DC 37, Local 376, 1 OCB2d 40 (BCB 2008)

(IP) (Docket No. BCB-2681-08).

Summary of Decision: The Union alleged that DEP acted in a discriminatory and retaliatory manner in violation of NYCCBL § 12-306(a)(1) and (3) when it deliberately altered time and leave records and docked wages of four employees, who took sick leave but failed to subsequently produce the requisite documentation. The Union further alleged that DEP failed to bargain in good faith when, in an attempt to discuss DEP's policy related to the agency's sick leave policies, DEP rebuffed the Union's attempts to discuss the agency's sick leave policies. The City avers that DEP did not act in a discriminatory or retaliatory manner and that it changed the employees' time and leave records and docked their pay in order to comply with DEP sick leave policies. After the hearing was concluded, the Union withdrew its failure to bargain claim. The Board found that the Union demonstrated a *prima facie* case against DEP and that the agency articulated a business reason for their actions. However the Board also held that the Union satisfied its burden of persuasion proving that DEP's business reasons were a pretext for acting in contravention of the NYCCBL. Accordingly, the petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, LOCAL 376,
AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE
NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On January 8, 2008, District Council 37, Local 376 ("Union" or "Local 376") filed a verified

improper practice petition against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP") alleging that DEP 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, due to the Union's decision to appeal several related Step I determinations and an adverse ruling against DEP in a separate improper practice case, the agency retaliated against four employees by altering their time and leave records and docking their respective wages. The City avers that DEP did not act in a discriminatory or retaliatory manner and that the Union has failed to demonstrate that DEP's motivation for these actions was anti-union animus. Rather, the City avers that DEP changed the time and leave records for, and docked the wages of these employees in accordance with DEP's sick leave policies. As such, the City maintains that DEP acted with a legitimate business reason when changing the time and leave records of these four employees. We find that, despite proffering an arguably legitimate business reason for their actions, DEP's reason was pretextual and that they were motivated by anti-union animus when DEP docked the four Construction Laborers's pay. Accordingly, we grant the Union's petition.

BACKGROUND

Three days of hearing were held, and the Trial Examiner found that the totality of the record established the relevant background facts to be as follows.[1]

---

[1] As part of the initial improper practice petition in the instant matter, Local 376 also claimed that DEP violated NYCCBL § 12-306(a)(4) by refusing to bargain in good faith concerning DEP's application of their sick leave policies as applied to the Construction Laborer title. Both parties addressed this claim during the hearing, however, on July 14, 2008, seven days after the conclusion of the hearing, the Union sent a letter to the City and the Board of Collective Bargaining ("BCB" or "Board") withdrawing its NYCCBL § 12-306(a)(4) claim against DEP.

The Bureau of Water and Sewer Operations ("BWSO") is a unit within DEP, and its main responsibilities are the operation, maintenance, and protection of New York City's drinking water and wastewater collection systems, as well as the protection of the adjacent waterways and the development and protection of DEP's Capital Water and Sewer Design Program. DEP, in order to fulfill these duties, utilizes workers in titles such as Apprentice Construction Laborer and Construction Laborer, who work out of various construction yards located throughout the City of New York.

A Consent Determination issued by the Comptroller of the City of New York sets forth the prevailing wage and supplemental benefits rates for, *inter alia*, DEP employees in the title of Construction Laborer ("Consent Determination"). In the section entitled "Sick Leave Allowance," the Consent Determination states that "sick leave may be granted at the discretion of the agency head and proof of disability must be provided by the employee . . . [and] presentation of a physician's certificate in the prescribed form may be waived for absences up to and including three consecutive work days." (Ans., Ex. B).

