DC 37, L. 3621, 11 OCB2d 5 (BCB 2018)

(IP) (Docket No. BCB-4104-15)

Summary of Decision*:** The Union filed a verified improper practice petition alleging that the City violated § 12-306(a)(1), (3), and (4) of the NYCCBL when it issued Operations Orders that unilaterally changed compensation for pre-shift briefings conducted by Lieutenants and Captains within the Emergency Medical Services Division. The Union also claimed that the Operations Orders were issued in retaliation for objections that were raised to a proposed settlement of a FLSA lawsuit that was brought by Union members with the assistance of the Union. The City argued that the Operations Orders neither implicate a mandatory subject of bargaining nor constitute a change to past practice. The City also argued that it was not improperly motivated when it issued the Operations Orders and that it had legitimate business reasons for doing so. The Board found that the FDNY did not make a unilateral change to a mandatory subject of bargaining. It further found that the FDNY had legitimate business reasons for issuing the Operations Orders. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 3621, AFSCME, AFL-CIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On March 16, 2015, District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621 (collectively, "Union") filed a verified improper practice petition against the City of New York

("City") and the New York City Fire Department ("FDNY").[1] The Union alleges that the City and the FDNY violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (3), and (4) by issuing Operations Orders 067 and 067A ("Operations Orders") that unilaterally changed compensation for pre-shift briefings conducted by Lieutenants and Captains within the Emergency Medical Services Division ("EMS"). The Union also claims that the Operations Orders were issued in retaliation for objections that were raised to a proposed settlement of a lawsuit under the Fair Labor Standards Act ("FLSA") that was brought by Union members with the assistance of the Union. The City argues that the Operations Orders neither implicate a mandatory subject of bargaining nor constitute a change to past practice. The City also argues that it was not improperly motivated when it issued the Operations Orders and that it had legitimate business reasons for doing so. The Board finds that the FDNY did not make a unilateral change to a mandatory subject of bargaining. It further finds that the FDNY had legitimate business reasons for issuing the Operations Orders. Accordingly, the petition is denied.

BACKGROUND

The Trial Examiner held four days of hearing and found that the totality of the record established the following relevant facts.

Local 3621 represents Emergency Medical Specialists Levels I and II (respectively, Lieutenants and Captains) employed by the FDNY. EMS operates and staffs all ambulances deployed to emergencies that are reported through the City's 911 system. EMS is comprised of five divisions that are generally organized by borough. EMS officers may also be assigned to other

[1] On June 2, 2015, the Union filed an amended petition with permission from the Office of Collective Bargaining ("OCB"). All citations to the petition refer to this amended petition.

Bureaus of the FDNY, including Emergency Medical Dispatch ("EMD") or the Bureau of Training ("BOT"), among others.

In general, Lieutenants direct and supervise the work of Paramedics and Emergency Medical Technicians ("EMTs"), who respond to emergency calls and render medical care. Lieutenants are also responsible for ensuring the effective operation of an ambulance station; inspecting vehicles, equipment, and controlled substances; assigning EMS personnel to their duties and vehicles; and directing operations at major incidents. At the time the petition was filed, Lieutenants were generally assigned as Station Officers or Conditions Officers.[2] Captains supervise the Lieutenants, Paramedics, and EMTS. They also serve as Commanding Officers of a station and are responsible for the station's overall efficient and effective operation. Lieutenants and Captains (collectively, "Officers") generally work an eight-hour tour of duty.[3] Lieutenants serving as Station Officers require one-for-one relief, meaning that they cannot leave the station until another Lieutenant comes to relieve them from duty. If the oncoming Lieutenant arrives late, the outgoing Lieutenant will be given overtime compensation to cover the shift until his relief shows up.[4]

"Pre-shift briefings" generally refer to the practice of Lieutenants and Captains arriving at work prior to their shift's official start time in order to receive a briefing or summary from the

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[2] Station Officers' duties include reporting updates of member and vehicle assignments, monitoring the station's Computer Aided Dispatch ("CAD") terminals and Automatic Vehicle Locator ("AVL") mapping program, reviewing orders and disseminating pertinent information to EMTs and Paramedics, inspecting and distributing equipment, maintaining the station's equipment logbook, managing vehicle resources, and reviewing unit activity logs and ambulance checklists. Conditions Officers are assigned a vehicle and generally conduct supervisory activities in the field.

[3] There is also currently a pilot program for 12-hour tours that has been implemented in 10 stations.

[4] Officers are either compensated for overtime in cash or compensatory time at the premium rate of time and a half.

outgoing Officer regarding information that is necessary for the next tour. While Officers view these briefings as essential, the time spent engaging in these briefings was historically uncompensated.

The following information is generally discussed during pre-shift briefings between incoming and outgoing Lieutenants serving as Station Officers: the number and type of ambulance units and conditions cars available and their status; the state of the physical station; the presence of hazardous materials; the status of materials and equipment, such as fuel, oxygen tanks, radios, and computers; the status and count of non-narcotic drugs; and information on Operations, Command, and Training Orders, as well as legal bulletins, that need to be disseminated. Information that is generally discussed during pre-shift briefings between an incoming and outgoing Lieutenant serving as a Conditions Officer includes: the status of subordinate personnel; the status and state of ambulances and vehicles; incidents of consequence in the coverage area; the state of emergency rooms and the need for triage; and the status and state of private ambulances.

FLSA Lawsuit and FDNY Operations Orders

Vincent Variale is the President of Local 3621 and has been employed by the FDNY for 22 years, serving the past 16 years as a Lieutenant. He testified that sometime in 2012 or 2013 Union members approached him complaining that they were not being compensated for overtime performed for various types of work and expressing a desire to file a lawsuit under the FLSA. One of the types of work at issue was the practice of Lieutenants and Captains participating in pre-shift briefings.

According to President Variale, the Union obtained the necessary information to file a FLSA lawsuit and hired and paid for an attorney ("Plaintiffs' Attorney"). The Union also "provided guidance needed to move the lawsuit along." (Tr. at 80) On or around December 31, 2013, the lawsuit was filed on behalf of a group of EMS Lieutenants, Captains, Deputy Chiefs,

and Division Commanders. The claims of 27 Deputy Chiefs and Division Commanders proceeded to a trial that concluded in May of 2015 with a jury finding that these titles were exempt from the FLSA. With respect to the Lieutenants and Captains, however, the parties agreed to resolve the claims with a settlement agreement ("Settlement Agreement"). A proposed Settlement Agreement was filed on or around December 12, 2014, with the United States District Court, Southern District of New York. Under the Settlement Agreement, the parties agreed that Lieutenants and Captains would be reclassified as covered employees subject to the FLSA. The City also agreed to pay eligible plaintiffs $1,245,840.00, subject to applicable enumerated deductions.

