Andreani, 2 OCB2d 40 (BCB 2009)

(IP) (Docket No. BCB-2725-08).

Summary of Decision: Petitioner claimed that the New York City Department of Environmental Protection violated NYCCBL § 12-306(a)(1), (2), and (3) by removing a communication from Petitioner's collective bargaining representative that was posted on a designated bulletin board. Petitioner further alleged that DEP attempted to dominate the administration of the collective bargaining representative, and retaliated against Petitioner due to his protected actions. The City claimed that the posting on the bulletin board was removed because it was threatening, that DEP never dominated the administration of any Union representative, and that any adverse employment actions taken against Petitioner were not motivated by anti-union animus, but were, instead, motivated by legitimate business reasons. After an evidentiary hearing, the Board found Petitioner failed to establish that DEP violated the NYCCBL. Accordingly, the petition was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

JOSEPH ANDREANI,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On October 6, 2008, Sergeant Joseph Andreani ("Petitioner"), who is a member of and delegate for the Law Enforcement Employees Benevolent Association ("LEEBA" or "Union"), filed a verified improper practice petition against the City of New York ("City") and the New York City

Department of Environmental Protection ("DEP" or "Department") alleging that DEP violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (2), and (3).[1] Petitioner asserts that DEP's removal of the communications from LEEBA to its constituents that were posted on a bulletin board customarily used by the Union interfered with and restrained the exercise of statutory rights of employees in the title Environmental Police Officer ("EPO") and further constituted an act of domination over LEEBA by DEP. Petitioner also alleges that DEP retaliated against him because of his numerous protected acts in which he engaged for the betterment of the EPOs in his precinct. The City argues that Petitioner's claim regarding interference lacks merit because the removed posting contained inflammatory language. The City further argues that Petitioner failed to prove facts sufficient to make out a *prima facie* case of domination and that the allegations of retaliation do not have merit.

On April 22, 2009, we issued an interim decision in this matter, *Andreani*, 2 OCB 2d 15 (BCB 2009) ,in which we dismissed some of Petitioner's claims on the grounds that they were untimely filed. We further held that several remaining claims were timely and ordered an evidentiary hearing to resolve disputed issues of material facts regarding the timely claims. Those claims arose from Andreani, 2 OCB 2d 15 (BCB 2009) : i) alleged statements regarding compensation Petitioner receives from the Union; ii) DEP's denial of Petitioner's financial hardship application related to his medical insurance coverage; iii) Captain Arnold's alleged reduction of Petitioner's supervisory duties; iv) the removal of the Union posting on the bulletin board in the 7th Precinct, known as Hillview Precinct; and v) the time and leave dispute between DEP and Petitioner which occurred on

[1] Petitioner initially filed this petition *pro se*, but he had retained counsel by the time the hearing commenced.

October 17, 2008. After holding a hearing, we find that Petitioner failed to establish that DEP violated the NYCCBL. Accordingly, the petition is denied.

BACKGROUND

After an evidentiary hearing, the Trial Examiner found that the totality of the record established the following relevant facts.[2]

DEP is responsible for delivering drinking water to the residents of the City from sources within the Water Supply System. DEP maintains and operates 13,000 miles of water mains and sewers, 14 waste-water treatment plants, and enforces noise, air, and hazardous material codes to ensure the safety of the drinking water. DEP employs EPOs, who are charged with protecting the Water Supply System and its related infrastructure, such as the treatment plants and water mains, including those located outside of the City.

DEP divides its jurisdiction into geographic regions denominated "precincts," and allocates its staff by precinct. The 7th Precinct station is located at 100 Central Park Avenue North, Yonkers, New York, and is also referred to as the Hillview Precinct ("Hillview"). Relevant to this discussion

[2] Additional background information is provided in our prior decision in this matter, *Andreani*, 2 OCB2d 15 (BCB 2009). Also, we note that during the course of the hearing, evidence was presented concerning several alleged causes of action that we dismissed as untimely in our prior decision, but which provide background information; Petitioner also presented evidence pertaining to allegations not raised in the improper practice petition. For example, the record includes information concerning payroll discrepancies, an audit of Petitioner's time and leave balance, and Petitioner's worker compensation claim. In addition, evidence was presented concerning a reduction in the amount of overtime scheduled within the agency and the ability for EPOs to swap shifts as well as locker room inspections. While we do not rule on the merits of these untimely claims, as discussed below, we consider them as background information regarding Petitioner's timely allegations.

are two additional precincts: the Eastview Precinct ("Eastview") and the Ashokan Precinct ("Ashokan").

Petitioner has been stationed at the 7th Precinct since May 2002 and has been a representative for LEEBA at that location since the Union began representing EPOs. According to Petitioner, as a Union representative, he represented EPOs assigned to Hillview concerning issues related to, *inter alia*, workplace safety and privacy; wage, hour, overtime and benefit disputes; acted as a representative at hearings before the Office of Administrative Trials and Hearings ("OATH") and maintained the "union bulletin board" located at Hillview. (Rep. ¶ 3).

Alleged Statements Regarding Compensation Petitioner Receives From the Union

Petitioner testified that other Union members began alleging he was improperly receiving funds from the Union after certain EPOs became aware that Petitioner initiated a complaint with DEP's Office of Equal Employment Opportunity ("DEP EEO") regarding the fact that certain EPOs who were part of the Emergency Service Unit ("ESU") had gone on a cruise vacation with Inspector Frank Milazzo, DEP's Acting Chief of Operations. During the course of a Union meeting at Stewart Airport in June 2008, a Union member called the Petitioner a thief and falsely accused him of receiving a $40,000 salary from the Union. The Union member making the allegations had gone on the cruise ship vacation with Inspector Milazzo. Concerning this matter, Petitioner stated that he received complaints from EPOs in his unit that Inspector Milazzo was vacationing with ESU team members and that such fraternizing resulted in favoritism towards certain employees, particularly in the promotion process. He contacted the DEP EEO office, and he was told by a DEP EEO representative that his report would remain confidential and anonymous. The same day that Petitioner contacted DEP EEO, Petitioner attended a Union meeting at which some of the ESU

members were "very agitated" and stated that they were being investigated because of Petitioner's complaint to DEP EEO regarding the cruise. (Tr. 466). Some of these ESU members also accused Petitioner of stealing funds and making $48,000 from LEEBA. Petitioner testified that although DEP EEO told him the matter would remain confidential, someone told him that Inspector Milazzo had contacted the ESU members during a training and told them they were being investigated as a result of Petitioner's discussion with DEP EEO.