Additionally, DEP disseminated an employee handbook addressing terms and conditions of employment including sick leave, that is applicable to all DEP employees, including Construction Laborers, which was valid during the period of time that the dispute in the instant matter arose ("Employee Handbook"). However, according to Deputy Chief for Field Operations at BWSO Dennis Delaney, the Employee Handbook is "a general reference book for everyone [within DEP]." (Tr. 73).[2] The "Sick Leave" section of the Employee Handbook states that "[m]edical documentation may be required for sick leave and for leave granted for sick leave purposes." (City Ex. 2). This

[2] "Tr." refers to citations from the hearing transcript.

document further states that "[m]edical documentation is required when an employee uses more than three consecutive sick leave days, . . . or when a supervisor requests it [medical documentation] for a shorter period of absence." (*Id*.). Under the "Notification" section of this provision of the Employee Handbook, it states "[a] supervisor may request documentation at any time, if circumstances warrant. An employee who does not provide documentation will be subject . . . to leave without pay." (*Id*.).

In addition, DEP annually distributes and posts a memorandum from Michael Krysko, the Director of BWSO, entitled "Vacation Schedules," which is specifically tailored to Construction Laborers and other construction titles within DEP ("Krysko Memorandum"). It states, in pertinent part, "[d]uring the period of May 27, 2007, through September 7, 2007, all sick leaves must be documented."[3] (Ans., Ex. F). According to Deputy Chief Delaney, BWSO is "required to maintain a response capability to all types of emergencies, [and they] need to have an appropriate level of manpower available to respond to everything from water main breaks to sewer collapses." (Tr. 63). Accordingly, the Krysko Memorandum was designed to provide management with an accurate accounting of all its construction employees during the summer months, which is the period during which most employees in the BWSO construction crews take vacations. Deputy Chief Delaney testified that, if an employee "calls in sick" during the summer months but fails to produce documentation, the employee is "marked [Absent Without Official Leave] and not paid for the day," regardless whether the employee has sick leave in his/her sick leave bank (Tr. 65).

---

[3] Since the Krysko Memorandum is redistributed annually, the dates setting forth the applicable time period change, but the substantive provisions contained therein do not.

According to Gene DeMartino, President of Local 376,[4] DEP's policy concerning Construction Laborers providing documentation for sick leave "varied from yard to yard . . . some yards requested the notes . . . [others] didn't," regardless of the Krysko Memorandum. (Tr. 16). He testified that, typically, in the yards that require documentation after taking sick leave, Construction Laborers who failed to produce notes were marked as Absent Without Official Leave ("AWOL"), had their pay docked, and were "put up on charges." (Tr. 17). Regarding the yards where documentation was not necessary after taking sick leave, Construction Laborers who had sufficient time in their sick leave banks had their sick leave bank docked, but never had their pay docked.

Local 376 Grievance Representative Thomas Kattou also testified that DEP applied a variety of policies in different construction yards concerning the issue of providing documentation when taking sick leave. According to Grievance Representative Kattou, the policy regarding this issue at the Zerega Avenue Yard in the Bronx was to require a Construction Laborer to provide documentation no later than five days after the employee's return from sick leave. If the employee failed to do so, "they would be AWOL'd," but the employee's pay would not be docked. (Tr. 41). At the B-11 Yard in Brooklyn, DEP was "very lax about . . . bringing in [a] note," and the employees were not marked AWOL, and if they had sick leave in their bank, DEP "would just take their [sick leave] time." (Tr. 42).

According to Grievance Representative Kattou, DEP's policy related to providing documentation for sick leave usage by Construction Laborers at the North 15th Street Yard ("North 15 Yard") was that, if the employee took sick leave, failed to produce documentation, and had sick

[4] President DeMartino has held this position since 2002, is intimately involved in contract negotiations, arbitrations, grievances, and day-to-day operations of Local 376 and represents a constituency of approximately 450 Construction Laborers within DEP.

leave in their sick leave bank, then the employee would be docked sick leave and would not be docked pay.[5] However, DEP "marked them AWOL" and "would bring them up on charges for AWOL [*sic*] for not providing documentation." (Tr. 51).

In the Summer of 2007, four Construction Laborers who worked at the North 15 Yard called in sick.[6] As a result of these four employees calling in sick, DEP marked them down as "DOC SL [documented sick leave]," paid them for the eight hours they missed, and docked eight hours from their respective sick leave banks. According to the City Human Resource Management Systems ("CHARMS"), an entry was made on this human resources database designating these absences as sick leave within a week of the employees' respective absences.

On August 9, 2007, District Supervisor of the North 15 Yard James Berkley completed "Disciplinary Data Sheets" documenting these four employees' failure to provide documentation following their sick leave requests. These documents allege that the four Construction Laborers, on various days, "called in sick" and "failed to bring in [documentation]." (*Id*.). On these disciplinary data sheets, District Supervisor Berkley listed the Borough Superintendent of Brooklyn, Louis DiMeglia, to whom he reports, as a witness to these allegations for all four employees. According to District Supervisor Berkley, he requested documentation from these four employees "more than once." (Tr. 111). He further testified that, after the completion of these data sheets, "their time cards [should have been] marked AWOL" and they should have had their pay docked. (Tr. 112). However, District Supervisor Berkley was not alerted by either his Principal Administrative

---

[5] Approximately 55 Constructions Laborers work at the North 15 Yard.

[6] Richard Mohan called in sick on June 28, 2007; Anthony Vitale called in sick on June 28, 2008 and July 16, 2007; Dante Turpin called in sick on June 28, 2007 and July 25, 2007; and Gary Johnson called in sick on July 24, 2007.

Assistant ("PAA") Daniel Samuel or Borough Superintendent DiMeglia that these four employees did not have their time cards changed until December 2007. On cross-examination, District Supervisor Berkley, who, at the time, had been working at North 15 Yard for approximately three years, admitted that, prior to the action taken regarding to these four employees, DEP had never docked the pay of a Construction Laborer with available time in his/her sick leave bank who requested sick leave and thereafter failed to produce proper documentation.

On September 10, 2007, DEP levied disciplinary charges against the four Construction Laborers alleging that each employee was AWOL because each of them failed to provide medical documentation concerning their respective sick leave requests.[7] According to Daisy Drop, a DEP Investigator Employee Discipline, who created a disciplinary database to track disciplinary charges against DEP employees, the only Construction Laborers who had disciplinary charges levied against them for failing to bring in documentation after taking sick leave were these four employees and one other individual. Neither party identified nor offered any evidence concerning that employee's circumstances.

On October 12, 2007, Construction Laborers Turpin and Vitale appeared for their Step I hearing, and the Step I hearing officer found that these two employees were guilty of being AWOL and failing to produce documentation for their respective sick leave requests. The Step I hearing officer recommended suspensions for Constructions Laborer Turpin and Vitale. Four days later, on October 16, 2007, the Union, on behalf of Construction Laborers Turpin and Vitale, appealed these determinations and proceeded to Step II. On November 9, 2007, a Step I hearing was held regarding

[7] Borough Superintendent DiMeglia was copied on all of the cover letters enclosing the disciplinary charges against the four Construction Laborers.

Construction Laborers Mohan and Johnson, and, again, the Step I hearing officer found that these two men were guilty of the same offenses. This Step I hearing officer recommended that DEP suspend Construction Laborers Mohan and Johnson for their misconduct. On November 20, 2007, the Union, on behalf of Construction Laborers Mohan and Johnson, appealed these determinations and proceeded to Step II. According to President DeMartino, at the time of the Step I hearing, DEP had not docked their pay, had not restored time to their respective sick leave banks, and still had their respective absences designated as sick leave.

According to President DeMartino, prior to the Step I hearings involving these four Construction Laborers, his members "were accepting the penalties" at Step I. (Tr. 20). However, since Local 376 wanted DEP to institute a "stepping program," which the agency applied to "every other part of DEP except for Construction Laborers," the Union decided to challenge the Step I findings and DEP's failure to apply their sick leave policies uniformly. (Tr. 21).

On November 26, 2007, PAA Samuel, whose duties include supervising the Clerical Associates under him and handling the administration of the payroll system at the North 15 Yard, received the time cards of the four Construction Laborers with four individual post-it notes from Borough Superintendent DiMeglia on top of them. The post-it notes instructed PAA Samuel to complete four Employee Time Report Adjustments ("ETRs") for these employees changing the days for which they requested sick leave in the Summer of 2007 from "sick time to AWOL." (Tr. 139).

On December 2, 2007, PAA Samuel completed these ETRs. According to PAA Samuel, "when any person calls in sick . . . that person has a grace period" to submit documentation verifying the sick leave, during which time the employee's leave is designated as sick leave. (Tr. 140). If no documentation is provided, it is the responsibility of Borough Superintendent DiMeglia to advise

PAA Samuel that no documentation was provided and to order the change of the sick leave designation to AWOL. According to PAA Samuel, he has no control when a designation change should occur, even if he notices that an employee failed to provide documentation. PAA Samuel further testified that, over the three years that he has worked at the North 15 Yard as a PAA, these were the first and only ETRs he completed that required a change from the sick leave designation to AWOL.

The next day, on December 3, 2007, the four Construction Laborers had time restored to their sick leave bank, had been marked as AWOL, and had been docked a day's pay.

On December 3, 6, and 10, 2007, Step II hearings were held concerning the disciplinary charges against the four Construction Laborers. On December 18, 2007, the Step II hearing officer issued determinations concerning these issues, upheld the Step I hearing officer's findings, and imposed suspension upon Construction Laborers Tuprin, Vitale, Mohan and Johnson that were commensurate to the activities in which they engaged.[8]

On January 8, 2008, the Union filed the instant improper practice petition alleging violations of NYCCBL § 12-306(a)(1), (3), and (4). Local 376 claimed that DEP retaliated against these four employees by implementing the sick leave policy in a discriminatory manner and docking the pay of these four employees. As a remedy, the Union seeks a finding that DEP violated the NYCCBL and "an order directing [DEP] to make [these four employees] whole in every way, including but not limited to compensation for any lost backpay or benefits." (Pet ¶ 13).

---

[8] All four of these employees, through the Union, appealed their respective determinations and penalties, though the record is unclear when this occurred. Moreover, though there is no evidence in this record of a Step III determination, on February 1, 2008, the Union, on behalf of these employees, filed requests for arbitration in continuance of the grievance process.

POSITION OF THE PARTIES

Union's Position

The Union argues that DEP violated NYCCBL § 12-306(a)(1) and (3) when it retaliated and discriminated against the four Construction Laborers.[9] DEP's sick leave policy, as it applies to this particular title, varied according to the different construction yards and was never uniformly applied on an agency-wide basis. DEP originally designated these four employees' respective absences as sick leave, docked eight hours out of their respective sick leave banks, and paid them a day's pay. However, after these employees participated in the disciplinary grievance process, and more than four months after having their absences designated as sick leave, DEP changed the designations from sick leave to AWOL, replaced the sick leave time originally used and docked the employees a day's pay.

Local 376 further argues that the asserted legitimate business reason of correctly applying DEP's current sick leave policy and correcting an administrative oversight with the employees' original designations are pretexts for improperly motivated discipline. Simply, the fact that Borough Superintendent DiMeglia was the person who authorized and ordered the changing of the records

---

[9] 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.

for these four employees belies the proffered excuses of DEP, especially since Borough Superintendent DiMeglia has been found by the Board on previous occasions to harbor anti-union animus against Local 376. Accordingly, DEP violated the NYCCBL by engaging in the acts complained of in the instant improper practice petition.

City's Position

The City avers that the Union has failed to establish a *prima facie* claim of retaliation against DEP. These four Construction Laborers and Local 376 did not engage in protected union activity sufficient enough to satisfy the first criterion in the applicable standard used by the Board in retaliation/discrimination cases. The rejection of the Step I hearing officer's findings is not protected union activity because the basis of the disciplinary charges against these four employees was legitimate; simply, they failed to provide documentation after requesting sick leave. Furthermore, any action undertaken by the Union on behalf of these Construction Laborers due to DEP's docking of their respective wages is not protected union activity because "DEP has a longstanding policy of not providing pay to employees for days in which they call in sick but for which they failed to provide appropriate documentation." (Ans. ¶ 87).

The City further avers that no causal connection exists between any protected union activity in which the Union or these four employees allegedly engaged and the manner in which DEP acted in the instant matter. DEP was not motivated by anti-union animus when they changed these Construction Laborers' respective designations from sick leave to AWOL, when they docked their pay, or when they levied disciplinary charges for failing to bring in documentation. Moreover, the Union's allegation that Borough Superintendent DiMeglia orchestrated these events is unfounded since Borough Superintendent DiMeglia was unaware of any alleged protected union activity.

In addition, the City avers that, assuming *arguendo*, the Union has demonstrated a *prima facie* case of retaliation/discrimination in the instant matter, DEP's legitimate business reason demonstrates that the actions taken in relation to these Construction Laborers would have occurred even in the absence of protected union activity. DEP's sick leave policy concerning this particular title, which is uniformly applied, dictates that once an employee calls in sick, he or she has grace period, typically a week, to provide documentation. If no documentation is presented, then the employee is docked a day's pay, is designated as AWOL for that period of time, and is brought up on disciplinary charges. DEP acted in a manner consistent with its policies when dealing with these four employees.

DISCUSSION

The issue presented in the instant matter is whether DEP discriminated and retaliated against four members of the Union by altering the application of the agency's sick leave policies, by changing their absences from the sick leave designation to AWOL, and by docking them a day's pay.

In discussing discrimination and/or retaliation cases under the NYCCBL, this Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, which states that 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.

Bowman, 39 OCB 51, at 18-19; *see also Edwards*, 1 OCB2d 22, at 16 (BCB 2008).

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima*

facie case, "the employer may attempt to refute 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." *DC 37*, 1 OCB2d 5, at 64 (BCB 2008); *see also City Employees Union, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

Here, we find that the Union has satisfied the first element of the *Bowman-Salamanca* test. The four Construction Laborers were engaged in protected union activity when they invoked and participated in the disciplinary grievance procedure by appealing the Step I hearing officer's finding. *See SSEU, Local 371*, 1 OCB2d 25, at 160 (BCB 2008) (finding that the employee was engaged in protected union activity when he took his dispute with his employer concerning the disciplinary action taken against him to arbitration); *see also Edwards*, 1 OCB2d 22, at 17 (participation in the grievance procedure has been considered protected union activity). These four employees appealed the adverse Step I determinations in order to protect their rights and to seek clarification regarding DEP's application of the sick leave policies as applied to Construction Laborers. *See DC 37*, 1 OCB2d 5, at 65 (invoking and participating in the grievance procedures on behalf of himself and other employees at his work location satisfied the first prong of the *Bowman-Salamanca* standard).

Furthermore, the City's argument that Borough Superintendent DiMeglia was not aware of the decision by the four Construction Laborers to participate in the grievance process and challenge DEP's application of their sick leave policies is unfounded. First, Borough Superintendent DiMeglia was made aware that these four employees called in sick, failed to produce the requisite documentation, and that disciplinary charges were levied upon them as early as August 9, 2007 because District Supervisor Berkley listed him as a witness to these four Construction Laborers alleged violations on the Disciplinary Data Sheets he submitted to DEP. Second, Borough

Superintendent DiMeglia was copied on all correspondence concerning these disciplinary charges, the correspondence scheduling the Step I and Step II hearings, and the respective determinations. Accordingly, we find that the record establishes that Borough Superintendent DiMeglia was put on notice that these four Construction Laborers appealed their respective disciplinary determinations. *See DC 37, Local 1113*, 77 OCB 33, at 26 (BCB 2006) ("the imputed knowledge through the employer's participation in the grievance process" is, along with other evidence, sufficient to satisfy the first prong of the *Bowman-Salamanca* test); *see also DC 37, Local 1757*, 45 OCB 67, at 14-15 (BCB 1990). As such, we find that Local 376 has satisfied the first prong of this standard.

Regarding the second prong of the *Bowman-Salamanca* test, which addresses the motivation behind the employment action in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26 (BCB 2006); *see also City Employees Union, Local 237,* 67 OCB 13, at 9 (BCB 2001); *CWA, Local 1180*, 43 OCB 17, at 13 (BCB 1989). "At the same time, petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22 (BCB 2005). Rather, "allegations of improper motivation must be based on statements of probative facts." *Edwards*, 1 OCB2d 22, at 17; *see also SSEU, Local 371*, 77 OCB 35, at 15 (BCB 2006). In addition, while temporal proximity alone is not sufficient to establish causation, the "repeated, suspicious, temporal proximity" between the use of the grievance process and the retaliatory action, in conjunction with other facts supporting a finding of improper motivation, may be sufficient to satisfy the second prong of the *Bowman-Salamanca* test. *Colella*, 79 OCB 27, at 55 (BCB 2008) (citing *SSEU, Local 371*, 77 OCB 35, 15-16 (BCB 2006)).

In the instant matter, we find that the Union has satisfied its burden concerning this element and demonstrated that DEP's decision to change the four Construction Laborers's sick leave

designations to AWOL, and to dock them each a day's pay was motivated by anti-union animus. Grievance Representative Kattou credibly testified concerning the manner in which DEP sick leave policies were applied at the North 15 Yard. He stated that, when dealing with an employee who took sick leave and failed to produce the requisite documentation, DEP docked the employee's sick leave bank, marked the employee as AWOL, levied disciplinary charges against the employee for failure to produce documentation, but would not dock the employee's pay. However, DEP management, in a break from the norm, docked the four Construction Laborers' pay.

In addition, this deduction of pay occurred almost five months after their initial designation of sick leave, approximately four months after District Supervisor Berkley completed disciplinary data sheets documenting these employees' failure to provide the requisite documentation, but only weeks after the Union decided to appeal the Step I determinations. Furthermore, District Supervisor Berkley testified that the four Construction Laborers should have had their pay docked back in August 2007, not in December 2007. We find DEP's initially following its normal course of not docking employees' wages, after the initiation of the disciplinary process, and then subsequently docking these employees' wages shortly after the appeal of the Step I determinations probative that the motivation for the docking of wages was the Union's appeal and not the initial offense of failing to provide the requisite documentation. Moreover, this finding is bolstered by the unrebutted testimony of President DeMartino stating that, prior to challenging the Step I determinations of these four Construction Laborers, his members were simply accepting the penalties issued at Step I; however after the employees refused to accept their respective penalties, their pay was docked.

Additionally, Borough Superintendent DiMeglia, who was aware of the events concerning these employees since August 9, 2007, as he was a witness to the disciplinary data sheets of District

Supervisor Berkley, did not order the changes to the CHARMS system and the completion of the ETRs until November 26, 2007, which was only after Local 376's decision to appeal the adverse Step I determinations. Therefore, in the instant matter, we find that the Union has established a *prima facie* case against DEP by demonstrating a causal connection between these four employees' participation in the disciplinary grievance procedure, and DEP's changing of the designations from sick leave to AWOL and docking of their respective wages.

If a *prima facie* case is established, "then the employer may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU, Local 371*, 1 OCB2d 25, at 17 (citing *SSEU, Local 371*, 77 OCB 35, at 18); *see also Lamberti*, 77 OCB 21, at 17 (BCB 2006) (finding that the business reason proffered by the agency was legitimate because the public employer's decision to promote another employee other than petitioner was based upon the other applicant's past supervisory experience and not petitioner's status as the shop steward). When examining whether the reasons proffered by the public employer are legitimate, "this Board will look to whether the record supports their contentions." *SBA*, 75 OCB 22, at 24 (BCB 2005); *see also Local 1182, CWA*, 57 OCB 26, at 23 (BCB 1996).

Here, we find that DEP satisfied its burden of production by proffering an arguably legitimate business reason concerning its decision to dock the wages of the four Construction Laborers and to change their designations in the CHARMS system. The record demonstrates that DEP had written sick leave policies in the Employee Handbook, which the agency disseminated to all DEP employees, including Construction Laborers. Additionally, the Consent Determination, which specifically governs Construction Laborers, indicates that "sick leave may be granted at the

discretion of the agency head and proof of disability must be provided by the employee." (Ans., Ex. B). The Krysko Memorandum also states that during the summer months "all sick leaves must be documented." (Ans., Ex. F). Moreover, Deputy Chief Delaney testified that when a Construction Laborer requests sick leave but fails to produce documentation, the employee is marked AWOL and is not paid for the extent of the sick leave request. District Supervisor Berkley testified that he requested documentation from the four Construction Laborers on more than one occasion, but they failed to comply with his request. Based upon the foregoing findings, we find that DEP carried its burden of articulating an arguably legitimate business reason which would have caused the agency to take the action complained of even in the absence of protected conduct.

When the employer satisfies its burden of production by proffering a purportedly legitimate business reason for the action taken against the employee, the burden shifts back to the union which "may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reason." *Johnson v. County of Nassau*, 480 F.Supp.2d 581, 594 (E.D.N.Y. 2007). When "proffered reasons which appear to be legitimate are unsupported and/or inconsistent with the record, this Board will find that the public employer committed an improper practice." *DC 37*, 1 OCB2d 6, at 30 (BCB 2008) (citing *SBA*, 75 OCB 22, at 24); *see also Greenburgh No. 11 Fed'n of Teachers, NYSUT*, 30 PERB ¶ 3052, at 3133 (1997) ("in a pretext case, the employer's asserted reasons for the imposition of discipline either do not exist or, . . . they are not, in fact, the actual reasons relied upon, the true reasons being the exercise of statutorily protected rights"). For example, in *Social Services Employees Union, Local 371*, 77 OCB 35, this Board found that the employer's business reasons for the disciplinary charges against an employee were pretexts for discipline because, *inter alia*, the grievance arbitrator found

most of these charges unsubstantiated and were based upon events that occurred three years prior to the issuance of these charges. *Id*., at 19.

Based upon the record in the instant matter, we find that the proffered business reason was pretextual and that DEP was actually motivated by anti-union animus. Though DEP does have extensive written sick leave policies governing its employees, DEP did not apply sick leave policies uniformly as they relate to Construction Laborers. Grievance Representative Kattou's credible testimony indicated that these policies were not universally enforced, and, in fact, he testified concerning three distinct construction yards that utilized three distinct sick leave policies, none of which followed DEP's written policies. To further illustrate this point, Grievance Representative Kattou stated that the sick leave policy at the North 15 Yard was to "mark[] them AWOL," "bring them up on charges," take sick leave out of their bank, but never dock their pay. (Tr. 51). As such, the City's contention that these four employees were docked pay in order ensure the North 15 Yard's compliance with DEP's policies is undermined by DEP's failure to apply the written policies concerning sick leave universally.

In addition, other facts in the record further undercut the City's proffered business reason. District Supervisor Berkley testified that, in his three years at the North 15 Yard, prior to these four employees, he never docked any Construction Laborer's pay after the employee failed to present documentation, if that employee had sick leave available in his bank. PAA Samuel testified that, in the three years that he has been in charge of the payroll system at the North 15 Yard, the ETRs for the four Construction Laborers were the first and only ETRs he completed to change a sick leave designation to AWOL. Furthermore, DEP Investigator Drop testified that, aside from one other individual, the four Construction Laborers were the only employees in BWSO who were charged

with being AWOL for failure to provide medical documentation since Summer 2007. Based upon the inconsistent assertions from DEP concerning the application of its sick leave policies and the credible testimony of a number of witnesses to the contrary, we find that the agency's proffered business reason was a pretext for discipline.

We further note that the City did not produce Borough Superintendent DiMeglia to testify in the instant matter, even though he would have been in the best position to offer evidence concerning motivation behind the decision to dock these employees' wages. As such, we draw an adverse inference concerning his failure to testify in this case. *See Colella*, 79 OCB 27, at 63 (BCB 2007) (an adverse inference may be drawn when a party fails to produce evidence which is within its control and which it is naturally expected to produce); *see also UFA*, 1 OCB2d 10, at 18 (BCB 2008); *People v. Gonzalez*, 68 N.Y.2d 424 (1986); *People v. Savinon*, 100 N.Y.2d 192, 196-197 (2003) (an adverse inference may be drawn from a party's failure to produce a witness, commonly known as a "missing witness" charge, when the uncalled witness is knowledgeable about a material issue, such a witness is under the "control" of the party that has failed to produce the witness, and the witness is available to testify).

Moreover, we take administrative notice that the supervisor who ordered the completion of the ETRs was Borough Superintendent DiMeglia who, in the past, this Board has found to have acted based upon anti-union animus. *See DC 37 Local 376*, 79 OCB 38, at 20-21 and 23 (BCB 2007) (this Board held that DiMeglia took an active role in the processing of an employee's disciplinary charge for an offense that typically is overlooked because the employee testified in an improper practice case in which DiMeglia was found to have violated the NYCCBL); *DC 37, Local 376*, 77 OCB 12, at 15-20 (BCB 2006) (since DiMeglia "was angered by [an employee] going over

his head to the Union" and "singled out [an employee] for disparate treatment based on protected union activity, this Board found that "DiMeglia . . . bore anti-union animus that informed his subsequent conduct"). The fact that DEP chose not to produce Borough Superintendent DiMeglia who, it is alleged by Local 376, continues to engage in a "continuous and deliberate practice" of discriminatory actions, supports this Board's inference that Borough Superintendent DiMeglia's testimony would not dispel the Union's evidence and "allows the inference of its persistence." *Halloran v. Virginia Chemicals, Inc.*, 41 N.Y.2d 386, 392-393 (1977) ("where the issue involves proof of a deliberate and repetitive practice, a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence"); *see Colella*, 79 OCB 27; *see also Berkovich v. Hicks*, 922 F.2d 1018, 1022 (2nd Cir. 1991); *see generally People v. Molineux*, 168 N.Y. 264 (1901).

Therefore, in the instant matter, we find that DEP violated NYCCBL § 12-306(a)(1) and (3) and, accordingly, Local 376's petition is granted.

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 District Council 37, Local 376, docketed as BCB-2681-08, be, and the same hereby is granted in its entirety; and it is further

ORDERED, that the Department of Environmental Protection remit backpay to Construction Laborers Richard Mohan, Anthony Vitale, Dante Turpin, and Gary Johnson in the amount that was docked from their paychecks on December 3, 2007 and deduct the appropriate amount of time from their respective sick leave banks, which is consistent with the manner in which the Department of Environmental Protection based upon the record in the instant matter, documented sick leave in the past at the North 15 Yard; and it is further

ORDERED, that the Department of Environmental Protection make whole Construction Laborers Richard Mohan, Anthony Vitale, Dante Turpin, and Gary Johnson with respect to any lost benefits as a result of the Department of Environmental Protection's discriminatory actions in the instant matter.

Dated: New York, New York
November 10, 2008

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