On December 15, 2014, the Court ordered Plaintiffs' Attorney to provide notice of the Settlement Agreement to all of the plaintiffs. Under the Settlement Agreement, plaintiffs could object by either appearing at a fairness hearing or by writing directly to the Court. Any written objections were to be received by the Court on or before February 2, 2015. The Settlement was set to take effect as long as no more than 10% of the plaintiffs objected. On December 30, 2014, Plaintiffs' Attorney sent the plaintiffs a Notice of Settlement, and on January 6, 2015, he sent an Amended Notice of Settlement. These notices informed the plaintiffs of the terms of the Settlement Agreement and noted that a fairness hearing was scheduled for March 10, 2015. However, the notices did not inform the plaintiffs that any written objections had to be filed on or before February 2, 2015. In the meantime, in or around February 2015, the FDNY began compensating Officers for the time spent conducting pre-shift briefings.

On March 9 and 10, 2015, Plaintiffs' Attorney filed a series of objections with the Court that amounted to more than 10% of all plaintiffs. None of these plaintiffs appeared at the March 10, 2015 fairness hearing. However, the Court ordered the parties to confer and submit a letter regarding the status of the settlement by March 17, 2015.

On March 13, 2015, the FDNY issued EMS Operations Order 2015-067 ("OO 067") titled

"Pre-shift Overtime." (Union Ex. F) This order stated that: "Effective immediately, overtime prior to a member's scheduled start time shall only be performed when there is prior approval from a superior. Overtime for the purposes of pre-tour briefing is not authorized." (*Id.*) On March 16, 2015, Plaintiffs' Attorney filed the original improper practice petition on behalf of Local 3621, claiming that OO 067 constituted a unilateral change to a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(1) and (4).[5]

In response to the Court's order, on March 17, 2015, Counsel for the City submitted a letter on behalf of both parties and explained each side's position. The plaintiffs' position stated that the late objections were a result of a "mishap," since the Notices sent to plaintiffs failed to inform them that any written objections had to be filed no later than February 2, 2015. (City Ex. 6) Plaintiffs' Attorney therefore requested that the Court hold another fairness hearing "so that counsel may have the opportunity to re-notice the plaintiffs and also provide them with clear instructions with respect to objecting to the proposed settlement." (*Id.*) He also stated that many of the objecting plaintiffs had indicated that they were withdrawing their objections and that he believed that if another fairness hearing was held the number of objections would decrease below the 10% threshold.

The City's position stated that the settlement should take effect following a new fairness hearing. It also stated that "defendants have advised plaintiffs' counsel that, absent an error brought to my attention regarding the calculation of damages for a particular plaintiff, defendants will not be increasing the settlement amount for any plaintiffs." (*Id.*) Additionally, the letter noted that while the City "take[s] the position that the objections filed by plaintiff's counsel on March 10, 2015 are both untimely and procedurally deficient, because plaintiffs were not properly

[5] After the original improper practice petition was filed, in-house counsel for DC 37 took over representation of Local 3621.

informed of the process by which they should file objections[,] defendants anticipate that the Court will order that the fairness hearing be re-noticed." (*Id*.)

A few days later, on March 20, 2015, the Department issued EMS Operations Order 2015-067A ("OO 067A"), titled "Pre-shift Overtime (revised)." (Union Ex. G). This revised order stated:

> Members are not permitted to perform any work-related tasks before the start time of their shift or after the end time of their shift unless the work has been approved by a superior and such time has been accurately recorded in CityTime. Members are obligated to accurately record all time worked in CityTime and are reminded that the sign-in time recorded in CityTime must not reflect any unauthorized pre-shift work. Any time recorded in CityTime in excess of a member's regular schedule for which a member has not requested overtime compensation is not compensable.

(*Id*.)

On April 3, 2015, Counsel for the City filed a letter with the Court to inform it of developments regarding the proposed Settlement Agreement and requesting that these issues be addressed at a status conference scheduled for April 17, 2015. In particular, this letter stated that since no objections had been filed on or before the deadline of February 2, 2015:

> defendants began laying the groundwork to effectuate the terms of the settlement pending the fairness hearing. As the settlement includes the reclassification of hundreds of employees spanning two ranks within [EMS], defendants undertook a thorough review of current practices and procedures to identify any necessary revisions that may be required in light of the impending reclassification. Defendants undertook this lengthy and involved process in reliance on the fact that no objections had been lodged regarding the settlement.

(City Ex. 7)

The letter also informed the Court of the Operations Orders implemented by the FDNY on March 13 and 20, 2015. Counsel for the City stated that it is "important to note that [Plaintiffs'

Attorney] and I discussed the March 13, 2015 operations order in advance of the parties' submission of a joint letter on March 17, 2015." (*Id*.) However, according to the City's Counsel, she did not become aware of the improper practice petition until April 1, 2015. The letter then stated that the City could no longer give Plaintiffs' Attorney the benefit of the doubt regarding his actions surrounding the objections since it believed his "blatant misrepresentations regarding his position on settlement demonstrate that he has no interest in effectuating the terms of the settlement agreement." (*Id*.)

While the record is unclear as to when the second fairness hearing was held, ultimately all of the plaintiffs withdrew their objections to the proposed Settlement Agreement. On July 16, 2015, the fully executed Amended Settlement Agreement was so-ordered by the Court. On June 2, 2015, the Union amended its improper practice petition, adding a claim that the Operations Orders were issued in retaliation for protected union activity in violation of NYCCBL § 12-306(a)(1) and (3).

History of Pre-Shift Briefings

The Union and the City presented witnesses who provided diverging testimony regarding pre-shift briefings. In general, the Union's witnesses testified that there has always been a practice of conducting pre-shift briefings and that these briefings are necessary to successfully perform their job. In contrast, the City's witnesses, while not expressly denying the existence of the practice, testified that pre-shift briefings are neither mandated nor necessary.

The Union's witnesses all testified consistently to the history, nature, and importance of pre-shift briefings.[6] Four of these witnesses testified that they recalled being specifically advised

[6] These witnesses included President Variale; Captain Jason Saffon, Commanding Officer for Station 20 in the Bronx; Lieutenant Anthony Almojera, who is assigned to Station 40 in Brooklyn; Lieutenant Renae Mascol, who is assigned to Station 50 in Queens; Lieutenant Adam Lorenz, who

during Officer training of the need to complete pre-shift briefings. This testimony is consistent with a deposition of Captain John Ryan, then-Captain of the BOT, that was taken in conjunction with the FLSA Lawsuit on September 16, 2014. Captain Ryan explained that when he instructs new Officers at the Academy he tells them:

> To be successful in the station and get a head start on your tour, it's advisable to come in early, 15, 20 minutes early, relieve the guy that's been there eight hours pulling his hair out, [and] get a proper briefing. This way you can start your audits, your rundown for the next tour. It's a cultural thing. We've always done it. It's the way it's always been. You come in early; you get your rundown; you get your start of your tour. You're not getting paid for it.

(Union Ex. H at 43)

EMS Academy Chief Lillian Bonsignore testified on behalf of the City regarding the FDNY's EMS training programs. Chief Bonsignore has been employed with the FDNY for 25 years and has served as Chief of the Academy since March 2016. She explained that training for Officers at the BOT includes a Basic Leadership EMS ("BLEMS") training course for Lieutenants, as well as an Advanced Leadership EMS ("ALEMS") training course for Captains. Chief Bonsignore testified that training for pre-shift briefings is not provided in either of these courses.[7] Furthermore, she has never personally provided training on pre-shift briefings, and she is not aware of any FDNY policy that mandates such training. However, she admitted that she was aware that Captain Ryan regularly instructed Officers that "if you're on time, you're late." (Tr. at 336) She stated that, in her opinion, this meant that "he was sharing his experience as being a [C]aptain and advising that we should be courteous to each other and consider that there's been somebody there

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is assigned to EMD; and Lieutenant Andre Catapano, who is assigned to Station 20 in the Bronx.

[7] The 2017 class schedules for the BLEMS course and the 2016 class schedule for the ALEMS courses do not include pre-shift briefings as a topic of instruction.

for eight hours and you should be ready to go when you're there." (Tr. at 336)

In addition to being told during training to conduct pre-shift briefings, the Union's witnesses all testified that it has always been the practice to do so. In general, these Officers testified that they arrive between 15 and 30 minutes prior to the beginning of their shifts to conduct the briefings.[8] According to Chief Bonsignore, when she worked as a Lieutenant it was also her experience that Officers engaged in briefings. However, she stated that not all Officers came in before their shift to do so. In such cases, the outgoing Officer would stay late to finish managing the station, and a briefing would then occur.

EMS Chief James Booth and EMS Assistant Chief Michael Fitton also testified for the City regarding pre-shift briefings. Chief Booth and Assistant Chief Fitton have been employed by the FDNY for 34 and 33 years, respectively. Both were promoted to their current positions in January of 2015. Chief Booth testified that although he did not perform pre-shift briefings during his time as an Officer, he became aware that Officers were conducting them when he became the Chief of EMS. Assistant Chief Fitton also testified that he was not aware of the practice of pre-shift briefings prior to 2015.[9]

The Union's witnesses testified consistently and in great detail regarding the information that is shared during pre-shift briefings, why this information is important, and the repercussions that they believe could occur if the briefings were not conducted. In particular, these witnesses

[8] President Variale stated that Officers generally arrive an average of 15 minutes prior to their shift; Captain Saffon testified that he generally arrives 15 minutes early; Lieutenant Almojera arrives an average of 15-30 minutes early; Lieutenant Mascol generally arrives 30 minutes early; and Lieutenant Lorenz arrives approximately 30 minutes early.

[9] Lieutenant Catapano testified on rebuttal that he worked with Assistant Chief Fitton many years prior to 2015 when Fitton was still a Lieutenant and that they engaged in briefings with one another.

testified that one of the main reasons pre-shift briefings are necessary is to inform officers of potential hazards to vehicles, drugs, equipment, or conditions in the area that could affect the health and safety of FDNY employees as well as the general public. For this reason, the Union's witnesses testified that an Officer could not successfully perform his or her job without a pre-shift briefing. Additionally, if pre-shift briefings are not completed and something goes wrong, President Variale testified that an Officer could be subject to discipline.[10]

Both Chief Booth and Assistant Chief Fitton testified that they believed the information that is exchanged by Officers during pre-shift briefings is available or can be obtained through other methods of communication. Assistant Chief Fitton explained that one such source of information is the station logbook, which is a ledger where the Officer "chronologically makes notes about pertinent things that go on throughout the tour of duty and it contains a wide array of things." (Tr. at 268-69) The logbook also contains what is known as the "rundown." (Tr. at 269) The rundown consists of information regarding which members were assigned to which units, as well as the vehicles they were in. It also contains information regarding any visitors or deliveries to the station, and it could also contain notes regarding equipment. Unit histories are also available through the CAD system. This includes histories of the complaints that each unit responded to. Additionally, information can be obtained through communicating with the division's Resource Coordinating Center ("RCC"). The RCC is staffed by two or three EMTs who "coordinate everything that's going on within the division," such as sending staff from one station to another as necessary, coordinating vehicles, and assisting members who are looking for overtime. (Tr. at

[10] As an example, he recalled a Lieutenant who was disciplined during the aftermath of Hurricane Sandy for a "failure to provide or receive a briefing . . . and for not having his station log in chronological order." (Tr. at 100) Variale later clarified that, although the official charges against this Lieutenant did not use the word "briefing," because he acted as the Union representative for this Lieutenant, he was aware that this was one of the issues that came up during the disciplinary proceeding. Ultimately, the Lieutenant was cleared of all the charges.

270-71) Furthermore, important memos such as Training Orders, Division Memos, and Protocol Updates are all issued electronically.

When Assistant Chief Booth was questioned as to whether it was currently the practice for Officers to utilize these resources, he responded that "[t]hese are things that should happen." (Tr. at 303) Assistant Chief Fitton testified that he did not agree with the assertion that it would be unsafe for Officers to not conduct a pre-shift briefing. Futhermore, he was not aware of any Officer being disciplined in relation to pre-shift briefings. Chief Bonsignore conceded that there is a benefit to pre-shift briefings. However, she testified that they are not absolutely essential to the functioning of EMS because "anything that needs to be transferred is written in a log or multiple logs." (Tr. at 338)

Union witnesses testified as to why they did not believe that they could obtain the information they needed simply by utilizing the logbook, rundown, unit history, and other resources described by Chief Fitton. For example, Lieutenant Catapano testified that "[t]he logbook's not going to give you the whole meaning of what went on that eight hours or 12 hours prior to your arrival. It's only going to give you units that you put out . . . ." (Tr. at 419) Furthermore, he stated that there were approximately ten other logs, as well as radios and equipment that he has to keep track of that are all separate from the logbook.

Despite the promulgation of the Operations Orders, Union witnesses testified that pre-shift briefings still occur regularly. Variale stated that many Officers continue to clock in for the briefings but that some do not because they know they will not be paid for the time.

Retaliation Claim

President Variale testified regarding the FLSA Lawsuit and his belief that the Operations Orders were issued in retaliation for the Union's objections to the Settlement Agreement. Variale testified that the parties first began contemplating settlement of the FLSA lawsuit in late 2014 and

that a settlement in principle had been reached by January or February of 2015. Also sometime in February, Variale had a conversation with various FDNY Chiefs, including Chief Booth, in which pre-shift briefings were discussed. According to Variale, Chief Booth told him that since everyone knew that the briefings were happening and had been for years, it "makes sense to just start paying you now. I'm sure you have no problem with that." (Tr. at 86-87) Variale responded that he did not have a problem with that since "we have to start getting paid anyway because we were settling the FLSA lawsuit." (Tr. at 87) Chief Booth testified that although he remembered having a conversation with President Variale about compensation for pre-shift briefings, he did not remember the exact contents of that conversation. For a short time thereafter, Officers began clocking in and were paid overtime compensation for the time spent conducting pre-shift briefings.

President Variale stated that some of the members who worked the overnight tour approached him shortly before the date on which the Settlement Agreement was supposed to be signed and stated that they felt the numbers were wrong. As a result, he and Plaintiff's Attorney came to believe that there was a discrepancy in the proposed figure for back pay and damages.[11] Therefore, Plaintiffs' Attorney informed the City that they wanted to re-check the Settlement figure. According to Variale, this occurred during a conference call between Plaintiff's Attorney and an attorney representing the City. Variale was in the room when the conference call occurred and stated that the City attorney, whose name he could not recall, "became very angry" during the phone call upon learning of the Union's new position. (Tr. at 82) In particular, she sounded "upset at the fact that they felt that we made them wait until the last minute and then we brought this up." (Tr. at 96) However, the Union and Plaintiff's Attorney wanted to make sure that the settlement

[11] Variale also testified that an actuary who was hired to calculate the numbers concluded that there was a discrepancy.

figure was accurate.

President Variale stated that although he couldn't remember the exact date that this conversation occurred, "the City was upset about it and immediately the next day stopped paying us[. A]nd then [OO 067] came out maybe . . . the following day after that, and then they updated it again with the order that's dated March 20th." (Tr. at 85) He asked the City to continue making payments for the pre-shift briefings, but it refused. Specifically, when he approached FDNY Chief James Leonard and EMS Chief Booth about the issue, they informed him that they were following orders from the Legal department.

Chief Booth and Assistant Chief Fitton testified regarding the circumstances surrounding the February 2015 payment for pre-shift briefings as well as the subsequent elimination of overtime for the briefings. Both explained that they were instructed by the FDNY's Labor Relations and Legal departments that, under the doctrine of "suffer and pay," if an employee completed work, whether they were aware of it or not, the employee had to be compensated for this time. (Tr. at 266, 364) Assistant Chief Fitton testified that as a result of these discussions, they decided that if an employee was performing the briefings it would be "fair" to pay them for that work, "and then we would evaluate whether that was necessary or not and then come up with a policy for it." (Tr. at 267)

Chief Booth and Assistant Chief Fitton both testified that sometime thereafter, they consulted with one another and discussed the issue with FDNY's Labor Relations and Legal departments. Based on these discussions, it was determined that the briefings were not in fact operationally necessary. In particular, Chief Booth testified that he believed that "if you arrive at your scheduled start time and if the previous officer had conducted themselves in a manner that they are supposed to, all of the information is laid out to you in a chronological order of what occurred before your arrival that's easily referenceable in the rundown and the documents that are

at the officer's desk." (Tr. at 368-69) Furthermore, "if something occurred that was significant during the tour . . . the person that was getting relieved had the opportunity to stay later with authorization to explain or help manage the circumstance that had occurred . . . so the incoming officer would have knowledge." (Tr. at 374) Therefore, OO 067 was issued, stating that overtime for the purposes of pre-tour briefing would no longer be authorized. Chief Booth testified that the revised order, OO 067A, was written in consultation with attorneys from the City's Office of Labor Relations ("OLR"), the Office of Management and Budget ("OMB"), and the FDNY's Labor Relations department. He stated that although he was not entirely sure why these entities "took interest in [the issue]" he believed that it was because EMS needed assistance in the wording of the document. (Tr. at 384)

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the FDNY violated NYCCBL § 12-306(a)(1) and (4) when it issued OO 067 and OO 067A, which unilaterally ceased payment for pre-shift briefings. First, it contends that pre-shift briefings are a mandatory subject of bargaining. It cites to Board cases ruling that the length of a tour and the length of a workday are mandatory subjects. It also contends that the decision not to compensate an employee for work performed is a mandatory subject. Additionally, the Union argues that the decision to stop briefings "so radically alters the Officer's duties and responsibilities, including but not limited to the standards to which they might be held for purpose of evaluation and discipline, that it represents a 'significant or material relationship to a condition of employment' and must qualify as a mandatory subject of bargaining." (Union Br. at 57-58) In particular, the Union claims that it is impossible for an EMS Officer to perform their duties without the briefings. The fact that the briefings have continued demonstrates the *de facto* extension of

the formally acknowledged workday without payment. The Union also claims that a ban on briefings gives rise to a new condition for possible discipline, which also qualifies as a mandatory subject of bargaining. Consequently, the Union claims that it has demonstrated that the FDNY made a unilateral change to a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(1) and (4).

The Union further argues that pre-shift briefings are a past practice that cannot be changed without bargaining. It presented evidence to demonstrate that briefings have always taken place, up to and including the present. Furthermore, Union members have been trained on the need and importance of the briefings for years. Although the City presented a witness to testify that she does not currently train Officers to conduct pre-shift briefings, this witness admitted that other instructors in the past have done so.

The Union also presented comprehensive testimony regarding the necessity of the briefings, which are an ongoing and integral feature of EMS operations and have been for decades. In response, the City presented only speculative testimony regarding alternative measures that Officers *could* utilize to obtain information. The City did not, however, demonstrate that any of these measures were currently being used in lieu of briefings. Furthermore, there is no evidence that any EMS Officer has ever been disciplined for continuing to engage in briefings since the Operations Orders were issued.

The Union additionally alleges that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by issuing the Operations Orders to ban the practice of and payment for pre-shift briefings in retaliation for the FLSA lawsuit. It claims that it was common knowledge to all parties that the FLSA lawsuit was initiated, coordinated, and financially supported by the Union "in furtherance of the collective welfare" of the Officers. (Union Br. at 64, citing *COBA*, 53 OCB 17, at 11 (BCB 1994)) Thus, the Union has established that the FDNY had knowledge of the protected Union

activity.

The Union argues that it has established a causal connection by demonstrating that the Operations Orders were issued almost immediately after a breakdown in settlement discussions related to the FLSA Lawsuit occurred. The City provided no evidence to rebut President Variale's credible testimony that the City was angered by the fact that some plaintiffs objected to the settlement and that the Operations Orders were issued a day or two after these objections occurred. The Union also contends that it is suspicious that OLR and OMB intervened, without the solicitation or input from EMS, to issue "an order which is manifestly addressed to a straight operational issue totally outside the traditional purview of those two City agencies." (Union Br. at 67) Thus, the Union argues it has met its burden of establishing a *prima facie* case of retaliation.

The Union contends that the FDNY has not established a legitimate business reason for its actions. The City has provided no explanation for why, within in a matter of weeks, the FDNY began compensating Officers for participating in pre-shift briefings and then completely reversed course. No studies were conducted, and there are no emails or legal memoranda to support the Chiefs' claims that the decision came about as a result of advice from the FDNY legal department.

Furthermore, the Union contends that the Board should not credit the Chiefs' testimony that they only became aware of pre-shift briefings in February 2015. This testimony is contradicted by the testimony of Lieutenant Catapano, who stated that he engaged in briefings with then-Lieutenant Fitton, as well as President Variale, who testified that Chief Booth told him that he knew that briefings had been occurring for years. Additionally, the Union contends "the idea that the decision was [made] as a result of the concept of 'suffer and pay' cannot logically be sustained." (Union Br. at 69) The Union contends this concept would only obligate the FDNY to retroactively pay for work already underway. Yet, instead it made the decision in February to pay for the work going forward. Regardless of the Operations Orders, the Union claims that the

necessity of conducting briefings has not changed. Thus, the Union claims that the FDNY does not have a legitimate business reason for its actions.

Finally, the Union argues that the FDNY has independently violated NYCCBL § 12-306(a)(1) because its conduct was inherently destructive to the Union and had a chilling effect on employees' right to engage in union activity. By attempting to ban briefings and reducing the Officers' wages, the FDNY's actions were directly aimed at undermining the Union's effort and unit members' concerted activity to ensure compensation for pre-shift briefings.

City's Position

The City argues that that it did not violate NYCCBL § 12-306 (a)(1) or (4) because the Operations Orders concerning pre-shift briefings do not implicate a mandatory subject of bargaining nor do they constitute a change to past practice. It contends that the Board has determined that NYCCBL § 12-307(b) grants the City the right to eliminate overtime for business reasons because the assignment of overtime is within the City's statutory management right to "determine the methods, means and personnel by which government operations are to be conducted." (City Br. at 26-27) Although a union is free to demand bargaining over the rate of compensation to be paid when overtime work is performed, the decision as to whether and when to assign overtime belongs to management. Here, the Operations Orders neither changed the total number of hours or tours worked by Officers nor impacted the time off in between shifts. They also did not change any pre-existing policy or procedure, since Officers had never been ordered or required by the FDNY to engage in pre-shift briefings. The Union's attempt to characterize the Operations Orders as changes to working conditions and compensation is belied by the fact that it seeks as a remedy mandated overtime assignments that would amount to millions of dollars per year in payments that were never contemplated by the parties.

Furthermore, the City contends that there has been no change in the length of the Officers'

tours, the length of their workday, their salaries, or their working conditions. The Operations Orders did not alter the tours worked by Officers because they continue to work eight or 12-hour shifts. Additionally, the wages of Lieutenants and Captains remain unchanged. These salaries are set forth in the parties' collective bargaining agreement, which was modified with general wages increases contained in the 2010-2018 memorandum of agreement. Here, there is no dispute regarding the rate of compensation received by Officers or whether they were paid overtime at the correct rate. Furthermore, the brief period of time in which the FDNY provided overtime compensation for some Officers performing pre-shift briefings does not constitute a binding past practice. The short time frame in which the payments occurred and the fact that not all Officers received overtime compensation demonstrate that the practice was not unequivocal nor could it instill a reasonable expectation that it would continue. Finally, the Union's allegation that the elimination of pre-shift briefings will lead to an increase in discipline is purely speculative. The Union's example of charges brought against a Lieutenant, allegedly for failure to provide or receive a briefing, should be disregarded because a review of the actual charges reveals that they had no relationship to briefings.

The City also argues that the FDNY did not violate NYCCBL § 12-306(a)(1) or (3) when it issued the Operations Orders.[12] First, the City alleges that the filing of a FLSA Lawsuit does not constitute protected union activity. Although the Board has stated that in appropriate circumstances the filing of a lawsuit can be considered union activity, the lawsuit must still be related, even indirectly, to the employment between the City and bargaining unit employees. Although the FLSA Lawsuit was related to the employment relationship, it was filed by individual plaintiffs- not the Union- who were represented by non-Union counsel. Furthermore, the Union

[12] The City further argues that the Board does not have jurisdiction to consider allegations of retaliation arising out of a FLSA matter.

alleges that it is the filing of objections to the proposed Settlement Agreement that triggered the alleged retaliatory Operations Orders. However, these objections were suspect at the time of their filing and were wholly withdrawn by the plaintiffs. Therefore, it remains unclear whether the objections were even undertaken by the plaintiffs. Consequently, the Union has not established the first prong of the *Bowman* standard.

The City also contends that the Union has not established a causal connection between any alleged union activity and the issuance of the Operations Orders. Here, there was no temporal proximity because the FLSA Lawsuit was filed more than a year before the Operations Orders were issued. Furthermore, the preparation for these Operation Orders, which included a thorough review of EMS practices and policies, began prior to the time that the objections were filed. Even if temporal proximity could be established, standing alone this is not enough. The only evidence presented by the Union to establish anti-union animus was President Variale's testimony that an attorney representing the City sounded "upset" on a phone call that did not include anyone from the FDNY. Furthermore, it should have come as no surprise that the FDNY planned to issue the Operations Orders directly after a Court appearance that would have effectuated a settlement agreement rendering the FDNY liable for millions of dollars of uncontemplated overtime.

Should the Board find a *prima facie* case of retaliation, the City argues that it has established that the issuance of the Operations Orders was the result of legitimate business reasons and would have occurred even in the absence of any protected union activity. It cites to *Local 621*, 5 OCB2d 38 (BCB 2012), and notes that the Board found that the desire to reduce the amount of overtime was a compelling legitimate business reason for the City to eliminate duty rotation, despite the fact that the Union had established a *prima facie* case of retaliation. Here, the FDNY was similarly motivated by the legitimate business reason of reducing unnecessary overtime expenditures when it issued the Operations Orders. Furthermore, the Union has not provided any

evidence beyond conclusory statements that pre-shift briefings are "imperative" or that they were ever ordered or otherwise formalized by the FDNY. (City Br. at 44) The City does not deny that some Officers engaged in these briefings. However, the testimony of Chief Booth and Assistant Chief Fitton make clear that, after reviewing FDNY practices in conjunction with the City's Law Department, OLR, OMB and the FDNY Legal Department, it was determined that pre-shift briefings, although helpful, were not operationally necessary. Consequently, the City had a legitimate business reason for issuing OO 067 and OO 067A.

Finally, the City contends that the Union failed to establish an independent violation of NYCCBL § 12-306(a)(1) because it did not meet the burden of showing that any of the City's conduct was "inherently destructive of important employee rights" protected under NYCCBL § 12-305.

DISCUSSION

It is an improper practice under NYCCBL § 12-306(a)(4) for a public employer or its agents "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." Under NYCCBL § 12-307(a), mandatory subjects of bargaining generally include wages, hours, working conditions, and any subject with a significant or material relationship to a condition of employment.[13] Where

[13] NYCCBL § 12-307(a) provides, in pertinent part:

> [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including, but not limited to, wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including, but not limited to, overtime and time and leave benefits), working conditions . . . .

management makes a unilateral change in a mandatory subject of bargaining, "it accomplishes the same result as if it had refused to bargain in good faith, and likewise commits an improper practice." *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009) (citation omitted).

However, not every decision by a public employer that affects a term and condition of employment is a mandatory subject of bargaining. *See Local 1182, CWA*, 61 OCB 4, at 6 (BCB 1998). Rather, § 12-307(b) of the NYCCBL "reserves to the City exclusive control and sole discretion to act unilaterally in certain enumerated areas that are outside the scope of collective bargaining, such as assigning and directing its employees, determining their duties during working hours, and allocating duties among its employees, unless the parties themselves limit that right in bargaining." *COBA*, 63 OCB 26, at 9-10 (BCB 1999) (citing *PBA*, 63 OCB 12 (BCB 1999), *affd*., *Matter of Saunders v. DeCosta*, Index No. 103467/1999 (Sup. Ct. N.Y. Co. July 7, 1999) (Wilkins, J.); *Local 621, SEIU*, 51 OCB 34 (BCB 1993)). This Board has stated that decisions regarding when and how much overtime is to be authorized or ordered fall within the rights reserved to management under NYCCBL § 12-307(b). *See Local 1182, CWA*, 61 OCB 4, at 6 (BCB 1998) (citing *Local 621, SEIU*, 51 OCB 34; *UPOA*, 39 OCB 29 (BCB 1987); *NYSNA*, 11 OCB 2 (1973); *DC 37*, 3 OCB 4 (BCB 1969); *SSEU*, 1 OCB 11 (BCB 1968)) (additional citations omitted) (improper practice dismissed concerning employees ordered to work mandatory overtime for a period of three months).

Here, the Union claims that the Operations Orders affect mandatory subjects of bargaining because they changed the length of the Officers' tours and the compensation they received for work performed. Indeed, OO 067A instructed Officers that they were not permitted to perform any work-related tasks before the start or after the end of their shift and further stated that any time recorded in excess of the Officers' regular schedule for which he or she did not request authorization to work overtime would not be compensable. Thus, the Operations Orders put an

end to any practice of pre-shift briefings and overtime compensation for the briefings.[14] Therefore, although the Operations Orders did not shorten the length of the Officers' regularly-scheduled tour, it did remove their ability to perform briefings and be paid approximately 15 to 30 minutes of overtime to perform certain duties without prior authorization.

Accordingly, we find that the Operations Orders concern when or how much overtime is authorized, a non-mandatory subject of bargaining, and not the length of a workday as the Union argues.[15] As stated above, this Board has consistently held that "[t]he decision as to when and how much overtime is to be authorized or ordered is outside the scope of the City's obligation to bargain collectively." *Local 2507, DC 37*, 67 OCB 3, at 7 (BCB 2001) (citing *UPOA*, 39 OCB 29, at 4); *see also Local 858, IBT*, 49 OCB 29, at 13 (BCB 1992) (NYCCBL § 12-307(b) "grants [the employer] the right to eliminate overtime for business reasons . . . .")).

We find the Board's decision in *UPOA*, 39 OCB 29, instructive. *UPOA* involved a claim that the employer made an improper unilateral change when it decided to reduce the amount of overtime allowed for certain job functions from one and a half hours to half an hour. The Board

[14] We note that there was clearly a past practice of Officers performing pre-shift briefings, without compensation, for many years prior to 2015. All of the Union's witnesses testified consistently regarding this practice. They also testified consistently to the fact that they had been specifically trained by members of FDNY management that they should conduct the pre-shift briefings. Although Chief Booth and Assistant Chief Fitton denied being aware of the practice, we do not find that this sufficiently rebuts the Union's evidence. Furthermore, City witness Chief Bonsignore admitted to being aware both of the practice as well as the fact that previous instructors at the Academy had instructed Officers that they should complete the briefings. Thus, the evidence demonstrates that the FDNY tacitly understood that employees were performing pre-shift briefings.

[15] While the Union is correct that this Board has found that the length of a work day may be found to be a mandatory subject of bargaining, none of the cases it cited concern the question of whether an employer must bargain over the decision to assign work that would require it to pay its employees overtime. *See PBA*, 15 OCB 24, at 22 (BCB 1973), *aff'd, Patrolmen's Benevolent Ass'n v. Board of Collective Bargaining*, N.Y.L.J., Jan. 2, 1976, at 6 (Sup. Ct. N.Y. Co.); *DC 37*, 75 OCB 10, at 8 (BCB 2005) (citations omitted); *UFT*, 4 OCB2d 54, at 13 (BCB 2011).

stated that, "in the absence of a contractual or other limitation, the determination that recommendations prepared or communicated in a half hour are sufficient for the City's purposes would appear to fall within its statutory right 'to determine the standards of services to be offered'…." *UPOA*, 39 OCB 29, at 4 (citing NYCCBL § 12-307(b)). Here, there is no contractual provision regarding pre-shift briefings, and the City has made the operational determination that it does not believe they are necessary because Officers can obtain the relevant information through alternate modes of communication. Thus, its decision to eliminate overtime for the particular job function of pre-shift briefings is one left solely to management under NYCCBL § 12-307(b) and is, therefore, a non-mandatory subject of bargaining.[16]

Furthermore, we do not find persuasive the Union's claims that the City's decision to stop pre-shift briefings has altered the standards to which Officers might be held for purposes of evaluation or discipline. On their face, neither Operations Order concerns standards for evaluation or discipline. Moreover, such standards are generally management rights under NYCCBL § 12-307(b). To the extent that the Union's argument in this regard is an allegation of a practical impact, the Union has not presented any evidence of how the Operations Orders have impacted the standards for evaluation or discipline.[17] Consequently, we cannot find that the Operations Orders have had an impact on these standards. *See Local 1182, CWA*, 5 OCB2d 41, at 9 (BCB 2012)

[16] For this reason, it is not within the Board's jurisdiction to opine on the importance of the pre-shift briefings. Although the Union presented credible and consistent testimony that pre-shift briefings are the most effective and efficient way in which to receive critical information, this evidence does not transform pre-shift briefings into a mandatory subject of bargaining.

[17] The Union appears to argue that eliminating the practice of pre-shift briefings will compromise the Officers' effective performance of their job and therefore subject them to discipline. Nevertheless, the Union did not present evidence of any Officer who had been disciplined in this regard since the Operations Orders were issued. Consequently, the record does not support this factual conclusion.

(citing *UFA*, 5 OCB2d 3, at 14 (BCB 2012)) ("Conclusory statements or vague or non-specific allegations are not sufficient to prove practical impact . . . .").

In light of the above, since we find that the Operations Orders did not affect a mandatory subject of bargaining, we do not find that the FDNY violated NYCCBL § 12-306(a)(1) and (4).

Retaliation Claim

Next, the Union claims that the FDNY issued the Operations Orders in retaliation for objections that were raised to a proposed settlement of the FLSA lawsuit, in violation of NYCCBL § 12-306(a)(1) and (3). To determine whether an 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 the Board in *Bowman*, 39 OCB 51 (BCB 1987), and its progeny. This test states that, in order to establish a *prima facie* claim of retaliation, 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 Feder*, 4 OCB2d 46, at 42 (BCB 2011).

Regarding the first prong, this Board has held that "the filing of a lawsuit will constitute protected activity where it is related to the employment relationship and undertaken on behalf of the employee organization and not strictly personal." *Local 1157*, 3 OCB2d 40, at 16 (BCB 2010) (citing *PBA*, 79 OCB 16, at 13-15 (2007); *McNabb*, 41 OCB 48, at 13-22 (BCB 1988) (participation of two employees in an Article 78 proceeding brought by their union constituted protected union activity)). Here, we find that the Union has clearly established the first prong of the *Bowman* test since the FLSA lawsuit came about as a result of employee complaints and the Union's financial support and involvement throughout the lawsuit's duration and ultimate settlement. Furthermore, the FLSA lawsuit concerned compensation for overtime work performed

by Union members during the course of their employment, which directly relates to the employment relationship of the entire bargaining unit. In addition, there is no dispute that the City was aware of the lawsuit. Consequently, the bargaining unit members' actions taken regarding the FLSA lawsuit and its settlement constitute protected union activity.[18]

As to the second prong, "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions which are the subject of the complaint." *OSA*, 7 OCB2d 20, at 19 (BCB 2014) (quoting *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007)) (internal quotation marks omitted). "[T]ypically, motivation is proven through the use of circumstantial evidence, absent an outright admission." *Colella*, 7 OCB2d 13, at 22 (BCB 2014) (internal quotation and editing marks omitted) (quoting *Burton*, 77 OCB 15, at 26 (BCB 2006**)**). Consequently, the Board considers "whether the temporal proximity between the protected union activity and the retaliatory action, in conjunction with other facts, supports a finding of improper motivation. *Id*. (citing *DC 37, L. 376*, 6 OCB2d 39, at 19 (BCB 2013)). Furthermore, claims of improper motivation must be based on statements of probative facts, rather than speculative or conclusory allegations. *See DC 37, L. 983*, 6 OCB2d 10, at 29 (BCB 2013) (citing *Morris*, 3 OCB2d 19, at 15 (BCB 2010)).

Here, the Union alleges that employee objections made to the FLSA Settlement Agreement were the motivating factor behind the City's decision to issue the Operations Orders ending pre-shift briefings. The record demonstrates that on March 9 and 10, 2015, Plaintiff's Attorney filed a series of objections to the Settlement Agreement with the Court and that around that same time Plaintiff's Attorney had a phone conversation with the City's attorney in which they discussed the objections. Union President Variale was on this conference call and testified that the City attorney

[18] Having found that the FLSA lawsuit constitutes protected union activity, we reject the City's argument that the Board does not have jurisdiction to consider the Union's retaliation claim.

"became very angry" and was "upset" with the change in the Union's position on the terms of settlement and its members objections. (Tr. at 82, 96) The City did not present any testimony or documentary evidence to rebut this assertion.[19] Further, the City issued OO 067 and stopped paying the Officers for engaging in pre-shift briefings on March 13, 2015, approximately three or four days after the City first became aware of the settlement objections. OO 067 was then supplemented one week later by a more comprehensive version, which suggests that it might have been issued in a rushed manner. We find that this evidence, in the aggregate, is sufficient to form a causal relationship between the Union's protected activities and the alleged retaliatory acts. Thus, the Union has met its burden of proffering a *prima facie* case of retaliation.

Once a union has proffered a *prima facie* case, "the burden shifts to the employer who may refute a 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." *Local 1180, CWA*, 8 OCB2d 36, at 16 (BCB 2015) (quoting *CSTG, L. 375*, 4 OCB2d 61, at 24-25 (BCB 2011) (internal quotation marks omitted)). In the instant case, we do not find it necessary to determine whether the City has sufficiently refuted the Union's *prima facie* case. Instead, we find that the City has demonstrated that it had legitimate business reasons for its actions.

The City asserts that the decision to issue the Operations Orders was made by Chief Booth and Assistant Chief Fitton in consultation with the City's Law Department, OLR, OMB, and the FDNY Legal Department. In particular, the City asserts that, after reviewing FDNY practices, it determined that pre-shift briefings were not operationally necessary and that, in light of the Settlement Agreement, future overtime payments should be reduced. As discussed above, the City

[19] In fact, the City's March 17 and April 3, 2015 letters to the Court corroborate the Union's assertion that the City was displeased with the objections to the Settlement Agreement.

has the managerial right under NYCCBL § 12-307(b) to make decisions regarding the methods, means, and personnel by which its operations are conducted. Furthermore, the Board has previously determined that the decision to discontinue a practice in order to eliminate a source of overtime expenses constituted a legitimate business reason, despite the fact that the union had proffered a *prima facie* case of retaliation. *See Local 621, SEIU*, 5 OCB2d 38, at 13-14 (BCB 2012) (finding that the City did not commit an improper practice when it eliminated the practice of having Supervisors of Mechanics respond to off-hour road calls on overtime). Thus, in the absence of a finding of pretext, the City's desire to cease the practice of pre-shift briefings and reduce future overtime payment liability constitute legitimate business reasons for its actions.

Our finding that the City has proffered a legitimate business reason is supported by a number of factors. First, we credit Chief Booth and Assistant Chief Fitton's testimony that they started payment for pre-shift briefings as a result of conversations with the FDNY's Legal Department, which educated them on the concept of "suffer and pay."[20] (Tr. at 266, 364) Under this framework, work that is not requested by the employer but is "suffered or permitted" must be compensated. It is not likely that the Chiefs would have been aware of this concept, or that the decision to pay for pre-shift briefings would have been made, without consulting with the FDNY's Legal and Labor Relations Departments. While the Union is correct that the concept of "suffer and pay" would only have obligated the FDNY at that time to pay for work that had already been completed, the City's assertion that it wanted to review the practice of pre-shift briefings to determine their necessity before ceasing the practice altogether is both logical and supported by the record. Therefore, the City's temporary authorization of payment for the pre-shift briefings

[20] This language clearly refers to the FLSA definition of the term "employ," which "includes to suffer or permit to work." 29 USC § 203 (g).

from February until March 2015 does not suggest that its legitimate business reason was pretextual.

Further, the testimony of Chief Booth and Assistant Chief Fitton is corroborated by the City attorney's representation to the Court in her April 3, 2015 letter that, as of February 2015, the City had begun "laying the groundwork to effectuate the terms of the settlement . . . ." City Ex. 7. This included undertaking a "thorough review of current practice and procedures to identify any necessary revisions that may be required in light of the impending reclassification" of hundreds of Officers as FLSA-eligible.[21] *Id*. Additionally, Chief Booth's testimony that the decision to issue the Operations Orders was made in consultation with other departments is supported by President Variale's testimony that, when he confronted Chief Booth about the issue, Chief Booth told him that he was following orders from the Legal Department.

Furthermore, we disagree with the Union's contention that it was "suspicious" that OLR and OMB were involved in crafting the language of the second Operations Order, which the Union described as "an order [that] is manifestly addressed to a straight operational issue totally outside the traditional purview of those two City agencies." (Union Br. at 67) To the contrary, the Operations Order concerned both labor relations issues as well as the FDNY's budget, which had the potential to be greatly impacted by overtime expenses if pre-shift briefings continued. Both of these issues are squarely within the purview of OLR and OMB, and it is likely that the agencies would be involved in decisions that were made in connection with the FLSA lawsuit and Settlement Agreement.

In light of the above, the Board is persuaded that City's desire to cease briefings it did not believe were necessary and to limit its overtime liability constitute legitimate business reasons for

[21] We also note that, despite the City's displeasure with the employees' objections to the Settlement Agreement, nonetheless the City continued to support the settlement and reclassification of the Officers - an outcome the Union had sought.

its actions. Consequently, we do not find that the City has violated § 12-306(a)(1) and (3).[22] *See also Local 1757, DC 37*, 67 OCB 10, at 18 (BCB 2001) (revision of job specification in order to avoid future grievances did not constitute retaliation); *Local 1180, CWA*, 8 OCB2d 36, at 21 (BCB 2015) ("to remedy an out-of-title grievance does not constitute unlawful retaliation"); *Cerra*, 27 OCB 27, at 8 (BCB 1981) (diminution of responsibility and the reduction of duties were not acts of discrimination [when] taken to resolve [an] out-of-title grievance"). Accordingly, we dismiss the petition in its entirety.

[22] Because we find there was no violation of NYCCBL § 12-306(a)(3), we find no derivative violation of § 12-306(a)(1). To the extent the Union alleged an independent violation of § 12-306(a)(1), the underlying facts of its claim were identical to the § 12-306(a)(3) claim. Therefore, we find that the FDNY did not commit an independent violation of NYCCBL § 12-306(a)(1).

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, docketed as BCB-4104-15, filed by District Council 37, Local 3621, against the City of New York and the New York City Fire Department, hereby is dismissed in its entirety.

Dated: February 15, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent. PETER PEPPER
MEMBER