Petitioner testified that this allegation was being repeated by Union members throughout the commands. Lieutenant Reda testified that he heard "people in general talking about it in the commands," but he did not hear it from Inspector Milazzo, Captain Arnold, or from anyone other than a member of the LEEBA.[3] (Tr. 241). Lieutenant Reda also "found it insulting that someone would make an accusation of calling [Petitioner] a thief." (Tr. 236).

On July 23, 2008, Petitioner sent a memorandum to two EPO Sergeants and one EPO Lieutenant at Hillview, concerning inquiries he had received regarding the amount of compensation he received from LEEBA due to his service as an Union representative. In this memorandum, Petitioner stated that these three subordinate EPOs accused Petitioner of "collecting a $40,000 [a] year salary" from LEEBA. (Rep., Ex. F). Petitioner further wrote that, due to these accusations, he has "been asked by various members in your team in the past about this issue" and that he "[took] these defamatory statements as a personal attack, attempting to discredit [his] name and reputation." (*Id*.). Petitioner concluded this memorandum by stating that he was "affording the opportunity to the Supervisors of the individuals in question to address and correct the situation." (*Id*.). Inspector

[3] Petitioner testified that in June 2008, he began receiving $1,000 per month from the union to cover expenses, but prior to that time, he did not receive funds from the Union.

Milazzo testified that one of the recipients of this letter asked him how to respond to Petitioner's message, he "directed them to seek advice of agency counsel before responding." (Tr. 362-63).

Thereafter, on October 11, 2008, Petitioner, having yet to receive a response regarding the above memorandum, forwarded the memorandum in a message to Chief Mark Benedetto, in which he stated:

> On July 23, 2008 I had sent an e-mail addressing an issue with [ESU] members and their actions. I have received no responses from the individuals addressed in the original email below. Since then, I have been alerted by other members of our force that these actions have persisted. On July 30, 2008 at approximately 1230 hrs, I had an opportunity to speak with Captain Arnold about this on-going problem, asking for his assistance.
>
> To date, I have not heard any further from Captain Arnold regarding this matter. I am now requesting assistance from you in looking into this and other matters that have been brought to my attention. . .

(Pet., Ex. F).

Chief Benedetto responded on October, 17, 2008, stating:

> Accusations and misinformation bring frustration and cause disruption. The passing of rumors and innuendo are equally damaging. This matter is solely related to union matters and should be addressed in that forum. All members should be positive and respectful in their communications within the Department as well as with the public at all times.

(Pet., Ex. F). That day, the Petitioner responded to Chief Benedetto, stating that the matter "originated and continued during 'Company Time' (on-duty) and thus has been and continues to be a [D]epartment matter." (Pet., Ex. F).

Petitioner testified that he was not satisfied with Chief Benedetto's response, stating:

> I think any supervisor would have called in the three officers, which were addressed in that memo, and asked them what happened and

> what went on or called me up and asked me what happened and went on. That would be proper procedure, and then addressed the issue.

(Tr. 531).

Petitioner stated that the matter was not Union business as "allegations were made while these officers were on patrol on duty, not in a Union meeting. The Union meeting issue is a separate issue, which was a totally separate day." (Tr. 531).

The denial of Petitioner's financial hardship application related to his medical insurance coverage

DEP has certain procedures by which its employees may change health insurance plans. Every year, a one-month "transfer period" occurs during which employees may change their health insurance plans. These applications were formerly handled by DEP, but are now processed using the New York City Automated Personnel System ("NYCAPS"). An employee desiring to change insurance coverage must notify the DEP personnel office, at which time that office will input the information into the NYCAPS system, and the change should begin effective the first pay period of the following January. Generally, employees may not make changes to their insurance coverage outside of the transfer period. Arlene Siegel-Fishman, an administrator in DEP's Health Benefits Unit, testified that only in the case of a "qualifying event," may an employee change insurance outside of the transfer period. A qualifying event includes such circumstances as an employee moving to a geographic area where the insurance plan is not accepted, the insurance plan ceasing to operate in the employee's area, or an instance where an employee had insurance from another source, such as a spouse's insurance, and such insurance is no longer available to the employee.

DEP employees have been granted "hardship exemptions" that allow them to change insurance outside of the transfer period. Regarding the method by which determinations on hardship exemption applications are made. Siegel-Fishman stated that DEP does not utilize a "formal

process," but instead provided "very few" such exemptions on an *ad hoc* basis for employees requesting help. (Tr. 709). Currently, NYCAPS is used to oversee health insurance for the City. Therefore, an official request for an exemption must be made through NYCAPS. Siegel-Fishman also testified that when a request is made for a hardship exemption, the decision whether to grant or deny the request is not made by DEP. In September 2008, Petitioner contacted DEP's Health Benefits Unit to change his insurance coverage because the cost of his coverage was raised by the carrier by approximately $100 per bi-weekly pay period and that raise in premiums caused him a "financial hardship." (Rep. ¶ 23). Petitioner asserts that he was advised by an administrator within this unit to file a "financial hardship letter" requesting a change of coverage. On September 19, 2008, Petitioner submitted a letter requesting to change medical plans in order to alleviate a "financial burden" due to the birth of a child and the resulting change in the number of family dependents. (Rep., Ex. H). In his financial hardship letter, he stated that in November 2007, he changed his medical coverage to Empire plan, but due to various expenses including his wife's extended leave from her job, the increased cost of his insurance policy, and increasing cost of tolls and gasoline, he needed to reduce expenses. Therefore, he requested the opportunity to change his medical coverage to GHI-CBP/Empire Blue Cross Blue Shield-Basic Plan.

Siegel-Fishman testified that her office received Petitioner's request, scanned his letter, attached it to an electronic mail and then sent it to NYCAPS for consideration on September 24, 2008. Later that day, her office received a electronic mail response from NYCAPS in which it was stated that the matter was being closed and his request would not be granted because it was determined that Petitioner's request was not based upon a "qualifying event." Specifically, the rationale was stated as follows: "Employee needs to wait for the transfer period as per policy from

the Office of Labor Relations. Employee does not have qualifying event to change coverage at this time." (Tr. 714). Later that day, Siegel-Fishman informed Petitioner that his request was "denied because there [was] no qualifying event at this time to change [Petitioner's] insurance coverage," but suggested that Petitioner could change medical plans "during the transfer period which [would] probably be in November [2008]." (Rep., Ex. H). Concerning the processing of Petitioner's request, Siegel-Fishman testified:

> This [request] is the first one we had on the NYCAPS system. So we submitted it with the request, which we call a ticket, to make a change. We submitted it to NYCAPS for their consideration as the oversight of the health insurance. . . . This is not a formal procedure. This is something we did on our own to try to help Sergeant Andreani. It is not something that is normally done. We went out of our way to try to help him.

(Tr. 709, 713).

Petitioner put in an application to change his insurance during the open enrollment period. Initially, his application to change insurance was not properly implemented in the NYCAPS system, and in January 2009, he was again billed for the Empire insurance, with the payment deducted from his paycheck for at least two pay periods. Siegel-Fishman testified that an issue arose regarding the inputting of the change to NYCAPS; she stated:

> [W]e assume that [the change] goes in. Usually there are confirmation letters, but this was our first time on NYCAPS. We just went on NYCAPS last February. This was our first transfer period and they had made changes to the transfer period. We had so many that we didn't get around to sending all the confirmations out. . . . But he was not alone. There were a few we had to take care of.

(Tr. 718-19). After Petitioner alerted Siegel-Fishman to this problem, her office saw that the information had not been inputted correctly. Siegel-Fishman's office contacted NYCAPS and asked them to make the change that was requested during the transfer period. Petitioner testified that when

he spoke with Siegel-Fishman regarding the issue, she apologized and told him that it was an error made by her office. He also stated that the change was inputted within a day of that conversation.

Alleged Reduction of Petitioner's Supervisory Duties

For about the past two years, Petitioner was responsible for scheduling overtime at Hillview; overtime charts are compiled, then reviewed by precinct lieutenants, and thereafter forwarded to Captain Arnold. Captain Arnold is a division commander responsible for managing both Eastview and Hillview. Petitioner alleged that, in September 2008, Captain Arnold reduced Petitioner's "supervisory job functions" and overtime assignments, opting rather to use sergeants from another precinct to perform such functions and assignments. (Rep. ¶ 24). According to Captain Arnold, when Petitioner was unavailable to complete the overtime charts, such assignments were performed by other officers. At certain points, Arnold forwarded documents concerning Hillview overtime to Sergeant Francis Lynch who was stationed at Eastview.

Sergeant Lynch testified that he previously worked at Hillview, but was transferred to Eastview in the middle of 2008. While working at each precinct, he has been responsible for scheduling overtime. When he was first transferred to Eastview, he only handled the scheduling of overtime at Eastview, but shortly thereafter, Captain Arnold asked him to look over the overtime for Hillview as well. Sergeant Lynch also noted that the request to review the work came directly from Captain Arnold and was sent directly back to Captain Arnold, which was not in accordance with the customary chain of command, whereby he sent his overtime schedules to his lieutenant who then sent them on to Captain Arnold. He stated that the overtime roster would be sent to him to be completed and he had no way to know who had initially compiled any particular roster.

Lieutenant Reda, Petitioner's direct supervisor at Hillview, testified about the overtime

scheduling as follows:

> [E]very week Sergeant Andreani or actually myself had to submit this report to the captain. Sergeant Andreani was doing that, submitting it to Captain Arnold, and we started hearing accusations that a sergeant from another command was actually being given that task.

(Tr. 192).

On October, 21, 2008, Petitioner wrote the following message to Captain Arnold:

> It has come to my attention that for the last 4-5 weeks the overtime postings for [Hillview] [have] been reviewed, reworked and sent back to me for posting by other sergeants from another precinct. [Hillview] Overtime has been one of my supervisory duties at [Hillview] for the past three years. During that time I have never been approached with there being any problems with my performance of this duty.
>
> Can you please advise if in fact, you have passed along one of my [Hillview] Sergeant Assignments to a sergeant at [Eastview]?

(Pet., Ex. I).

Captain Arnold replied to this message on October 21, 2008, stating:

> You have been given false information. Last Friday you were representing MOS in a Disciplinary and [OATH] Hearing. I require two weeks of schedules and projected overtime which is required to be submitted to me on Thursday, so I can review and amend if needed. (I have had to make very few changes and I appreciate your abilities in this area). I am required to send same to Inspector Milazzo by Friday morning. During Friday 10/17/08 I spoke with Lt. Reda regarding the two week schedule and overtime needed from [Hillview]. He stated that I was not going to receive anything because you were in [OATH] and I would receive it possibly on Saturday. Therefore I did the two week overtime projection myself. A sergeant and lieutenant from Eastview properly assisted with scanning and faxing the material to the Inspector and to your Command. This scenario has occurred on several occasions. And I can understand your question below, having been given totally incorrect and fabricated information.
>
> Apparently the necessary info in this required process was never

> provided to you from your immediate superior. So I will provide you the process.
>
> Every Thursday I am required to provide Insp. Milazzo the next two weeks of schedules with the projected overtime for each of the two weeks.
>
> The schedules sent are the actual physical schedules with write in corrections such as comp, vacation and training days noted via pen.
>
> You will examine the two weeks and then chart the necessary overtime on a separate paper.
>
> You should then scan to yourself and email to me. . .

(Pet., Ex. I).

Captain Arnold further testified that while Petitioner was out on leave, another officer, Sergeant Lambert, was assigned to do the overtime scheduling for Hillview. He stated he would also have sergeants at Eastview review the work, in addition to himself, in order "to make sure [he] had a zero fail rate when it came to . . . [u]nnecessary overtime." (Tr. 582).

No supervisors, including Captain Arnold, had reported issues with Petitioner's job performance. Captain Arnold stated that he has reviewed Petitioner's performance evaluations in which he has consistently been rated as "very good." (Tr. 106). Captain Arnold stated that he has not had any problems with Petitioner's job performance over the past three years, and Petitioner had not been disciplined. Lieutenant Reda, Petitioner's direct supervisor, stated that he has completed Petitioner's yearly performance review for the past several years and has given him "an overall rating of very good;" he has never found fault with any of Petitioner's work and has never disciplined him in any way. (Tr. 190-91).

Removal of the Union posting on the bulletin board at Hillview

In 2008, the Union and numerous Union members, in their individual capacity, filed a complaint in the United States District Court for the Southern District of New York ("Federal Lawsuit"), alleging that the City, DEP, and Local 300 of the Service Employees International Union violated various federal and state employment discrimination and environmental statutes as well as the United States and New York State Constitutions. The plaintiffs, including the Union and the numerous participating were represented by the Union's attorney, Richard J. Merritt, Esq., and the Union members signed individual retainer agreements.

