a contract grievance. This Board finds the evidence does not support a finding that anti-union animus motivated the NYPD's employment actions against DeSantis, specifically, reassignment to sweeping duties and transfer from the barrier unit to the building maintenance unit, and that, accordingly, no cause of action has been made out under either NYCCBL § 12-306(a)(3) or (1).

Pursuant to NYCCBL § 12-306(a)(3), it is an improper practice for a public employer to "discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any public employee organization." *See DC 37, Local 376*, 77 OCB 12, at 14 (BCB 2006). In determining whether an alleged action constitutes retaliation based on anti-union animus, thus violating NYCCBL § 12-306(a)(3), and, derivatively, § 12-306(a)(1), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by us in *Bowman*, 39 OCB 51 (BCB 1987). To establish a *prima facie* case under the *Salamanca-Bowman* test, we have held, and the courts have affirmed, a petitioner must establish:

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.

CWA, Local 1180, 77 OCB 20, at 13 (BCB 2006)*; see also Dist. Council 37 v. City of New York*, 22 A.D.3d 279, 283 (1st Dept. 2005). If a petitioner alleges sufficient facts concerning these two elements to state a *prima facie* case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that a legitimate business motive would have caused the employer to take the action complained of even in the absence of protected conduct. *Id*.

The City does not dispute that the pursuit of a contract grievance is protected activity or that NYPD knew that DeSantis was engaged in a grievance over the assignment of overtime or that DeSantis sought the Union's assistance in attempting to resolve this grievance. Thus, the Union has concededly established the first prong of a *prima facie* case under the *Salamanca-Bowman* legal standard.

Our analysis focuses on the second prong of a *prima facie* case, whether the Union has established that conduct by the NYPD supervisors in a position to make decisions affecting the terms and conditions of DeSantis' employment was improperly motivated. To be successful in its claim, the Union must demonstrate a causal connection between the protected activity – in this case, DeSantis' efforts to obtain Union assistance for his grievance over assignment of overtime – and the motivation behind the temporary reassignment and subsequent permanent transfer from barrier work to sweeping duties. *See Burton*, 77 OCB 15, at 25-26 (BCB 2006); *City Employees Union, Local 237,* 67 OCB 13, at 9 (BCB 2001). The Union must carry its burden of proof that the action was wrongfully motivated. *See Lieutenants Benev. Ass'n*, 61 OCB 49, at 6 (BCB 1998); *Local 983, D*

C 37, 67 OCB 15, at 6 (BCB 2001).

In establishing a *prima facie* case, we have repeatedly recognized that:

> "the existence of retaliatory or anti-union animus must be proven indirectly, through the use of circumstantial evidence, absent an outright admission." *Soc. Serv. Employees Union*, 77 OCB 35, at 15 (BCB 2006) (citing *Burton*, 77 OCB 15, at 25-26 (BCB 2006), and *City Employees Union, Local 237*, 67 OCB 13, at 9 (BCB 2001)). This Board's willingness to accept indirect evidence of wrongful intent "does not, however, permit the [petitioner] to carry [his] burden of proof through mere assertion." *Id.* (citing *Local 983, District Council 37*, 67 OCB15, at 6 (BCB 2001)). Rather, allegations of improper motivation must be based on specific, probative facts. *Id.* (citing *Lieutenants Benevolent Ass'n*, 61 OCB 49, at 6 (BCB 1998)). As part of his evidentiary showing, "the 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." *Communication Workers of Am., Local 1180*, 77 OCB 20, at 14 (BCB 2006).

DEA, 79 OCB 40, at 23 (BCB 2007) (quoting *Collella,* 79 OCB 27, at 54 (BCB 2007) (internal citations edited).

Although the Union raises a question as to the proximity in timing between DeSantis' phone call to the Union and his reassignment the next business day to sweeping duties, that alone, without more, is insufficient to persuade this Board that there is a causal connection. Piccardi may well have heard DeSantis' conversation with his Union representative about the overtime grievance, but Piccardi was neither a supervisor nor a manager. Petitioner's testimony that it was his belief that Piccardi heard the telephone call and told a supervisor about it, and that the decision to reassign DeSantis was made in response to Piccardi's action, is based entirely on conjecture and is unsupported by the record evidence.

Moreover, no evidence was introduced contradicting or tending to undermine the significance

of the memoranda in the record, and supported by Beckmann's testimony, concerning DeSantis' attendance deficiencies. Although Beckmann's testimony is far from unimpeachable, particularly when he asserts variably that he was and that he was not responsible for reassigning and transferring DeSantis, nevertheless, this discrepancy in his testimony does not in any way vitiate the uncontroverted and contemporary documentary evidence of DeSantis' workplace deficiencies, which antedated the protected activity asserted by the Union, the July 6 phone call. Thus, the temporal proximity between the phone call to the Union and the adverse employment action, without more, does not support a finding of retaliation. *DEA*, 79 OCB 40, at 22-23.

The same is true for the events of September 2007 from which we are asked to conclude that Piccardi's photographic activity and the supervisors' response to it, including DeSantis' permanent transfer from the barrier unit to the building maintenance unit, were taken in retaliation for his protected grievance activity. DeSantis' unauthorized departure from the premises following the altercation with Piccardi undermines the account offered by the Union to support its claim that the had no legitimate concern with his behavior in the incident in question, which is consistent with his documented history of unauthorized departures and absences from the workplace. Thus, the inference cannot be drawn that his transfer following this event was a pretext for retaliation against DeSantis for his grievance activity. We see nothing retaliatory in the supervisors' action in transferring him to a unit where he could be kept under closer surveillance, especially where, as noted above, Piccardi was also transferred out of the barrier unit at the same time and subject to investigation with his shield and gun removed, thus undermining the inference that management endorsed or promoted his behavior. We find that these facts, taken as a whole, fail to establish that the adverse employment actions were motivated by anti-union animus.

Even if we were to find that the Union had established retaliation in contravention of the NYCCBL, the City has provided sufficient proof that its actions were motivated by legitimate business reasons without regard to protected conduct. *DC 37, Local 768*, 63 OCB 15, at 17 (BCB 1999) ; *CSBA, Local 237*, 71 OCB 32 (BCB 2003); *City Employees Union, Local 237*, 67 OCB 13 (BCB 2001). The actions at issue in the instant matter do not appear to be a *post hoc* rationale depicting as neutral acts that were retaliatory; rather, the City's proffered legitimate business reasons are supported by a contemporaneous record of personnel warnings and actions antedating any protected activity. *DEA*, 79 OCB 40, at 22-23. Uncontroverted testimony was presented that DeSantis made an unauthorized departure from the job site during work hours on the same day that he made the phone call. That unauthorized departure, together with his prior tardiness and disregard for directions as memorialized in the uncontroverted memoranda, some of which were reflected in his performance evaluation, gave his supervisors sufficient cause to reassign him to work at the warehouse where they could more closely supervise him to assure his availability for specific assignments and to monitor his job performance. The City demonstrated a legitimate business defense for taking the actions that it did which are the subject of the instant petition. Thus, we find no violation of NYCCBL § 12-306(a)(3) or, derivatively, (1).

Finally, under NYCCBL § 12-306(a)(1), it is unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of their rights granted in NYCCBL §12-305. The filing of a contract grievance, as DeSantis sought to do in the instant case, is protected activity under the NYCCBL. *DEA*, 79 OCB 40, at 22; *Fabbricante*, 71 OCB 30, at 27 (BCB 2003); *Doctors Council*, 59 OCB 12, at 10 (BCB 1997). However, in this case, the Union has not alleged any facts to support any claim that agents of the NYPD independently interfered with DeSantis' statutory

rights. Thus, no independent violation of NYCCBL § 12-306(a)(1) has been stated and any such claim, as well, must be dismissed.

For all these reasons, we find that the Union has failed to carry the requisite burden of proof and we deny the instant petition in its entirety.

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 Local 924, District Council 37, AFSCME, against the City of New York and the New York Police Department, docketed as BCB-2655-07, is denied in its entirety.

Dated: September 24, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER