# *DC 37*, 2 OCB2d 31 (BCB 2009)

(IP) (Docket No. BCB-2673-07).

***Summary of Decision:*** DC 37 alleged that the City made unilateral changes to prospective annual leave, sick leave, and leave regulation accruals for employees in the title of Supervisor Highway Repairer, in violation of NYCCBL § 12-306(a)(4) and (5). Petitioner also alleged that the changes stemmed from anti-union animus, in violation of NYCCBL § 12-306(a)(1) and (3), and that the changes violated § 12-306(a)(2). Although the facts surrounding this decision have been the subject of prior Board decisions, the Union's contentions in those decisions focused on the retroactive calculation of leave. The allegations in this matter concern future leave calculation and accruals. The Board found that it did not have jurisdiction over the Union's claim that the City failed to bargain in good faith, and even if we did have jurisdiction over the remainder of the claims, those claims were not yet ripe for adjudication. ***(Official decision follows.)***

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**OFFICE OF COLLECTIVE BARGAINING**
**BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Proceeding**

***-between-***

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,**

***Petitioner,***

***-and-***

**The CITY OF NEW YORK,**

***Respondent.***

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## DECISION AND ORDER

On November 30, 2007, District Council 37, AFSCME, AFL-CIO ("DC 37") filed a verified improper practice petition alleging that the City of New York ("City") made unilateral changes to annual leave, sick leave, and leave regulation accruals for employees in the title of Supervisor Highway Repairer ("SHR"), in violation of § 12-306(a)(4) and (5) of the New York City Collective

Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Petitioner also alleged that the changes stemmed from anti-union animus, in violation of NYCCBL § 12-306(a)(1) and (3), and that the changes violated § 12-306(a)(2). The facts surrounding this decision have been the subject of prior Board decisions, but the Union's contentions in those decisions focused on the retroactive calculation of leave. The allegations in this matter concern future leave calculation and accruals. Similar to *Local 1157*, 2 OCB2d 10 (BCB 2009), the Board concludes that it does not have jurisdiction over the Unions' claims that the City failed to bargain in good faith and, even if we did have jurisdiction over the remainder of the claims, those claims are not yet ripe for adjudication.

## PROCEDURAL HISTORY

On October 4, 2007, Local 1157, District Council 37, AFSCME, AFL-CIO ("Local 1157") and co-Petitioner Mickey McFarland, through Local 1157's attorneys, filed a verified improper practice petition and request for injunctive relief against the City. Local 1157 alleged that the City unilaterally effectuated changes to annual leave, sick leave, and leave regulation accruals for employees in the title of SHR. Local 1157 claimed that the City's decision to implement these changes without bargaining violated § 12-306(a)(5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). On October 10, 2007, DC 37 filed a separate verified improper practice petition and request for injunctive relief regarding the same set of facts.

The City argued that Local 1157 lacked proper standing to bring a claim under the NYCCBL since Local 1157 had filed without the authorization or consent of DC 37, the holder of the

bargaining certificate. The City also claimed that, in any event, the Unions failed to establish that the City violated any provision of the NYCCBL. At the request of the Board, DC 37 submitted a letter stating its position on the issue of standing, which was that Local 1157 lacked the requisite standing to bring a claim with regard to NYCCBL § 12-306(a)(5). On October 22, 2007, Local 1157 filed an amended improper practice petition claiming violations of NYCCBL § 12-306(a)(1), (2), and (3).

Both requests for injunctive relief were denied by the Board on October 25, 2007. In a subsequent Interim Decision and Order, *Local 1157, DC 37*, 1 OCB2d 7 (BCB 2008), the Board found that Local 1157 lacked the requisite standing to bring a claim under NYCCBL § 12-306(a)(4) or (5) but reserved a determination on its claims that the City violated § 12-306(a)(1), (2), and (3). In *Local 1157*, 2 OCB2d 10 (BCB 2009), which consolidated the Local 1157 and DC 37 petitions, the Board found that it did not have jurisdiction over the Unions' claims that the City failed to bargain in good faith. The Board did not reach the question of whether it has jurisdiction over the remainder of the Unions' claims, as it found that those claims were not yet ripe.

## BACKGROUND

Local 1157 is a constituent part of DC 37 that includes as members individuals employed in the title SHR. On February 2, 1978, the Board of Certification determined that DC 37; Civil Service Forum, Local 300, SEIU, AFL-CIO; and Pavers and Roadbuilders District Council, Laborers' International Union, AFL-CIO should be certified as the joint representatives for the purposes of collective bargaining for all Foreman Highway Repairers, Highway Repairers, and Highway Repairers (CETA) employed by the City. *DC 37*, 22 OCB 2 (BOC 1978). The title Foreman

Highway Repairers was changed to SHR in 1982. DC 37 was the union signatory to SHRs' last signed agreement, covering the period of April 1, 1995, through March 31, 2000.

SHRs are "prevailing rate" employees, denoting that these employees serve in titles that are covered by New York Labor Law § 220 ("§ 220"). Accordingly, these employees are paid wage rates and supplemental benefits that track the wage rates and supplemental benefits received by private sector employees in the same job classifications. However, since 1984, § 220 has also provided that the public employer and the employee organization "shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements . . ." of the employees in the title.[1] When an agreement is reached, with respect to wages and supplements, the terms of that agreement are reflected in a "Consent Determination," which is issued by the local fiscal officer. The local fiscal officer who determines the rates for SHRs is the New York City Comptroller ("Comptroller"). Section 220 further provides that if the public employer and the employee organization "fail to achieve an agreement," the employee organization can file a complaint that initiates the statutory process for obtaining an independent determination by the Comptroller. Once the Comptroller makes a determination, that determination may be appealed it to the courts pursuant to Article 78 of the Civil Practice Law and Rules. Such appellate review under Article 78 is expressly authorized in Labor Law § 220.8.

NYCCBL § 12-307(a)(1) states that "with respect to those employees whose wages are determined under section two hundred and twenty of the labor law, the duty to bargain in good faith over wages and supplements shall be governed by said section."

The last negotiated agreement covering SHRs was a Consent Determination covering the

[1] 1984 New York Laws, chapter 767, amending Labor Law § 220.8-d.

period of April 1, 1995, through March 31, 2000. As the Consent Determination's expiration date drew near, DC 37 and the City began negotiations for a successor agreement on wages and supplements. The parties met numerous times, but were unable to reach a voluntary settlement. As a result, DC 37 exercised its rights under § 220 and requested that the Comptroller commence the statutory process for obtaining its independent determination, which includes a survey to determine the prevailing wage rate and supplemental benefits for the title.

On August 19, 2004, the Comptroller's Bureau of Labor Law ("Comptroller's Bureau") issued its preliminary determination, which covered the period of April 1, 2000, through June 30, 2005. In its determination, the Comptroller's Bureau stated that the applicable wage and supplement rates for SHRs should be equated to the wage and supplement rates of workers represented by Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, AFL-CIO, and workers represented by Highway, Road, and Street Construction Laborers Local Union 1010. After the preliminary determination was issued, DC 37 and the City were unsuccessful at reaching a voluntary settlement based upon these findings.

On December 10, 2004, Local 1157's counsel wrote a letter to the Comptroller to complain about the City's actions at a meeting between the parties that occurred on December 8, 2004, and requested a hearing at the New York City Office of Administrative Trials and Hearings ("OATH") regarding its claims. Local 1157 claims that, at the December 8 meeting, the City took the position that SHRs were not covered by § 220 and rejected the Comptroller's preliminary determination. Local 1157 asserts that the City announced that, accordingly, it would negotiate based upon the increases contained in the relevant Citywide agreements applicable to non-prevailing rate titles. The

City denies these allegations.

Pursuant to § 220, the City challenged the preliminary determination, and a hearing was held at OATH on October 19, 2005. On January 23, 2006, OATH issued a report and recommendation to the Comptroller affirming the Comptroller Bureau's findings in their totality, and on March 2, 2006, the Comptroller issued a Final Order and Determination ("Order") adopting OATH's findings. The Comptroller's Order stated, in pertinent part:

> It is Hereby Determined that:
>
> 1. The prevailing rates of wages and benefits to be paid to employees in the title of [SHR] during the period April 1, 2000 through June 30, 2005 are those of foremen of the Highway, Road, and Street Construction Laborers Local Union 1010 and Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, AFL-CIO.
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> It is Hereby Ordered that:
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> 2. The [City] shall pay to its employees in the title [SHR] for the period April 1, 2000 through June 30, 2005, the wages and benefits of foremen of the Highway, Road, and Street Construction Laborers Local Union 1010 and Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, AFL-CIO. . . .

The City then appealed this determination to the Appellate Division, First Department. On June 14, 2007, the Appellate Division unanimously confirmed the Comptroller's Order in *Matter of Hanley v. Thompson*, 41 A.D.3d 207 (1st Dept 2007).

On September 6, 2007, the City and DC 37 met again to attempt to negotiate an agreement. At this meeting, the City made a proposal to DC 37 regarding wages and supplements. On September 21, 2007, DC 37 made a counter-proposal to the City by e-mail.

On September 26, 2007, an Assistant Commissioner at the New York City Office of Labor Relations ("OLR") sent DC 37's Research and Negotiations Division a letter. It stated, in pertinent

part:

> This letter is to inform you that, pursuant to the attached Appellate Division Order dated June 14, 2007 (41 A.D.3rd 207), [OLR] will, as soon as practicable, implement the Comptroller's Final Order and Determination (the "Order") covering [SHRs] for the period April 1, 2000 to June 30, 2005.
>
> Pursuant to the [Order], OLR will be paying the retroactive hourly wages, night shift differential and overtime based on the Local 1018 rates, retroactive to April 1, 2000.
>
> With regard to the Local 1018 hourly fringe benefits rates as set forth in the Order, OLR will initially implement the necessary leave accrual recalculations *prospectively*, based on the costing that was shared with you at our bargaining session on September 6, 2007. As a result, going forward, SHR's will accrue 4 ½ fewer annual leave days and 5 fewer sick days per annum. In addition, SHR's will no longer be eligible for the "Leave Regulation" benefits as outlined in Appendix A, Article III section 1 (a) – (f).[2] As previously stated, these leave accrual recalculations are necessary in order to match the Local 1018 hourly fringe benefit rates as set forth by the Comptroller.
>
> With regard to the *retroactive* Local 1018 hourly fringe benefit rates dating back to April 1, 2000, OLR is currently recalculating the amount of retroactive leave that will need to be taken from each SHR in order to match the rates contained in the Order. Once that amount has been ascertained we will advise you of how much over-accrued leave each SHR owes the City and when it will be debited from their existing leave balances. . . .

(emphasis in original.)

The leave regulation benefits that were eliminated include paid bereavement leave, jury duty leave, leave for court attendance under subpoena or court order, a health department required absence, absence to take a civil service examination or interview, and leave to attend as a delegate or alternate to a State or National veteran or volunteer firefighter organization's convention.

The City claims that it was required to impose the changes regarding leave in order to implement the Comptroller's Order because it was faced with an order from the Appellate Division

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[2] Article III is entitled, "Other Absences with Pay."

and would face criminal penalties if it did not implement *Matter of Hanley v. Thompson*, 41 A.D.3d 207. The Union claims that the City had to complete bargaining over the implementation of the Order before implementing it.

As a remedy, DC 37 asks that the Board order that the City cease and desist from any unilateral change in the annual, sick, and leave regulation accruals of Local 1157 members in the SHR title, cease and desist from discriminating against the Union members in exercise of their rights protected by the NYCCBL, and post appropriate notices at the Respondent's facilities and work sites.

## POSITIONS OF THE PARTIES

### Union's Position

DC 37 alleges that the facts and legal theory in the instant matter are the same as those set forth in its prior case, which challenged the City's unilateral change in leave balances. The instant matter challenges the City's unilateral change in future accruals. DC 37 argues that in unilaterally determining the manner in which future annual and sick leave and leave regulation accruals would be changed to "conform" with the rates determined by the Comptroller, the City has failed to bargain in good faith on a matter within the scope of collective bargaining in violation of NYCCBL § 12-306(a)(4). DC 37 also contends that in taking these actions during a period of negotiations, the City has also violated NYCCBL § 12-306(a)(5).

Furthermore, the City has discriminated against Union members in the title of SHR in the exercise of their rights guaranteed under the NYCCBL for the purpose of discouraging Union members to exercise their rights under the NYCCBL and participate in the activities of the Union in violation of NYCCBL § 12-306(a)(3). Finally, by taking the above actions, the City is deliberately

interfering with, restraining, and coercing employees represented by the Union in the exercise of their rights guaranteed by NYCCBL § 12-305 for purposes of depriving them of such rights, in violation of NYCCBL § 12-306(a)(1).

In response to the City's claims that the Board lacks jurisdiction over this dispute because it involves claims arising under § 220, DC 37 claims that after the final determination was issued and no further appeals were taken by the City, the City unilaterally determined the means by which accruals would be modified. These changes were made with no consultation or negotiation with DC 37. The parties did not engage in a back-and-forth dialogue as to whether it might be better to reduce more vacation time and less sick time or to reduce, but not eliminate, leave regulation days. The City unilaterally determined how the vacation/sick/leave regulation days would be modified. This unilateral action, over what is a clear mandatory subject of bargaining, is a violation of the NYCCBL.

Further, contrary to the assertions by the City, a union does not surrender its rights under the NYCCBL when it files a labor law complaint and pursues its rights under § 220. While the Board does not have authority to consider the merits of the Comptroller's determination, claims of improper practice are cognizable. Thus, DC 37 requests a finding that the City's unilateral determinations regarding the accrual modification be deemed a violation of the NYCCBL. Additionally, the Board does have jurisdiction over the claimed violations of NYCCBL § 12-306(a)(1) and (3) because DC 37's actions were related to the employment relationship and were in furtherance of the collective welfare of employees, which constitute protected activity under the NYCCBL.

**City's Position**

The City argues that the instant improper practice petition must be dismissed, as terms of

wages and supplements for SHRs are governed by Labor Law § 220, not the NYCCBL. NYCCBL § 12-307(a)(1) clearly states that terms involving wages and supplements for employees who fall under § 220 are not within the scope of bargaining. SHRs are employees who fall under § 220. The complained-of wages and supplements raised by the Union in this matter are governed by Labor Law § 220 and thus, fall outside the scope of bargaining for the purposes of the NYCCBL. As such, terms relating to wages and supplements for SHRs are subject only to the terms of § 220 and are not mandatory pursuant to the NYCCBL. The Union and the City have both proceeded within the framework of § 220, and the whole course of negotiations, including a Comptroller's Order, an OATH hearing, and an Appellate Division Order, have evinced that the parties understood that § 220 was and is the operable statute. Therefore, the Board cannot find that the City violated NYCCBL § 12-306(a)(4) or (5).

Furthermore, the Petitioner also fails to demonstrate that the City has violated NYCCBL § 12-306(a)(1) or (3) because it cannot demonstrate that the Union was engaged in protected activity under the NYCCBL or that the City has retaliated against the Union. The Union initiated a compliance investigation with the Comptroller's Office pursuant to Labor Law § 220(7), and considering that action was taken pursuant to the Labor Law and not the NYCCBL, the Union's actions cannot be considered "protected" under the NYCCBL. Furthermore, the City has not taken any action against the Union, but as the facts have established, the City has merely implemented the terms of the Comptroller's Order. Assuming for the sake of argument that the City's actions appear discriminatory against employees in violation of § 12-306(a)(3), the instant claim must fail, as the City's actions in implementing the Comptroller's Order constitute a legitimate business reason.

The City contends that the claimed independent violation of NYCCBL § 12-306(a)(1) should

be dismissed because the City did not "interfere with, restrain or coerce public employees" under that section, nor has DC 37 alleged any facts that would support such a claim. Finally, any claim that the City has violated NYCCBL § 12-306(a)(2) is conclusory and speculative.

## DISCUSSION

Although the Union's claims in the instant matter focus on the prospective calculation of leave calculation and accruals as opposed to retroactive calculation of leave, as involved in the earlier matter before this Board, our analysis in this matter does not differ from that found in that prior case, *Local 1157*, 2 OCB2d 10 (BCB 2009). As in our prior ruling, we are constrained to find that the subject of leave in this matter is outside of our jurisdiction. We refer the parties to *Local 1157* and the decision in *McFarland v. City of New York*, 2009WL 138366 (N.Y. Sup. Ct. April 1, 2009) for a fuller analysis of the Board's reasoning with respect to these matters, and a corollary avenue of review as provided for under Labor Law § 220.

Under the NYCCBL, an employer's duty to bargain with respect to employees subject to § 220 is treated as an exception to the general rule set forth in § 12-307(a), which provides in relevant part that:

> public 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) [and] working conditions . . . except that:
>
> (1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, the duty to bargain in good faith over wages and supplements shall be governed by said section. . . .

This Board has previously held that "[u]nder this section, issues of the duty to bargain over 'wages and supplements' are governed by § 220 and not the NYCCBL, and thus are excluded from our jurisdiction." *Local 1157*, 2 OCB2d 10, at 13. However, we also have held that a public employer generally has a duty under the NYCCBL to bargain over the working conditions of § 220 public employees which do not involve "wages" or "supplements." *Local 1157,* 1 OCB2d 10, at 13; *Local 237, City Employees Union, IBT,* 67 OCB 37, at 6 (BCB 2001); *see DC 37,* 25 OCB 29, at 5 (BCB 1980). In our previous cases, we have defined the term "wages" as including wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums. *Local 1157,* 1 OCB2d 10, at 13; *Local 237, City Employees Union, IBT,* 67 OCB 37, at 6; *see, e.g., Committee of Interns and Residents*, 49 OCB 22, at 13-14 (BCB 1992). Section 220.5-b describes "supplements" as "remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay[,] life insurance, and apprenticeship training."

The parties' duties regarding bargaining over wages and supplements for § 220 employees are laid out in the N.Y. State Labor Law. An examination of the plain language of subdivision 8-d of § 220 establishes a duty to bargain in good faith for an agreement with respect to wages and supplements. The source of this duty is the Labor Law, not the NYCCBL, a fact which is also recognized in the express language of NYCCBL § 12-307(a)(1).[3] Additionally, the remedy for any

[3] We note that from its enactment in 1972 (1972 Local Law No. 1) until its amendment in 1998 (1998 Local Law No. 26), NYCCBL § 12-307(a)(1) provided that:

> with respect to those employees whose wages are determined under section two hundred twenty of the labor law, there shall be no duty to bargain concerning

breach of the duty to bargain regarding § 220 employees' wages and supplements is set forth in the Labor Law. Indeed, § 220.8-d states that the employer and public employee organization shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements of the laborers, workmen, or mechanics in the title. Continuing on, it states that if the parties fail to achieve an agreement, the Union may file a complaint under § 220.7 of the Labor Law. Furthermore, § 220.9 provides that:

> When a final determination has been rendered, any person, or corporation that wilfully refuses thereafter to pay the rate of wages or to provide the supplements determined to be prevailing . . . determined by said order until modified by order of the fiscal officer or court and thereby violates the provisions of this section shall be guilty of a misdemeanor and upon conviction, shall be punished. . . ."

The remainder of the section lays out, in detail, the penalties for an employer's failure to comply with the provision.

Further, this Board had previously determined that, "[a]s the accrual of sick leave and vacation leave and paid leave regulations are non-monetary remuneration, the changes at issue fall within the definition of supplements in § 220.5-b, for which the duty to bargain and a mechanism

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> those matters determination of which is provided for in said section. [Emphasis added.]

The legislative history shows that when § 12-307(a)(1) was amended in 1998 to its present form, the intent was to harmonize the NYCCBL with the Labor Law, § 220.8-d of which had been amended by the State Legislature (L. 1983, c. 447) to authorize, in cities of one million or more, the negotiation of wages and supplements by certified employee organizations and public employers, and to provide that, failing agreement, the certified employee organization, alone, could file a complaint with the Comptroller seeking a prevailing wage determination. *See Statement of OCB Director in Support of NYCCBL Amendments* (May 28, 1998) at 6, filed with the City Council in support of Intro No. 235-A of 1998 (enacted as 1998 Local Law No. 26). There is no evidence of any intention to create a duty to bargain beyond that set forth in § 220.8-d of the Labor Law.

for its enforcement sound not in the NYCCBL but rather in the Labor Law." *Local 1157,* 1 OCB2d 10, at 15; *see Local 237, City Employees Union, IBT*, 67 OCB 37, at 6. Since there is no assertion that this unilateral change had an impact upon other terms and conditions of employment, there is no basis for this Board to exercise jurisdiction over these claims.

Furthermore, in so holding, we note the Court's language in *McFarland v. City of New York*, 2009WL 138366 (N.Y. Sup. Ct. April 1, 2009). In that matter, the Court held:

> In the context of this case, subdivision seven authorizes the Comptroller to investigate the complaint and to make an order or any other disposition to the complaint (*see*, Labor Law § 220[7]). Unlike the CSL and the NYCCBL, section 220 does not expressly prohibit unilateral changes and set forth a procedure for redress. However, the law authorizes the Comptroller to adjudicate the complaints of aggrieved employee organizations. It does not by its terms proscribe the ability of the Comptroller to "make either an order, determination or other disposition . . . of [the] verified complaint." (Labor Law § 220[7]). . . .
>
> Labor Law § 220 expresses a strong preference for resolving disputes relating to covered wages and supplements through the collective bargaining process and failing efforts through that process, an adjudication before the Comptroller. For this reason, the court is loathe to intervene where petitioners have not attempted to seek redress through that process. The administrative remedy could provide the required relief and, therefore, the failure to pursue this remedy cannot be excused. Accordingly, the court grants respondents' cross motion to the extent of dismissing that branch of the petition seeking to enjoin respondents from unilaterally changing leave benefits prospectively. . . .

2009 WL 138366, at 5.

Moving to the Union's claim that the City violated NYCCBL § 12-306(a)(1) and (3) by retaliating against them for Union activity, we find that even assuming this Board has jurisdiction over this claim, the claims are also premature. Issues before this Board must be addressed in the context of an actual controversy, and not in the abstract. *Local 1157,* 1 OCB2d, at 15; *Doctor's Council*, 49 OCB 28, at 18 (BCB 1992); *State of New York (Office of Mental Health)*, 24 PERB ¶

3004, at 3005 (1991).

The Petitioner claims that the City unilaterally adopted its interpretation/costing of the Comptroller's Order as a means of punishment or retaliation for their union-related activity. The City counters by claiming that it implemented the Order properly, in order to avoid enforcement proceedings against it. Addressing these facts, the Board has found that, "[s]ince the Comptroller has not yet determined whether the City's implementation of the Order comported with the Comptroller's intent in rendering it, [the Union's § 12-306(a)(1) and (3) claim] is not ripe for decision, assuming the Union's actions constitute protected activity under our statute, and we have jurisdiction."[4] *Local 1157,* 2 OCB2d 10, at 16-17. As previously noted, "[u]ntil the Comptroller issues such a determination, we have no basis to find that adverse employment action has occurred." *Id.* The Union's claim that the City independently violated NYCCBL § 12-306(a)(1), and § 12-306(a)(2) are similarly premature. Therefore, we dismiss this portion of the claim without prejudice to re-file an improper practice with this Board, should the Union receive a determination from the

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[4] In order for a petitioner to show that an employer retaliated against an employee/public employee organization, the Board utilizes the *Salamanca-Bowman* test. 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
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> 2. the employee's union activity was a motivating factor in the employer's decision.

*Bowman*, 39 OCB 51, at 16-17; *see also DC 37*, 1 OCB2d 6, at 27 (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. *See UFA,* 1 OCB2d 10, at 20 (BCB 2008)*; Local 237, CSBA,* 71 OCB 5, at 9 (BCB 2003).

Comptroller that the City implemented his Order in a manner that was not substantially in accordance with his intent.

**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 in the matter docketed as BCB-2673-07 be, and the same hereby is, dismissed in all respects, and it is further

ORDERED, that the petitions are dismissed without prejudice for the Union to re-file an improper practice with this Board, should it receive a determination from the Comptroller that the City implemented the Order in a manner that was not substantially in accordance with his intent.

Dated: New York, New York
September 24, 2009

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

I dissent.

GABRIELLE SEMEL
MEMBER