During the summer of 2008, a copy of the complaint filed in that action was posted on bulletin boards at various precincts. Several EPOs at Ashokan saw their names listed as plaintiffs in this action and, thereafter, wrote letters to the Union attorney, requesting that their names be removed from the Federal Lawsuit. In addition, the EPOs sent the letters to the attorney representing the City.

On September 18, 2008, Inspector Milazzo was present at Eastview conducting an inspection of the facility and saw a posting on a bulletin board in the kitchen area of this precinct.[4] The posting consisted of the letters from the EPOs discussed above and were preceded by an unsigned cover letter. The cover letter reads as follows:

> As many of you already know, some of our fellow union members have attempted to sabotage our Federal lawsuit. Several attempts to

[4] The City asserts that "the bulletin board [was] customarily used by [DEP] for notices to employees [and was] also made available to all employees within the [Hillview], as well as [u]nions representing employees of [DEP]." (Ans. ¶ 13). In response, Petitioner claims that the vast majority of postings on that bulletin board were Union related and consisted of "e-mail communications, newspaper articles, letters and memos which were not on [Union] stationary." (Rep. ¶ 4). Furthermore, Inspector Milazzo, admitted, in an affidavit attached to the City's answer, that "this bulletin board is customarily used by the union representing [EPOs]." (Ans., Ex. B).

> be diplomatic with these members have resulted in them stabbing the rest of us and our families in the back. The days of being polite and respectful with these members are now over. Here is the list of the members that have requested their names be taken off the suit. In addition to the names, the letters they sent to the union and the NYC Law Department are attached.
>
> The word "sabotage" is being used to describe the few members that sent their letters to the NYC Law Department. If they only wanted off of the suit, then they would've only needed to contact the union. Instead, they sent their letters to the NYC Law Department in an attempt (intentionally or not) to give NYC a defensive strategy to have the case dismissed. Their actions could possibly destroy the lawsuit for the rest of the membership.
>
> The names are being posted so that every member of the [organization] has the opportunity to know who is trying to sabotage our families futures. They will also now have the ability to personally thank those members.
>
> If more names come to our attention, we will add them to this list.

(Ans., Ex. C).

After reviewing the posting, which he deemed threatening to the officers that authored the letters, Inspector Milazzo consulted with DEP's Director of Labor Relations, Denise Dyce, and DEP's Equal Employment Opportunity Officer, both of whom "confirmed that the posting was inappropriate by the threatening nature of the message." (Ans., Ex. B ¶ 6). Later that day, Inspector Milazzo contacted Captain Arnold and several other commanding officers in a message entitled "FW: PBA Posting Eastview Kitchen Area," and stated the following:

> Captain Arnold,
>
> Please look into when this was posted and by who.
>
> All Division Commanders,
>
> Please ensure that this inappropriate material is not posted at any

> other precincts and reply by email once you have confirmed this. If you find this or any other inappropriate material posted ensure that it is removed immediately.

(Union Ex. 8 at 4).

Captain Arnold stated that Inspector Milazzo asked him to remove the posting at Eastview. Captain Arnold testified that Inspector Milazzo instructed him to see whether similar fliers were posted at Hillview. Captain Arnold told Inspector Milazzo that he observed the flier at Hillview and when he told him, Inspector Milazzo told him to remove it. Captain Arnold sent an electronic mail to Inspector Milazzo on September 25, 2008 in which he stated:

> [O]n 09/24/08 at approximately 1600 Hrs this writer inspected the Hillview Pct. Upon checking the Hillview Pct pin board postings, I discovered 5 of the individual letters that had been written by the named Officers listed on the [] Posting. No other posting was attached. I will need to interview the Hillview supervisor staff regarding this posting discovered on the Hillview Precinct pin board.

(Union Ex. 8). The City conceded that the unsigned cover letter described above was not attached to the posting at Hillview.[5] Thereafter, Captain Arnold asked the supervisory staff at various precincts, including Hillview, about the postings. At Hillview, he spoke with various officers, including Lieutenant Reda and the Petitioner. Captain Arnold wrote an electronic mail message to Inspector Milazzo on September 29, 2008, in which he documented the statements he received from

---

[5] Captain Arnold first testified that the contents of the postings at Eastview and Hillview were exactly the same. However, after being recalled, he later testified that he could not recall whether the cover letter was on the bulletin board at Hillview and that his earlier statement that the postings at Eastview and Hillview were exactly the same was not correct. He stated that he was changing his testimony because he "[could not] be exactly sure what was there from memory." (Tr. 591). Further, although he initially testified that he did not believe that Inspector Milazzo asked him to continue an investigation regarding the person responsible for posting the letters, upon being recalled to testify, he responded affirmatively when asked whether he "did make an inquiry with regard to who posted [the document]." (Tr. 598).

the officers he spoke with in response to the following questions:

> Question A: How long has this . . . Posting been on the pin board (Note: The posting was then shown to them)
>
> Question B: Do you know who posted it?

(Union Ex. 8 at 1). Lieutenant Reda testified as follows concerning his conversation with Captain Arnold:

> I was called into Captain Arnold's office that he occupied at the precinct and he had some paperwork on his desk and he had asked me if I had any knowledge as the precinct commander as to who was the responsible party that placed them on the bulletin board. . . . I don't know how many in total but there were a few letters that I guess members had written that were posted and he had asked who put them up there and why they were up there. . . . Honestly, I don't remember if he showed them to me or not, but I asked him what they were referring to and he mentioned about something being displayed in Eastview that was found offensive, and when I asked him to elaborate, he told me it was letters that people had written requesting to be taken off the lawsuit.

(Tr. 179-80). Lieutenant Reda further testified:

> [Captain Arnold] had [the letters] in his possession on the desk. When he called me in the office they were already removed off the board. When I had asked him what the issue was, he said he was investigating something. At that time I had said that well, being I'm the precinct commander, I would like to know who you're investigating in my command. And he had at that time explained that I guess someone had put something in Eastview precinct which Inspector Milazzo had found to have created a hostile environment. And when I had asked Captain Arnold what exactly he removed from the board, I remember him saying something of the nature of letters of people wishing to remove themselves off the lawsuit. And I didn't see why that would be an issue and how that would create a hostile environment but I don't remember reading the actual [letters].

(Tr. 188).

Regarding the removal of the postings from the bulletin boards, Inspector Milazzo testified

as follows:

> I instructed Captain Arnold to inspect and Captain Sass to inspect all the bulletin boards and to ensure that the information that was found at the Eastview precinct that was determined to be offensive by the EEO office and the Office of Labor Relations as inappropriate and if it was found anywhere else to remove it and to see if we knew who put it up and when.

(Tr. 337-38). Inspector Milazzo further stated that he did not recall whether he found offensive any of the letters posted on the bulletin board attached beneath the offending cover letter; he stated that it was "the tone of the cover letter [on the Eastview posting] is what was the concern of the agency." (Tr. 338).

Petitioner testified that prior to the removal of the letters in question, there "had never [been] any issues whatsoever regarding anything on the union bulletin board or any union board matter." (Tr. 498). He further stated that there were no posted instructions or verbal orders creating guidelines as to what was permissible material to be posted on the bulletin board.

The time and leave dispute between DEP and Petitioner which occurred on October 17, 2008

On October 17, 2008, Petitioner, "in order to furnish [two EPOs] with fair Union representation during a disciplinary action," attended a Step I conference and then a disciplinary hearing located at OATH. (Rep., Ex. J). Reda authorized Petitioner to participate in these disciplinary hearings. However, Inspector Milazzo called Lieutenant Reda from the OATH hearing and informed him that Petitioner "was to return to the precinct or use his own leave time being that [Petitioner] did not receive prior authorization from [Director] Dyce." Confused by "this new procedure [concerning] requests for union representation," Lieutenant Reda wrote an email to both Inspector Milazzo and Director Dyce inquiring about the procedures Union representatives need to

follow to get valid, authorized leave to attend Union related business. (*Id*.).

The next day, Director Dyce responded stating that DEP is not utilizing new procedures. She further wrote that:

> Some releases are excused which means the employee is paid as if s/he were at work. Those situations usually involve [labor-management] meetings. . . . Other releases are not paid, and the employee has to submit a leave slip and use his own time. All release [requests] should be made in writing by the union, on union letterhead, [and] submitted to my office. My office will then contact the division regarding the release, and where feasible, the release will be granted.

(*Id*.). Lieutenant Reda's response, on October 21, 2008, stated that these release procedures were "new" because such procedures did not exist when Service Employees International Union, Local 300, represented EPOs.[6] (*Id*.).

That same day, Petitioner wrote an email to Director Dyce regarding this event and stated that he "had been only several feet away from Inspector Milazzo throughout the afternoon, and at no time did he relay to [Petitioner] that there was a problem concerning [Petitioner's] representing two [EPOs] in their disciplinary hearings." (*Id*.). He further stated that Inspector Milazzo "continue[d] to retaliate against [Petitioner], members of [the] Union, and LEEBA in its entirety," and that, since 2002 when he became a delegate, he has "never seen these so called established procedures." (*Id*.).

On October 22, 2008, Director Dyce responded to Petitioner's email and stated that, since he was only authorized to attend the Step I conference and not the disciplinary hearing at OATH, Petitioner was on "excused" leave for only part of the day. As such, DEP's timekeeper at Hillview used Petitioner's compensatory time in order to make-up for the hours that Petitioner was not at his

---

[6] EPOs were represented by SEIU Local 300 prior to October 2005 when LEEBA was certified as the bargaining representative for EPOs. *See LEEBA*, 76 OCB 5 (BOC 2005).

assigned post. (*Id*.). Director Dyce concluded by stating that, "to avoid conflicts of this nature, [Petitioner should] have the union submit on letterhead (or via email) to [Director Dyce's] office, in advance, a request to have [Petitioner] released to attend these sorts of activities." (*Id*.). In Petitioner's responses to this email, he highlighted the fact that he was in a DEP-marked vehicle with one of the EPOs facing disciplinary charges. Thus, returning to the Hillview immediately after the Step I conference would have been imprudent because he either would have left an EPO stranded at OATH, or Petitioner would have left the DEP-marked vehicle with that EPO and been required to take public transportation back to Hillview.

Also on October 22, 2008, Director Dyce responded to this email by stating "after reviewing your email, I have further reviewed the situation and find that there is merit to your argument about your inability to return." (*Id*.). According to Director Dyce, after speaking with Inspector Milazzo, the compensatory time usage was restored to Petitioner's balance, and his pay for that day would be as if he worked a normal shift. Within one week, the leave deduction was restored.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that DEP violated NYCCBL § 12-306(a)(1), (2), and (3).[7] Because

[7] NYCCBL § 12-306(a)(1) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (3) to discriminate against any employee for the purpose of

Petitioner engaged in protected union activity, he was docked pay and leave time, had his overtime assignments reduced, and had certain supervisory duties taken away.[8] Management would give certain tasks of completing or reviewing Petitioner's work to other employees, thereby "[s]kipping a link in the chain of command [which] is a serious event in police work." (Pet. Br. at 15). Based upon the temporal proximity between Petitioner's protected union activity and the adverse

---

> encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .
>
> NYCCBL § 12-305 provides, in pertinent part:
>
> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

[8] Although we excluded specific claims as untimely in our prior decision in this matter, Petitioner presented substantial evidence and argument on such claims. For example, there are several time and leave disputes, including improperly computing his vacation pay, improperly removing wages from his paycheck, and failing to give Petitioner an accounting of the money removed from his paycheck. At the hearing, a DEP representative testified that an agency has a right to take 25% of an employee's paycheck to recoup an overpayment, however, at certain times, specifically during October 2006, DEP took far in excess of that amount out of Petitioner's paycheck. A DEP representative admitted that DEP wrongly calculated Petitioner's vacation balances and on two separate occasions, paid Petitioner for an additional overtime worth one week's pay. Petitioner contends that this was a "deliberate creation of a hardship for Petitioner" and that "[i]magination must be stretched to unlimited bounds to believe the employer's mistake was inadvertently made on two separate occasions. Respondent offered no credible excuse for the same mistake, but readily admitted it was the same mistake made twice." (Pet. Br. at 8).

In addition to these untimely claims, although it was not alleged in the improper practice petition and was not listed in our prior decision among the issues remaining for determination, Petitioner now claims he was not paid his full workers' compensation award. During the course of the hearing, two of the City's witnesses contradicted each other, with each stating that the other was responsible for handling workers' compensation and both stated that they were not the proper party to answer questions regarding workers' compensation. This matter is "deeper than the payment of the [workers' compensation] award, it deals with the motive behind the employer's deprivation of compensation to a union shop steward," and the "Board is invited to conclude that the same large mistake in compensation made on two separate occasions is not a coincidence. Intent and malice are clearly portrayed." (Pet. Br. at 12, 22).

employment actions, the motivation for such discriminatory treatment can be reasonably inferred to be based upon anti-union animus. In general terms, "[r]estrictions on the use of the Union Bulletin Board combined with spot Inspections of the locker rooms was a notice given to rank-and-file EPOs of punishment for union activity." (Pet. Br. at 16). Petitioner also alleges that improper statements were made by EPOs about him receiving compensation from LEEBA and that these statements were induced by management.

Petitioner asserts that DEP retaliated against him when his request to change his medical insurance because of financial hardship was denied. DEP also unilaterally reduced Petitioner's supervisory duties and improperly had another officer review his work product. Captain Arnold violated the chain of command, "a serious event in police work," when he ordered an officer working at Eastview, Sergeant Lynch, to review Petitioner's work, bypass the lieutenant at Eastview, and report directly to Captain Arnold. (Pet. Br. at 15). Petitioner also now claims that his authority was also undermined by Inspector Milazzo in May 2008, when Inspector Milazzo conducted an unannounced, unscheduled, and unescorted inspection of the locker rooms and only informed Petitioner that he was performing this inspection after it was completed, which "displays a direct attack on the authority of [Petitioner, who was acting as] the Hillview duty officer." (Pet. Br. at 15). Inspector Milazzo further undermined the Union when he removed disciplinary responsibility from union members, specifically removing the authority of sergeants and lieutenants who had traditionally been responsible for managing and disciplining EPOs. Indeed, "[d]estroying the command structure was intended to send a message to EPOs who supported LEEBA." (Pet. Br. at 17).

According to Petitioner, Inspector Milazzo committed an improper practice when he

attempted to refuse Petitioner's release to act as a union representative at a grievance hearing and attempted to institute a new procedure for clearing for people for union activity only where it concerned Petitioner. Further, DEP's attempt to "[r]efus[e] to release Petitioner, who was a union delegate, for union activity combined with unpaid time to conduct representation functions, amounted to union busting activity." (Pet. Br. at 16). Petitioner also alleges for the first time in his brief that DEP refused to compensate Petitioner for his union activities even though "Executive Order 75, referenced in the collective bargaining agreement, applies to compensation for Union activity. . . . The Order established a right to receive compensation for representational work." (Pet. Br. at 23).

In support of his retaliation claims, Petitioner points to several instances of Union activity including his report to DEP management regarding Inspector Milazzo's vacation with ESU members and his submission of an EEO complaint alleging discrimination against black and Hispanic officers. Petitioner also points to DEP's decision to cease permitting flexible scheduling and duty tour swaps as retaliatory to the Union at large as "DEP management was clearly punishing the union membership and trampling morale because a union shop steward [Petitioner] questioned management's motive behind scheduling a pleasure cruise with [half of] the ESU . . . and displaying favoritism in the promotion process." (Pet. Br. at 5-6).

Further, DEP committed an improper practice when it removed five letters posted on a bulletin board at Hillview. These letters were written by union members requesting to be removed from the Federal Lawsuit brought against DEP, and posting these letters on the bulletin board constituted Union communication with its membership. DEP violated NYCCBL § 12-306(a)(1) by interfering with the statutory rights of LEEBA members when Captain Arnold, upon direction from

Inspector Milazzo, removed the posting that appeared on the Hillview Union bulletin board. This action also constituted a "[b]latant, in your face, defiance of First Amendment rights." (Pet. Br. at 18). DEP's action prevented the Union from keeping its constituents informed about the ongoing Federal Lawsuit that effected all LEEBA members. Interruption of the distribution of Union materials constitutes a violation of the NYCCBL; and Inspector Milazzo, by his own admission, stated that this bulletin board was customarily used to post Union communications. Prior to Captain Arnold removing the letters from the bulletin board, Lieutenant Reda testified, there had been no instruction regarding the use of the bulletin board. Further, it should be noted that while Inspector Milazzo testified that he had ordered an investigation to determine who posted the letters, Captain Arnold initially stated that he had not conducted such an investigation. Further, although Captain Arnold first testified that the documents in question posted at Eastview and Hillview were exactly the same, when he was recalled to testify, he stated that he could not recall whether they were exactly the same, and he changed his testimony. He also initially stated that he did not believe Inspector Milazzo asked him to investigate who posted the document, but upon being recalled, he stated that Inspector Milazzo did ask him to look into who posted the document and that he did make such an inquiry. Captain Arnold deemed his action an "inquiry," not an "investigation."

City's Position

The City asserts that Petitioner has failed to establish that DEP violated NYCCBL § 12-306 (a)(1) and (3) with regard to all of the claims preserved in the Board's interim decision in this matter. In order to make out a claim of retaliation or discrimination, a petitioner must establish several necessary elements, particularly those articulated in the *Salamanca/Bowman* standard, and Petitioner has established none of these elements.

First, Petitioner's claim, regarding the statements made by fellow EPOs, fails because there is no evidence that the employer was involved with the offensive comments. The statements were made by fellow Union members and are a Union matter in which the employer did not participate or condone. Further, if the employer had involved itself in this Union dispute, such action could have constituted interference in violation of NYCCBL § 12-306 (a)(1). Therefore, DEP was constrained from involving itself in this matter.

Second, Petitioner's claim regarding the denial of his hardship application to change his medical insurance is likewise without merit. There is no evidence that DEP engaged in any improper acts as DEP was not responsible for the making the decision to deny his request and did not have the independent authority to do so.

Third, Petitioner's claim that Captain Arnold took supervisory duties away from him is based on conclusory allegations and fails to make out that any retaliatory actions were taken against Petitioner. The witnesses that testified on this matter, including Captain Arnold, Sergeant Lynch, and Lieutenant Reda, all stated that Captain Arnold directed that Petitioner's work be reviewed. Pursuant to NYCCBL § 12-307(b), an employer has the absolute right to review the work of its employees. Captain Arnold stated that Petitioner's scheduling duties were assisted because he had gone out on leave, and Petitioner has shown no basis to infer another improper motive for this action. Further, Petitioner did not suffer any adverse consequences as a result of the review of his work.

Fourth, Petitioner's claim, regarding the removal of alleged Union documents from a bulletin board, is lacking in several regards. Petitioner affirmatively denied that he was responsible for the postings. Therefore, he may not claim retaliation in a matter that does not involve him. To the extent that a union may make out an interference claim based on an employer's removal of materials

from a bulletin board, a nexus must be established between the union and the communication; such interference must amount to "concrete, actual interference with an employee's right." (City's Br. at 23) (citing *C.A., L. 1180*, 71 OCB 28 (BCB 2003) (internal quotation marks omitted). In any case, DEP reasonably assessed that the documents posted on the bulletin board were threatening to some of its employees. Therefore, DEP's decision to remove the documents was made based upon a legitimate business reason. Further, Petitioner focuses on the fact that the posting in question, which was located at Hillview, did not contain the cover letter that Inspector Milazzo found offensive, which was posted at Eastview. However, Captain Arnold removed the posting at Hillview based on his instructions from Inspector Milazzo that he remove the related postings. Although Petitioner attacked "Captain Arnold's veracity after he gave an inaccurate answer to an incomprehensible question," upon being called again to testify, "Captain Arnold readily explained that he misunderstood the question from counsel and then gave a full description of the inquiry" that he performed. (City's Br. at 24). Captain Arnold stated that Inspector Milazzo directed him to inquire of precinct supervisors whether they had knowledge of the postings and of the party responsible for posting them.

Fifth, on the matter of Petitioner being denied compensation for the time he spent attending a disciplinary hearing on behalf of another Union member, the evidence to support such a claim is inadequate to support a retaliation claim. According to the City, "[i]n all likelihood, the misunderstanding leading up to this episode would have been avoided had Petitioner given advance notice of his leave." (City Br. at 25). Still, management's decision to take prompt corrective action and the fact that Petitioner ultimately did not suffer any adverse consequences preclude a finding of retaliation.

Finally, Petitioner also fails to make out claim of interference or domination pursuant to NYCCBL § 12-306 (a)(2) as the record is devoid of facts or circumstances that would support such a claim.

DISCUSSION

In our interim decision in this matter, we dismissed several of the claims Petitioner made in his initial filings after finding them untimely. 2 OCB2d 15, at 21-22. Specifically, we dismissed the following claims:

> DEP's alleged improper reduction of pay and annual leave balance in November 2006; DEP's alleged improper rescission of Petitioner's paid leave to attend a LEEBA meeting in December 2006; DEP's alleged improper reduction of pay and annual leave balance, as a result of a DEP audit in February 2007; Petitioner's claims of alleged discriminatory treatment arising out of the "personal vacation" in March 2008; and Petitioner's claim arising out of the alleged improper inspection in May 2008.

Id. During the course of the hearing, Petitioner presented evidence on several of these untimely claims. Also at the hearing, Petitioner alleged for the first time that DEP did not give him the full amount of his workers' compensation claim for which a decision was filed by the State of New York Workers' Compensation Board in September 2008. This matter, in addition to not being pled in Petitioner's initial filings, is likewise untimely. While we do not rule on the merits of these untimely claims, we consider them as background information regarding Petitioner's timely allegations. *Id.* However, based upon the Board's conclusions set forth below, it is not necessary to discuss whether the evidence adduced on these untimely claims establishes anti-union animus. Therefore, our analysis focuses on a resolution of the timely issues on which we ordered a hearing:

> i) the statements concerning the amount of compensation Petitioner

> receives from the Union due to his status as LEEBA representative; ii) DEP's denial of Petitioner's financial hardship application related to his medical insurance coverage; iii) Captain Arnold's reduction of Petitioner's supervisory duties and overtime assignments; iv) the removal of the Union posting on the bulletin board in the 7th Precinct; and v) the time and leave dispute between DEP and Petitioner which occurred on October 17, 2008.

2 OCB2d 15, at 22-23.

With the exception of the bulletin board matter, Petitioner's claims involve alleged retaliation or discrimination. In order to establish a *prima facie* case of such a violation under NYCCBl § 12-306(a)(3) and (1), a petitioner must demonstrate:

> 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.

DEA, 2 OCB2d 21, at 11-12 (BCB 2009) (citing *Bowman*, 39 OCB 51, at 18-19 (BCB 1987)). We have often noted that "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26; *see also CEU, Local 237,* 67 OCB 13, at 9 (BCB 2001); *CWA, Local 1180*, 43 OCB 17, at 13 (BCB 1989). However to establish motive, a petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22. Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001). If the petitioner makes 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." *DEA*, 2 OCB2d 21, at 12.

Petitioner's participation in protected activity and management's awareness of such protected

activity is clear, given his official role as a Union representative and his active engagement in that role. Next, we move to another crucial determination in such claims: whether a petitioner has alleged an adverse employment action taken by an employer. *DC 37*, 73 OCB 6 (BCB 2004); *PBA*, 73 OCB 13 (BCB 2004); *DC 37*, 79 OCB 24, at 8 (BCB 2007). However, several of Petitioner's claims do not constitute an adverse action under our prior interpretation of the NYCCBL. Regarding the comments that other Union members made that Petitioner improperly received money from the Union, Petitioner alleges that DEP violated the NYCCBL in two ways. First, although the comments were spoken by Union members, Petitioner claims they were "induced" by management, on the speculative grounds that Inspector Milazzo vacationed with these Union members and allegedly notified them that they were subject to an EEO investigation. On this point, we find the record lacks any testimony tending to suggest that DEP encouraged, counseled, ratified, condoned, or was in any other manner responsible for the statements made by Petitioner's fellow Union members., *See DEA*, 79 OCB 40, at 22-23 (BCB 2007) (factual causation of alleged improper practice an element of the burden of proof). Second, Petitioner claims that DEP did not make a sufficient effort to investigate the matter or reprimand these officers when they made such comments while performing work for DEP. We find that DEP's actions or lack thereof, as described by Petitioner, do not constitute an adverse employment action under our case law. *DC 37*, 73 OCB 6 (BCB 2004); *PBA*, 73 OCB 13 (BCB 2004).

Concerning Petitioner's claims on the denial of his hardship request to change his health insurance coverage, Petitioner does not dispute the City's explanation of a "qualifying event," which would enable an employee to change insurance outside of the normal course, and that he does not fall within such definition. Further, we need not determine whether a decision not to grant an

employee's request to change insurance plans outside the open season period is an adverse action as Petitioner has provided no evidence that his employer, DEP, had authority to authorize such a change. There is no testimony tending to suggest that the NYCAPS office had any knowledge of Petitioner's protected activity when it made its decision regarding his hardship request, let alone that it was motivated by such knowledge. Thus, there is a complete lack of proof connecting the Petitioner's protected activity with the entity responsible for the alleged adverse action. Moreover, it is undisputed that petitioner was in fact outside of the open enrollment period, and that hardship exemptions are only upon a fact specific showing, and, further, that such exemptions are very rarely granted. On this showing, we cannot conclude that probative facts tending to establish a claim of discrimination have been established.

Petitioner also alleges that Captain Arnold's decision to have other officers review Petitioner's work was retaliatory. However, Petitioner did not show that he suffered some negative consequence from the way in which Arnold reviewed his work. As Petitioner himself underscored, he has never been disciplined or received poor performance reviews. Petitioner was not legally harmed by Captain Arnold's decision to have other officers review his scheduling work, and he failed to show that any adverse employment consequence resulted from the manner in which he was supervised. Without such evidence, there is no basis for this Board to scrutinize the manner in which DEP supervised its employees and managed its work product. Therefore, we see no basis for finding that this action violated the NYCCBL.

Petitioner makes a greater showing on his claim regarding the time and leave dispute arising from his attendance at a grievance representative in October 2008. Petitioner has shown several of the elements necessary to make out a *prima facie* case of discrimination. As noted above, the record

is clear that Petitioner engaged in substantial union activity, both in general as a LEEBA representative, as well as more particularly on the day in issue, October 17, 2008. On that date, Petitioner attended a grievance meeting to represent the interests of another Union member. Inspector Milazzo was also in attendance at that meeting along with Petitioner. We find it notable that, instead of addressing Petitioner directly at the meeting regarding his leave status, during the course of that day, Inspector Milazzo called the office of Petitioner's lieutenant. Given the temporal proximity between Inspector Milazzo taking action to deprive Petitioner of leave while Petitioner was actively involved in representing a Union member at a grievance, inferring anti-union animus would be reasonable. *DC 37*, 1 OCB2d 5 (BCB 2008). Nevertheless, it is undisputed that another agent of DEP, Director Dyce, took "swift corrective action." *CWA*, *Local 1180*, 77 OCB 20, at 12 (BCB 2006). Therefore, while it appears that Inspector Milazzo may have attempted to retaliate against Petitioner for his union activity, DEP's swift action to remedy the situation averted any violation of the NYCCBL. *Id.; see also, Hoffman v. Parade Public. Inc.*, 65 A.D.3d 48, 54 (1st Dept 2009) (describing *Wahlstrom v. Metro-North Comm. RR Co*., 89 F. Supp. 2d 506).

On the matter of the bulletin board, we note that unions do not have a statutory right to utilize an employer's bulletin board for purposes of union communication. However, such a right may be conferred to a union either by contract or past practice. Here, it is undisputed that the past practice within the DEP precincts was to permit the posting of Union and employee related materials on bulletin boards at the precincts. Therefore, the Union would have a general expectation that it would be permitted to post materials to the extent that they were not inflammatory or derogatory. *See COBA,* 53 OCB 17, at 14 (BCB 1994). *Continental Pet Tech.*, 291 NLRB 42, 291 (1988) (citing *Container Corp. of America*, 244 NLRB 318, 321-322 (1979)); *United Parcel Serv.,* 327 NLRB 317

(1998) (an employer improperly interferes when it removes bulletin board it finds merely "distasteful").

At the outset, we note that Petitioner alleges violations regarding the removal of the posting at Hillview only. After examining the facts at issue here, it is clear that Inspector Milazzo, and Captain Arnold working under his directives, were acting with primary concern for the employees whose letters were posted on the Union bulletin boards, which was triggered by not just the withdrawal letters themselves but by the cover letter included at Eastview. The Union underscored the fact that the cover letter at Eastview was not posted on the Hillview bulletin board. Within the context of the facts here, the intent of posting the withdrawal letters at Hillview is unmistakable: the letters were not posted merely to give Union members updates on their lawsuit, but appears quite clearly to be intended to threaten and intimidate other employees. We find that the withdrawal letters were posted not only to inform the Union membership of the lawsuit as Petitioner asserts, but also, as the Eastview cover letter states, to characterize the actions of the employees withdrawing from the Federal Lawsuit as "trying to sabotage our families futures" and encouraging other members to "personally thank" them. Such thinly veiled invitation to coercion and intimidation is outside of the protection of the NYCCBL. *See Reynolds Elec. & Eng. Co. v. Jones, et al*., 292 NLRB 947, at 951-952 (1989); *Tenneco Auto., Inc. v. Local 660, Itl. UAW*, 2008 WL 1786082, at nn. 127-128 (NLRB Div. of Judges).

The Union underscored that the referenced language was contained on a cover letter not included at Hillview, and that the posting at Hillview was composed of withdrawal letters only. The Union argues that the absence of the cover letter at Hillview should remove from our consideration the contents of the Eastview cover letter. However, given that the documents were

contemporaneously posted at Eastview and Hillview, we cannot ignore the inflammatory language of the Eastview cover letter when making a determination regarding the Hillview posting. The clear intent of posting the withdrawal letters at Hillview was to imply a threat. *See generally City of Salamanca*, 17 PERB ¶ 4625 (1984) (motivation or intention for posting certain material may be implied from surrounding circumstances). Under the totality of the circumstances presented here, the employer did not violate the NYCCBL when it removed the postings from the various precincts in order to protect the well-being and safety of its employees.

Further, the Eastview cover letter also included a threat aimed at other employees considering withdrawal as it stated that "[i]f more names come to our attention, we will add them to the list." Not only does the NYCCBL protect against employer violations, it also prohibits a Union from acting "to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305." NYCCBL § 12-306(b)(1). In determining whether a violation of NYCCBL § 12-306(b)(1), we would apply the standard pronounced by the NLRB whereby "the appropriate test is whether the remark can reasonably be interpreted by the employee as a threat." *Consol. Bus Transit, Inc.* 350 NLRB 1064, *1066 (2007).

Finally, Petitioner also alleged that DEP violated NYCCBL § 12-306(a)(2), which prohibits an employer from acting "to dominate or interfere with the formation or administration of any public employee." We have reviewed the entire record and find no facts that may be construed as employer interference and domination of the Union.

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 Docket No. BCB-2725-08, filed by Joseph Andreani against the City of New York and the New York City Department of Environmental Protection, be, and the same hereby is, denied.

Dated: November 23, 2009
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER