

COBA, 2 OCB2d 7 (BCB 2009)

(IP) (Docket No. BCB-2493-05).

Summary of Decision: The Union alleged that the New York City Department of Corrections, in violation of NYCCBL § 12-306(a)(1) and (3), discriminated and retaliated against an union delegate by, *inter alia*, improperly proffering disciplinary charges against him and removing him from his post. The City contended that the disciplinary charges against this employee were levied because this employee acted in a disrespectful manner toward his commanding officers and failed to comply with the employer's regulations concerning an employee's proper uniform. Additionally, the City claimed that this employee was removed from his post as the head of the sanitation detail because he had been subjected to numerous other disciplinary actions. The Board found that DOC violated the NYCCBL when dealing with this union delegate. Accordingly, the Board granted the petition. (*Official decision follows.*)

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

In the Matter of the Improper Practice Petition

-between-

**CORRECTION OFFICERS
BENEVOLENT ASSOCIATION,**

Petitioner,

-and-

**THE CITY OF NEW YORK and THE NEW
YORK CITY DEPARTMENT OF CORRECTIONS,**

Respondents.

DECISION AND ORDER

On July 22, 2005, the Correction Officers' Benevolent Association ("Union" or "COBA")

filed a verified improper practice petition on behalf of Correction Officer (“CO”) William Valentin against the City of New York (“City”), the New York City Department of Corrections (“DOC”), Warden Fidel Gonzalez, Assistant Deputy Warden Vincent Caputo, and Captain Darryl Lewis.¹ The Union alleges that DOC violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(a)(1) and (3) by levying disciplinary charges against CO Valentin and by removing him from his post as head of the sanitation detail. The Union claims that these measures were taken because CO Valentin is a Union delegate, who has filed several grievances and authored numerous written complaints concerning DOC’s policies on the staffing levels, training, overtime opportunities, and safety measures.

The City maintains that DOC levied disciplinary charges against CO Valentin because he acted in a disrespectful manner toward his superior officers and failed to comply with DOC regulations concerning one’s uniform. In addition, the City claims that DOC removed CO Valentin from his post as the head of the sanitation detail because he had a long history of discipline and he often failed to complete his duties as sanitation officer. As such, the City claims that DOC had legitimate business reasons for issuing disciplinary charges against CO Valentin and for removing him from his post.

¹ In the Union’s Petition, dated July 22, 2005, Counsel for COBA lists CO Valentin as a co-Petitioner, and Warden Gonzalez, Assistant Deputy Warden Caputo, and Captain Lewis and as Respondents. Nevertheless, in the instant matter, we have amended the caption *nunc pro tunc* because, based upon the record before this Board, Counsel for COBA acted on behalf of CO Valentin and not in conjunction with CO Valentin. *See SBA*, 75 OCB 22, at 1-2 (BCB 2005) (where counsel for the union represented both the union and the employee-member, the Board treated the petition filed by the union on behalf of the employee member and not in conjunction with him). Moreover, the individual Respondents are removed from the caption because, in the context of the instant matter, they were acting as agents of DOC when allegedly committing the acts complained of herein. *See Frink*, 71 OCB 21, at 10 (BCB 2003); *see also Hassay*, 71 OCB 2, at 2 (BCB 2003).

The Board finds that DOC violated the NYCCBL when it proffered exaggerated disciplinary charges against CO Valentin for an incident in the Emergency Service Unit base involving one of his superior officers. We further find that, even though four of the disciplinary charges levied against CO Valentin arising out of an incident at a delicatessen were not motivated by anti-union animus, DOC's issuance and augmentation of the other disciplinary charges arising out of that incident violated the NYCCBL. Accordingly, the petition is granted.

BACKGROUND

The Trial Examiner held 12 days of hearing and found that the totality of the record established the relevant background facts to be as follows:

Relevant Background Information

In 1991, CO Valentin was hired as a CO by DOC, and, in 1993, was assigned to the Emergency Services Unit ("ESU").² At all times relevant to this action, Warden Fidel Gonzalez served as the warden for the Special Operations Division ("SOD"); Assistant Deputy Warden ("ADW") Vincent Caputo served as the Executive Officer of ESU; Captain Darryl Lewis served as the Security Captain of ESU; and Captain Darryl Nelson served as the Personnel and Administration Captain of ESU.³

² Throughout his tenure with DOC, CO Valentin received several awards, commendations, and certificates of appreciation and/or recognition from DOC, the New York State Commission of Corrections, and the State of New York Municipal Police Training Council dating from 1991 to 2005.

³ ESU is a tactical team that responds to emergencies that rise above the level to which any individual facility has the capability to respond, including heightened security alerts, inmate escapes and riot situations. ESU is a part of the SOD.

In 1995, CO Valentin became a duly elected Union delegate and was the “official Union representative for ESU.”⁴ (Pet. ¶ 3). As a COBA delegate, CO Valentin is responsible for advocating for the rights of his constituency and enforcing the terms of the collective bargaining agreement and does so by expressing the concerns of his constituency through memoranda, grievances, and verbal discussion with superior officers, as well as participating in monthly labor-management meetings. CO Eric Marrero testified that CO Valentin “fights for us [COBA members] when we need representation.” (Tr. 66).⁵ CO Samuel Valle characterized CO Valentin as a zealous Union advocate because “he wastes no time if there’s a member with a situation or problem.” (Tr. 167). As the ESU delegate for COBA, he often took positions contrary to DOC administration and would routinely participate in “fact-finding meetings” involving either an ADW or warden. (Tr. 218). Some specific and relevant examples of issues frequently raised by CO Valentin to his superiors include, *inter alia*, improper staffing levels, unqualified and/or improperly equipped COs required to perform certain duties, and shift reductions.

In 2002, “pursuant to [a] departmental directive awarding of job assignments within the command,” CO Valentin was officially awarded the post of ESU sanitation officer.⁶ (Tr. 244). CO Valentin testified that the sanitation post was “preferred” amongst the COs in ESU because “the position is a little more relaxed”; the tour worked on this post can be either a “7:00 to 3:00 tour” or

⁴ Since his initial election, CO Valentin has been successfully re-elected for consecutive terms.

⁵ “Tr.” refers to citations from the hearing transcript.

⁶ The ESU sanitation officer post was a “competitive type situation where anybody within the unit would have the opportunity to put in for the post,” and it was awarded based upon such criteria as “seniority, work performance, attendance, punctuality and special skills.” (Tr. 245).

a “6:00 to 2:00 tour”; and ESU sanitation officer only works during the week and does not have to work on holidays.⁷ (Tr. 246). As ESU sanitation officer, CO Valentin picked up several inmates from one of the facilities on Rikers Island, and the inmates would perform general sanitation work within the ESU compound, such as throwing out garbage, sweeping, mopping, and occasionally, snow removal. The CO assigned to the sanitation post was responsible for gathering all the cleaning equipment and supplies needed for the day, but was not required to “pick up a broom” and perform any actual cleaning activities. (Tr. 1022). Furthermore, even though CO Valentin’s shift began at 6:00 a.m., he could not pick up the inmates from the facility until the “count had cleared,” and they ate breakfast, so the sanitation detail started “roughly around 9:30 a.m.”⁸ (Tr. 607).

According to a DOC regulation applicable to all facilities and divisions, DOC prohibited “the shift reduction, or temporary closing of a specific post due to staffing needs, of positions listed as environmental health and sanitation.” (Union Ex. 42). According to CO Valentin and Captain Nelson, this regulation applied to ESU and the sanitation post therein. However, ADW Caputo stated that this regulation did not apply to ESU because it only applies to “facilities” and “divisions,” and ESU is neither, though ESU is part of SOD. (Tr. 1269-1270). Furthermore, although ADW

⁷ The City submitted a document that, according to the City, lists the hours of the sanitation post as 7:00 a.m. to 3:00 p.m. The document submitted into evidence was not “an awarding of a post form” and, on its face, appears to be a photocopied sheet from a log book with nothing other than the post name and number, the alleged tour, and the person to whom it was awarded. (Tr. 655 and City Ex. 7). Furthermore, according to CO Valentin, he never worked those hours while being assigned to the sanitation detail.

⁸ Captain Nelson testified that inmates assigned to sanitation details were “usually picked up . . . between 9:30, 10:00.” (Tr. 974). However, Captain Nelson testified that inmates “could have been picked up . . . between 6:00 a.m. and 6:30 a.m.” (Tr. 1020), even though on cross-examination, he admitted that the CO assigned to the sanitation post must first wait for the count to clear, which typically occurs around “7:30 a.m.” (Tr. 1061-1063).

Caputo denied ever being apprised of this regulation prior to the initiation of the instant matter, CO Valentin and Captain Nelson testified that they raised this topic and regulation with ADW Caputo on several occasions.

Also concerning the sanitation post at ESU, based upon the testimony of witnesses from both parties, it is clear that the vehicle allocated by DOC to transport inmates for the sanitation detail was not always operational, which would hamper, if not prevent, the sanitization of ESU base for that day. CO Valentin, on countless occasions, both verbally and in writing, apprised various superior officers, including Warden Gonzalez, ADW Caputo, Captain Nelson and Captain Lewis, that the vehicle designated for the sanitation post at ESU did not consistently function properly. Captain Nelson testified that CO Valentin voiced this particular concern “probably once or twice a week.” (Tr. 1064).

According to Captain Donald McCarthy, who briefly served as the arrival response captain at ESU, the sanitation conditions at the ESU compound were “very poor” because they weren’t “done in a timely manner.” (Tr. 819). He further testified that COs he directly supervised “complained about the condition of the [ESU] compound” to him, and he listed several COs who had complained about the unsanitary conditions in the ESU compound. (Tr. 828). On rebuttal, two of the COs named by Captain McCarthy testified that they never complained to him or any other superior officer concerning the sanitation detail, the conditions of ESU compound or CO Valentin’s failure to perform his duties. (See Tr. 1303-1304 and 1308).

CO Valentin testified that, between 2003 and 2004, superiors officers had “a harmonious relationship with staff” (Tr. 234), and he could not “recall even submitting grievances [or] memos” on behalf of his constituency during this time. (Tr. 249). However according to CO Valentin, the

atmosphere between the COs and the superior officers changed in October 2004 when ADW Caputo became the Executive Officer of ESU on Rikers Island.⁹ As Executive Officer of ESU, ADW Caputo was responsible for the overall supervision of ESU, including adequate staffing levels, distribution of overtime, proper training for COs serving within ESU, review of disciplinary charges proffered against COs within ESU, and recommending of transfers into and out of ESU. (Tr. 1255-1257). CO Valentin testified that, after ADW Caputo's appointment, he would characterize the relationship between staff and management within ESU as "poor" because CO Valentin began receiving "many complaints . . . from members" due to the perceived "violations of departmental polic[ies]" by DOC. (Tr. 251).

However, the City presented a different portrait of the atmosphere that existed between DOC and CO Valentin during the period prior to the arrival of ADW Caputo. The City submitted a number of "ordered reports" authored by CO Valentin from 2000-2004, in order to illustrate that CO Valentin was not always in agreement with the previous regime at ESU, and asserted that these "ordered reports" were a form of progressive discipline. (City Exs. 8, 9, and 10-14). According to the Union, these reports were simply explanations, and such memoranda are routinely authored by all COs. As such, these documents cannot be considered a form of discipline since CO Valentin was never subjected to a command discipline or memorandum of complaint as a result of any of these specific incidents, and none of these "ordered reports" appear in CO Valentin's personnel folder.

⁹ The Union initially contended that Warden Gonzalez's arrival in January 2005 as the warden of SOD, which oversees ESU and is one of many divisions located on Rikers Island, also contributed to the change in relationship between COBA and DOC. However, this extensive record reveals that Warden Gonzalez generally did not directly interact the COs. His involvement in the instant matter is more a result of his title of warden, rather than his active and direct participation in DOC's alleged improper actions.

For example, on February 7, 2000, CO Valentin was ordered to issue a written report explaining the parking of his own car in an unauthorized area in ESU compound. According to this document, CO Valentin left his vehicle illegally parked, despite receiving a command from a DOC captain to move the car, because he “misunderstood the order of the captain.” (City Ex. 10). On December 27, 2000, CO Valentin was ordered to author a report concerning his use of “a navy blue neoprene mouth/ear cover” while he was assigned to an outside post. (City Ex. 11). CO Valentin wrote that he utilized this mask to stay warm, and removed the mask when a DOC captain informed CO Valentin that such a mask was not part of a CO’s uniform. On December 24, 2001, CO Valentin was ordered by Captain Lewis to issue a written report with regard to the parking of his own car in an unauthorized spot. CO Valentin explained that he left his vehicle in this location because he was “off-loading Christmas presents for the officers of ESU into the lounge . . . and inadvertently left [his] car parked” in that spot. (City Ex. 13).

On January 15, 2003, Captain Lewis asked CO Valentin for an ordered report regarding the failure by the sanitation detail to wax the floor in his office. CO Valentin, in this memorandum, stated that Captain Lewis confronted CO Valentin at 12:00 p.m. on that day and asked him “to wax his floor in his office.” (City Ex. 14). CO Valentin explained to Captain Lewis that sanitation had been completed for that day, that he had two other assignments to complete, and that the assigned day to wax Captain Lewis’s floor was later in the week. CO Valentin then “assured the captain that before Friday his office would be waxed,” but Captain Lewis responded “that he wanted it done now!” (*Id.*). According to this document, CO Valentin again explained the situation to Captain Lewis, who then “appeared to be satisfied with this answer.” (*Id.*).

On January 19, 2004, CO Valentin received a memorandum from DOC informing him that

he had been instructed “on no less [sic] than two occasions . . . to ensure that the Administrative Trailer is sanitized by 8 a.m.” (City Ex. 8). In an attached memorandum from CO Valentin to DOC, he offered various explanations to why such a task had not been completed by the required time, including “vehicle has a flat and would not start,” ESU compound had excessive ice buildup, ESU compound had to be salted prior to performing of the sanitation detail, and “proper outfitting of the inmates had to occur prior to” beginning sanitation detail. (*Id.*). Later, on February 27, 2004, CO Valentin failed to begin sanitation of ESU compound prior to 8:00 a.m., and was given a “Corrective Interview Report.” (City Ex. 9). This report found that CO Valentin “is more than capable of completing the administration trailer in the prescribed time . . . [and this] written counseling in reference to this matter is only an attempt to give [CO] Valentin another opportunity to complete said task.” (*Id.*). (** 12/1)

On January 5, 2005, CO Valentin filed a written memorandum complaining about the decisions of ADW Caputo and Captain Lewis to limit overtime, understaff units within ESU, and staff certain units, such as the Rapid Response Team (“RRT”), with under-trained COs.¹⁰ According to CO Valentin, Captain Lewis, as Security Captain for ESU, was responsible for staffing certain units such as RRT, and ADW Caputo, as Executive Officer of ESU, had to approve all staffing decisions. Citing specific examples where the safety of COs was compromised due to the inadequate staffing, CO Valentin alleged in this memorandum that these actions violated DOC “Operations Orders” and “weaken[ed] the effectiveness and productivity of [ESU].” (Union Ex. 9). According

¹⁰ The Union contends, and for the most part the City admits, that most of the memoranda and grievances authored by CO Valentin that have been entered into the record in the instant matter were delivered both to Warden Gonzalez and ADW Caputo, either personally, to their respective secretaries, or through proper administrative channels.

to CO Valentin, he wrote this memorandum because he had received “many complaints from staff” concerning these issues. (Tr. 251). In support of CO Valentin’s testimony, CO Anthony Ubides testified that, on multiple occasions, ADW Caputo or Captain Lewis, reduced the number of COs on the RRT.¹¹ Captain Allen Miller, the direct supervisor in charge of the RRT, testified that, even though the RRT was supposed to operate with ten COs assigned to it, the RRT operated at below that staffing level “on at least two days out of the week,” (Tr. 756), and did so on “orders . . . [from ADW] Caputo.” (Tr. 1298).

In contrast, Captain Lewis testified that such staffing shortages never occurred, that he never heard other COs complain about under-staffing, and that he never saw this particular memorandum authored by CO Valentin. (Tr. 918). He also stated that he only apprises his “supervisor as to the availability of qualified staff,” offers “recommendations,” and the ultimate decision concerning staffing of security details belongs to “the executive officer [of ESU],” ADW Caputo. (Tr. 922). ADW Caputo never directly testified regarding the allegations that the RRT and other security details operated below the DOC-established staffing levels.

On January 27, 2005, CO Valentin wrote to ADW Caputo requesting “access to certain paperwork that [was] not normally accessible” to him, in order to “conduct[] an investigation” into the issues raised in his January 5, 2005 memorandum, such as documents pertaining to staffing,

¹¹ RRT is a specialized team within ESU that responds to any and all emergencies within DOC, such as inmate disturbances and inmate cell searches, and is staffed with “specially trained officers” (Tr. 221). According to DOC procedure, the RRT “shall be manned at all times around the clock . . . [and] shall always be [staffed with] a minimum of one Captain and ten Correction Officers (minimum) . . . on each tour. (Union Ex. 7). “Under no circumstances shall any team work without the minimum coverage.” (*Id.*)

overtime, schedules, and Temporary Duty Assignments (“TDYs”).¹² (Union Ex. 10). According to CO Valentin, though ADW Caputo never responded to this request in writing, he did confront CO Valentin and told him, “I’m not giving you any of that [requested documentation].” (Tr. 270).

On January 28, 2005, CO Valentin filed a memorandum listing many of the same complaints as the January 5, 2005 memorandum and also expressing concerns about inadequate training for certain units, reduction of training in those units, and assigning personnel to details for which they lacked proper equipment and instruction. CO Valentin wrote that these “issues” had been brought to COBA’s attention from its “membership” and that these issues continually arose because management’s desire to “decrease overtime” through “utilizing unreported TDY personnel, . . . cutting training, . . . [and] shift reducing vital areas.”¹³ (Union Ex. 11). As before, CO Valentin testified that actions that altered staffing levels, such as shift reductions and TDYs, were the ultimate responsibility of ADW Caputo and the fault of having ill-equipped and under-trained COs during certain details fell on Captain Lewis.

On January 31, 2005, CO Valentin filed three grievances on behalf of COBA’s members in ESU complaining about: i) DOC’s failure to “fairly and equitably distribute” overtime, ii) DOC’s

¹² TDYs are temporary assignments of COs from “their parent command to another Facility/Division/Unit for a short term,” “shall be no longer than ninety (90) days,” shall require commanding officers ordering TDYs to complete a “Temporary Duty Request/Extension Form 611,” and are governed by DOC Operations Order 3/98. (Union Ex. 12).

¹³ DOC Operations Order 04/00, entitled “Shift Reduction Program,” was designed to reduce “overtime expenditures throughout the agency” by closing certain designated “budgeted uniform positions for one or more shifts.” (Union Ex. 32). Furthermore, any positions that have been designated for shift reduction “must remain closed for the period reported.” (*Id.*). Within ESU, Captain Nelson selected various “budgeted uniformed positions” that would be utilized in this program, including the sanitation post. (City Ex. 31). However, the number of actual shifts that must be reduced in a weekly period is established by DOC headquarters, not by any superior officer within ESU. (Tr. 1036-1038).

utilization of shift reductions to staff certain posts, and iii) DOC's "improper staffing levels" by using TDYs "to fill holes in the schedule." (Union Ex. 13). According to CO Valentin, these grievances criticized the manner in which ADW Caputo administered ESU, and how ADW Caputo's actions "resulted in safety and security violations." (Tr. 376).

On February 2, 2005, CO Valentin authored another memorandum complaining about the manner in which the superior officers treat the COs within ESU. Again, CO Valentin complained about COs' training being cut, posts being shift reduced, and severe shortages in staff, as well as some "unfair transfers." (Union Ex. 19). According to CO Valentin, he "personally" delivered this memorandum to ADW Caputo. (Tr. 401). On February 10, 2005, Warden Gonzalez responded to CO Valentin's grievances, dated January 21, 2005, stating that CO Valentin's grievances were factually unfounded.

On February 11, 2005, CO Valentin authored another memorandum to Warden Gonzalez stating that COs, who had previously expressed a desire to attend a "Mock Prison Riot in West Virginia," rescinded their requests to attend this exercise because "morale is at an all time low." (Union Ex. 14). According to CO Valentin, he had multiple conversations with other COs from ESU, and they felt that, since their superior officers "blatant[ly] disregard[ed] our grievances," they refused to attend this event, in which they typically participated. (Tr. 305). CO Valentin further testified that "no officer attended the prison riot in West Virginia," which was "unusual." (Tr. 305-306).

Timely Allegations of Discrimination

On March 29, 2005, at the beginning of the shift, CO Valentin, ADW Caputo, Captain Lewis, Captain Nelson, and Captain Miller attended roll call, where superior officers "check to see which

[COs] are present, which [COs] are not present, relay any pertinent information to staff concerning any operations, . . . make any announcements, and inspect the uniformed ranks and render your salute for the day.”¹⁴ (Tr. 322). As set forth by DOC Uniform Directive # 2270 (“Uniform Directive”), “uniformed members of [DOC] shall wear at all times while on duty, the regulation duty uniform prescribed by the Commissioner and the Chief of Department . . . [and] members shall not deviate from, modify or interchange in any manner, the prescribed uniform.” (Union Ex. 16). The Uniform Directive further states that the superior officers conducting roll call “shall personally inspect every officer to ensure that the uniform and equipment are in compliance with the regulations contained herein,” and if the CO is not in compliance, the CO “will be instructed to immediately remedy the situation.” (*Id.*). CO Valentin testified that at the time of roll call and throughout the rest of the day, he wore his regulation uniform, as well as a non-DOC issued navy blue vest, which “was visible.” (Tr. 697).

CO Valentin, who at the time was on a light duty assignment which prohibited him from having any inmate contact, was assigned to ESU base desk and was responsible for the ESU log book, which details the daily events and post assignments within ESU for that particular day. According to CO Valentin, the front door of ESU base “was broken . . . so the door remained in the open position,” and as a result, the ESU base was cold (Tr. 316) and required CO Valentin to wear a “navy blue vest in an attempt to stay warm.” (Union Ex. 15). Around 12:00 p.m., Captain Lewis “smacked” CO Valentin on the shoulder and said “get up,” to which CO Valentin responded, “are you serious?” (*Id.*). Captain Lewis informed CO Valentin that he was not going to sign the log book

¹⁴ Roll call occurs at the beginning of the 7:00 to 3:00 tour in the “roll call trailer.” (Tr. 598).

while standing. CO Valentin testified that he then responded by pointing out the fact that “there were four additional chairs in close proximity.” (Tr. 316). CO Valentin then moved one of the chairs over and “invited him [Captain Lewis] to sign the log book.” (*Id.*). Then, CO Anthony Ubides, who was also in ESU base at the time, moved another chair over for Captain Lewis, but Captain Lewis “remained standing over me and said get up.” (Tr. 317). CO Valentin remained seated and Captain Lewis made an entry into the log book recording the details of this event and left the area. Shortly thereafter, Captain Lewis instructed CO Valentin to draft a report concerning the day’s earlier incident, which he did that same day.

According to CO Ubides, he was at ESU base that morning exchanging a battery for his portable radio and saw CO Valentin sitting at ESU base desk. Captain Lewis approached CO Valentin and “asked him to get up from the chair he was sitting at.” (Tr. 106). CO Valentin asked Captain Lewis “if he [Captain Lewis] was serious,” but Captain Lewis was adamant that CO Valentin relinquish his chair. (*Id.*). Seeing that the situation was escalating, CO Ubides, observing that there were four other, vacant chairs right next to CO Valentin, walked over to ESU base desk and presented one of the empty chairs for Captain Lewis, who “arrogantly ignored” CO Ubides’s offer. (Tr. 142). “Captain Lewis refused to sit in the chair [provided by CO Ubides], and kept on insisting for [CO] Valentin to get up out of that chair.” (Tr. 106). “At that point, I decided it was time for me to leave . . . because he [Captain Lewis] wasn’t listening to me.” (Tr. 107).

Captain Lewis testified that on March 29, 2005, pursuant to ADW Caputo’s recent directive to him, he was touring the ESU compound, which “wasn’t one of [his] previous assigned duties.” (Tr. 851). He entered ESU base and “asked Officer Valentin to let me have his seat so that I could

sign the log book,”¹⁵ and CO Valentin responded “I’m not standing. I am not giving you my seat. Sign the book standing up.” (Tr. 852). Captain Lewis again asked for CO Valentin’s chair, and CO Valentin’s response was the same. At that point, Captain Lewis requested another supervisor to report to the ESU base. Captain Miller then entered the ESU base; Captain Lewis “explained to him [Captain Miller] that I was attempting to sign the log book [and] Officer Valentin was refusing my direct order to stand and give me his seat.” (Tr. 853). According to Captain Lewis, Captain Miller then “spoke with Officer Valentin and asked him to stand, [but] . . . he again refused.” (*Id.*). Then, CO Ubides “retrieved another chair and said, ‘Here Cap, use this chair to sit down. And I utilized his chair.’” (*Id.*). He further testified that he never touched CO Valentin at any time during this incident, but he did notice that CO Valentin was wearing a non-DOC issued, quilted jacket at the time of the event.

Captain Miller, who occasionally supervised CO Valentin, testified that he walked into ESU base to see Captain Lewis standing over CO Valentin. Captain Lewis said to Captain Miller, “you’re my witness. I am going to give this officer a direct order to stand up. . . . So he gave [CO] Valentin a direct order to stand up so that he could sign the log book. And Valentin didn’t respond.” (Tr. 741-742). After giving a second direct order, eliciting the same response from CO Valentin, Captain Lewis asked him for a report on “why he didn’t stand up to a superior supervisor.” (Tr. 742). According to Captain Miller, even though there were other chairs in close proximity that Captain Lewis could have used, CO Valentin’s refusal to comply with a direct order was unacceptable “because out of respect for the rank, when a captain enters your post . . . you stand up, show respect.”

¹⁵ Based upon the record, had this incident with Valentin not occurred, Captain Lewis would have noted in ESU log book that he toured ESU base and he would have set forth the status of this base.

(*Id.*). Captain Miller never witnessed Captain Lewis touch CO Valentin, but he did testify that he entered ESU base after such an alleged touching would have occurred. He also testified that it is never appropriate for a superior officer to “strike a correction officer in an aggressive way.” (Tr. 752). Furthermore, Captain Miller testified that he did not notice whether CO Valentin was out of uniform. Captain Miller characterized this incident as “Captain Lewis was blowing off steam.” (Tr. 740).

About a half hour after the incident, CO Marcelo Villaroel was posting the daily schedule sheet on the roll call bulletin board about ten to fifteen feet from the door to Captain Lewis’s office. While posting this sheet, he overheard a phone conversation between Captain Lewis and ADW Caputo, since the office’s door was open. During this conversation, he specifically heard Captain Lewis say “hey Dep [ADW Caputo], I want this guy [CO Valentin] transferred out of here [ESU].” (Tr. 25). According to CO Erika Vernon, whose office is right next to ADW Caputo’s office, she testified that sometime during the afternoon of March 29, 2005, Captain Lewis entered the Executive Officer’s building on the ESU compound of Rikers Island, walked into ADW Caputo’s office and “said that he wanted Officer Valentin transferred.”¹⁶ (Tr. 93). However, according to Captain Lewis, he denied making any such statements. Moreover, even though ADW Caputo admitted to being briefed by Captain Lewis regarding the incident with CO Valentin, ADW Caputo stated that Captain Lewis did not make those comments. ADW Caputo testified that, even if Captain Lewis had made those comments, he lacks the authority to transfer any CO because those decisions “would be up to the warden.” (Tr. 1238).

¹⁶ Also, CO Marrero, according to his testimony, overheard Captain Lewis request CO Valentin be transferred out of ESU. Captain Lewis did not recall making such a request.

On March 30, 2005, at the beginning of the 7:00 to 3:00 tour, Captain Donald McCarthy informed CO Ubides that he was assigned to the sanitation post for that day. CO Ubides informed Captain McCarthy that he was routinely assigned to the RRT post, that CO Valentin performed the sanitation detail, and that he “did not want to do that post.” (Tr. 114). Despite CO Ubides’s insistence that the sanitation post belonged to CO Valentin because he had been rightfully awarded that post, Captain McCarthy informed him that “Warden Gonzalez wants to hit [CO Valentin] hard, he wants to transfer him out of the unit.” (Tr. 116). Captain McCarthy testified that he never made this statement. (Tr. 815).¹⁷ Immediately after this exchange, CO Ubides contacted “the assistant [ESU] delegate [CO Negron] and told him what Captain McCarthy told me.” (Tr. 116).

Also on that day, Captain Lewis authored a memorandum regarding the previous day’s incident with CO Valentin. In this document, Captain Lewis refuted CO Valentin’s claim that he “smacked [CO Valentin] on the shoulder and said get up,” or that there were four chairs within close proximity of the ESU base desk. (City Ex. 2). Rather, Captain Lewis wrote that he never had any physical contact with CO Valentin, that CO Ubides offered him “a chair from the rear of the base,” and that CO Valentin was wearing a “quilted ESU fraternal jacket with patches.” (*Id.*). Also in the memorandum, Captain Lewis explained that CO Valentin “has been the subject of numerous supervisors’ complaints . . . [and] these charges were not adjudicated or minimized because of COBA intervention. Therefore, an environment of insubordination and overall disrespect for supervisors has been exacerbated.” (*Id.*). He then recommended that CO Valentin be transferred to another command. However, throughout this document, no mention was made of either CO

¹⁷ During cross-examination, Captain McCarthy admitted that, after CO Ubides testified in the instant hearing, he confronted CO Ubides and asked him “why did you put me in this [improper practice proceeding]?” (Tr. 824).

Valentin or Ubides failing to stand up and salute him when he entered the ESU base.

At the bottom of Captain Lewis's memorandum, there is a notation indicating that there are "16 encl[osure]s" attached to the memorandum. (City Ex. 2). Some of the enclosures included ordered reports from CO Valentin and CO Ubides, a picture of the type of jacket CO Valentin was allegedly wearing, and ordered reports submitted by CO Valentin concerning other, unrelated incidents. Enclosed within this memorandum was a Memorandum of Complaint ("MOC") dated April 14, 2005 and executed by various DOC officials on April 22 and 25, 2005, nearly one month after the drafting of this memorandum. Also attached to this document is an one-page, incomplete, unsigned Command Discipline ("CD") form concerning an event that allegedly occurred in January 15, 2003, but which CO Valentin testified he never received.¹⁸ The Union later submitted a different version of Captain Lewis's memorandum, which did not contain the post-dated document but did contain a more complete version of the January 2003 CD.

On April 12, 2005, Captain Nelson presented CO Valentin with a CD resulting from the March 29, 2005 incident involving Captain Lewis and CO Valentin's refusal to relinquish his chair

¹⁸ CO Valentin testified that when he was served with Captain Lewis' memorandum, he only received "the first and second page" and "did not receive any of the following pages." (Tr. 572). CO Valentin further testified that he "never received this command discipline" from January 15, 2003 nor is "this command discipline . . . in [his] personnel folder." (Tr. 574). However, in an attempt to corroborate Captain Lewis' testimony, the City introduced City Exhibit 21, which contains all three pages of the January 15, 2003 command discipline. Captain Lewis testified that CO Valentin was served with this document and that a disciplinary meeting with the administrative captain, CO Valentin and a COBA representative occurred to discuss this CD. But, this form is unsigned by CO Valentin or any superior officer; this form is not in CO Valentin's "personnel record"; and Captain Lewis did not know who served these disciplinary charges on CO Valentin, who the administrative captain at that time was, and when this meeting allegedly occurred. (Tr. 881-883).

to a superior officer (“Chair Incident”).¹⁹ CO Valentin was charged with failure to “wear the prescribed uniform while on duty” in violation of the Uniform Directive, “disrespect towards a supervisor” in violation of DOC Regulation 3.20.180, “disobeying a lawful order” in violation of DOC Regulation 3.20.190, and “conduct unbecoming a officer” in violation of DOC Regulation 3.20.120. (Union Ex. 17). ADW Caputo testified that he had no involvement in the drafting of these disciplinary charges.

With regard to these disciplinary charges, CO Valentin testified that standing and saluting a superior officer upon his/her entrance into a room is not “done all the time.” (Tr. 318). In fact, CO Valentin testified that, on numerous occasions, he has failed to stand up and salute a superior officer when entering a room, but this was the first and only time, to his knowledge as a COBA delegate since 1996, that a CO has been brought up on disciplinary charges for such an action. However, on cross-examination, CO Valentin admitted that he did not “know of any . . . rule” that would allow a CO to disregard a direct order from a superior officer. (Tr. 602). CO Ubides testified that he also did not stand and salute Captain Lewis when he entered the ESU base, that he does not always stand and salute when a superior officer enters a room, and that he has never been brought up on disciplinary charges for failing to do so. (Tr. 161-162). During cross-examination, CO Ubides acknowledged that DOC regulation 3.20.120 states that members of the uniformed force shall stand at attention and salute before addressing a superior officer, and Captain Lewis is a superior officer in relation to COs Valentin and Ubides.

¹⁹ A CD is an informal disciplinary process by which disciplinary charges are proffered at the command level, adjudicated at that same level, typically involve minor infractions of DOC’s rules and regulations, may result in minor penalties such a loss of no more than five vacation days, and “are expunged” from a CO’s disciplinary history after one year of the penalty’s imposition. (Tr. 1165-1166).

The next day, April 13, 2005, CO Valentin and the Second Vice-President of COBA, Joseph Bracco, attended an informal conference before ADW LaBruzzo in order to determine the validity of the disciplinary charges arising out of the Chair Incident. According to CO Valentin, ADW LaBruzzo during this conference stated that “he couldn’t determine which side was valid . . . [and that] normally [DOC’s] position is to accept the supervisor’s . . . story over the officer’s” and thus offered a two-day loss of pay penalty to CO Valentin. (Tr. 340). CO Valentin and Vice-President Bracco rejected this offer and requested that this matter be adjudicated before DOC’s Office of Trials and Litigations.

Sometime thereafter, CO Valentin’s disciplinary file concerning the Chair Incident was assigned to William Bryk, who is a DOC Attorney, Level III working in the Division of Trials and Litigation. Since it is his “duty to [DOC] as its advocate to examine the entire the file and draft charges accordingly,” Bryk testified that he reviewed the entire file, including the CD from Captain Lewis and was not “restricted in drafting charges to the violation of the directive and the . . . rule and regulations” cited by Captain Lewis. (Tr. 1164). Based on his experience, the decision to refer a CD to his office for a MOC occurs after the parties cannot resolve the dispute at the command level and “lies within his [the commanding officer of the facility] discretion and within the rules and regulations, directive and operating orders in [DOC].”²⁰ (Tr. 1196).

On April 15, 2005, CO Valentin wrote a memorandum to Norman Seabrook, President of COBA, concerning, *inter alia*, the Chair Incident. CO Valentin indicated that he was the “subject

²⁰ A MOC is the more formal disciplinary process, alleges serious violations of DOC’s rules and regulations, is adjudicated at the Division of Trials and Litigation, may result in significant penalties such as termination, and is a permanent part of a CO’s disciplinary history. According to Bryk, the issuance of a MOC “depends upon the gravity of the misconduct” and not the actual number of disciplinary charges alleged by DOC. (Tr. 1167).

of retaliation due to [his] union activities,” that ADW Caputo and Captain Lewis are “searching for a reason to tarnish [his] record,” and that matters are “escalating” and creating “an uncomfortable work environment.” (Union Ex. 18). According to CO Valentin’s testimony, he authored this memorandum because he was seeking “intervention” from COBA, and wanted to apprise the Union of DOC’s retaliatory actions. (Tr. 348).

On April 20, 2005, CO Valentin wrote a memorandum to Warden Gonzalez stating that the RRT “was allowed to go understaffed for two hours,” so that COs on overtime could be released, even though COs “who volunteered for [overtime] were not given an opportunity to work.” (Union Ex. 20). That same day, CO Valentin submitted another grievance regarding the equitable distribution of overtime and the reduction in the ability to partake in necessary training. (Union Ex. 21).

On May 2, 2005, CO Valentin wrote a memorandum to Vice-President Bracco informing him that, despite “repeated attempts” by CO Valentin to schedule a labor-management meeting with Warden Gonzalez for April 2005, no meeting took place, “nor did Warden [Gonzalez] contact [CO Valentin] to make alternate arrangements.” (Union Ex. 22). According to CO Valentin, he “drafted this [memorandum] to the Union so that the Union can see the Warden’s not wanting to address the issues.” (Tr. 424). He testified that these meetings “are held every month” and that not conducting such a meeting was “highly unusual.” (Tr. 425).

On May 25, 2005, CO Valentin again authored a memorandum which criticized the manner in which the superior officers within ESU “were being allowed to make poor decisions which not only violate protocol, but place [COs] in jeopardy.” (Union Ex. 23). According to CO Valentin, this memorandum, which is critical of ADW Caputo and Captain Lewis, highlights another instance

where “untrained, unqualified staff members can affect the safety of the [COs] in ESU.” (Tr. 428).

On June 1, 2005, CO Valentin received a MOC from the Assistant Commissioner of DOC’s Office of Trials and Litigations. These set of charges originating from the Chair Incident, contained a total of 15 charges. In addition to violations of the Uniform Directive, “disrespect towards a supervisor,” “disobeying a lawful order,” and “conduct unbecoming a officer,” the new disciplinary charges include violations of DOC Regulations “2.30.020,” “3.05.010,” “3.20.010,” “3.20.300,” and “4.30.020.”²¹ (Joint Ex. 1).

On June 8, 2005, CO Valentin wrote another memorandum regarding the “ongoing failure to maintain staffing levels at ESU.” (Union Ex. 24). The reason for this memorandum was to highlight another example when the RRT was “allowed to operate with six individuals . . . Leaving the RRT with unsatisfactory staffing levels.” (Tr. 444-445).

On June 14, 2005, CO Valentin sent a memorandum concerning an undercover security detail.²² (Tr. 457). CO Valentin wrote that the specific security detail was understaffed, lacked the necessary equipment, and was given poor intelligence. (Union Ex. 25). In fact, CO Valentin

²¹ DOC Regulation 2.30.020 states, in pertinent part: COs “shall perform their duties in such a way as to gain the respect and willing obedience of the inmate population and shall cooperate with their supervisors.” DOC Regulation 3.05.010 states, in pertinent part: “All employees shall be accountable to the Commanding Officer for their assigned areas.” DOC Regulation 3.20.010 states, in pertinent part: Members of [DOC] shall present a professional demeanor and as an employee of the City of New York shall act in a dignified manner. . . . They shall not use indecent, abusive, or profane language.” DOC Regulation 3.20.300 states, in pertinent part: “all behavior which threatens the good order and discipline and all conduct of a nature to bring discredit up [DOC] shall be acted upon by [DOC].” DOC Regulation 4.30.020 states, in pertinent part: “Members of [DOC] shall not make false entries or notations or render false reports concerning business of [DOC].”

²² Aside from Warden Gonzalez and ADW Caputo who typically were served with these memoranda, CO Valentin served Captain Lewis with a copy because he was the security captain at that time.

testified that on the day that detail left ESU, he spoke with ADW Caputo and Captain Lewis regarding concerns expressed in the memorandum. (Tr. 461).

Also on this day, CO Valentin submitted a proposed agenda for the June 2005 labor-management meeting to be held between Warden Gonzalez, ADW Caputo, and CO Valentin. In this agenda, CO Valentin referenced the topic of an “Arsenal for ESU Staff.” (Union Ex. 27). According to CO Valentin, COs are “mandated to have a firearm at all times However, we cannot enter the correctional facilities with the firearm for obvious reasons.” (Tr. 471). Since ESU had “no official way to secure that firearm while you went into the facilities, . . . [the COs in ESU] requested an arsenal be put into the ESU base for that purpose.” (*Id.*).

On June 29, 2005, a labor-management meeting was held. Afterward, Warden Gonzalez wrote a memorandum to DOC Commissioner Martin Horn detailing what transpired at that meeting. In pertinent part, Warden Gonzalez wrote that the request for an arsenal “at ESU base for the purpose of securing personal protection firearms” was granted.²³ (Union Ex. 28).

On July 6, 2005, Warden Gonzalez authorized ADW Caputo to review and approve Command Level Order 07/05, entitled “Securing Personal Firearms,” which was promulgated at the behest of CO Valentin and was a direct result of the June 2005 labor-management meeting. (Union Ex. 30). According to this order, the CO who is assigned to ESU base as his/her post is entrusted with the responsibility of carrying out the duties set forth therein. Furthermore, this order states that the “sanitation officer” shall “assist the base officer with the aforementioned task” of securing firearms on Mondays through Fridays at the start of the 7:00 a.m. tour. (*Id.*). However, regarding

²³ The Arsenal in ESU base consisted of approximately 30 gun boxes which are located near ESU base desk.

the other two weekday tours, 3:00 p.m. and 11:00 p.m., Command Level Order 07/05 is silent as to which CO is designated to assist the CO assigned to ESU base in securing personal firearms. As noted by CO Valentin during his testimony, “only one” specific CO during one specific tour was enumerated in this order to assist in the completion of the duties set forth in this order; and at the time of this order’s promulgation, CO Valentin happened to be the sanitation officer who worked during the 7:00 a.m. tour. (Tr. 486-487). Captain Nelson testified on cross-examination that, after CO Valentin was removed from the sanitation post, the CO assigned to this post stopped assisting the CO assigned to ESU base in the securing of the firearms. (Tr. 1084).

On July 22, 2005, COBA, on behalf of CO Valentin, filed the instant improper practice petition claiming that DOC, through its agents Warden Gonzalez, ADW Caputo, and Captain Lewis, subjected CO Valentin to discriminatory and retaliatory acts in violation of NYCCBL § 12-306(a)(1) and (3). According to the instant petition, DOC violated the NYCCBL by disciplining CO Valentin in a discriminatory manner concerning, *inter alia*, the Chair Incident. For relief, the Union sought an order finding that the agency violated these provisions of the NYCCBL, expunging CO Valentin’s disciplinary record of the disciplinary charges that arose as a result of his protected union activity, enjoining DOC from engaging in any further discriminatory/retaliatory conduct directed toward CO Valentin, and requiring the posting of notices.

On August 1, 2005, Warden Gonzalez, CO Valentin, and CO Negron, who is COBA’s alternate delegate in ESU, attended the July 2005 labor-management meeting. During this meeting they discussed several topics, including “improper staffing levels.” (Tr. 497). Seven days later, on August 8, 2005, CO Valentin, at the beginning of his shift, confronted ADW Caputo and explained to ADW Caputo that the shift reduction negatively impacted “the safety of the officers.” (Tr. 500).

He asked ADW Caputo “why would you put these officers’ safety in jeopardy to save a couple of dollars,” and ADW Caputo's response was “because I can do that.” (Tr. 500-501). ADW Caputo testified that he could not “recall [that] meeting taking place,” but he did not deny that he made this comment. (Tr. 1263).

On the next day, August 9, 2005, CO Valentin reported for duty and was then informed by ADW Caputo that the sanitation post was to be shift reduced and he was re-assigned to the RRT for the day. However, according to CO Valentin, “what was odd about it [his shift reduction] was . . . he [ADW Caputo] placed someone else in the [sanitation] post and basically backfilled the post, . . . which violates the shift reduction order.” (Tr. 507-508). That same day, CO Valentin authored a memorandum to President Seabrook detailing his shift reduction by ADW Caputo and sought the Union's assistance to “investigate this matter.” (Union Ex. 33). According to the CO schedule sheet from that day, CO Valentin was assigned to the sanitation post, not the RRT, and the sanitation post was not backfilled.²⁴ (City Ex. 29).

According to CO Valentin, on October 18, 2005, he reported for duty, and approximately one hour and a half into his shift, he took his 40 minute meal period. According to a written report authored that day, CO Valentin wrote that around 7:45 a.m., he “began feeling ill” and needed to take his blood pressure medication, which must be taken with food. (Union Ex. 35). He enlisted the aid of another CO who had just finished his shift to drive him to the Roma Deli, which is “across the street from the main entrance to Rikers Island . . . on 21st Avenue” and frequently patronized by

²⁴ The Union contended that, on August 9, 2005, CO Valentin was shift reduced in the middle of his tour and this change was not noted on the daily CO schedule, but would have been noted in the log book. As such, the Union requested the log book pages from that day. Nevertheless, despite these numerous requests, the City failed to disclose such documents, even though the City did introduce City Exhibit 6 which are pages from that same log book but from a different day.

DOC employees. (Tr. 519-520). On cross-examination, CO Valentin admitted that, aside from the Roma Deli, he could have gone to the “medical assistance trailer,” which is part of ESU compound, if he was feeling ill, or he could have purchased snacks or a soda from one of the vending machines in ESU lounge for food.²⁵ (Tr. 615). After purchasing his breakfast sandwiches, he exited the Roma Deli, saw Commissioner Horn in a car parked outside this deli, saluted him and returned to ESU base.

Shortly after returning, Commissioner Horn approached CO Valentin outside the ESU compound near the roll call trailer, and asked “what was my tour” and “who my immediate supervisor was.” (Tr. 522). After informing Commissioner Horn that his tour was 6:00 a.m. to 2:00 p.m. and that his immediate supervisor was Captain Nelson, CO Valentin proceeded to ESU lounge and ate his meal. Shortly after CO Valentin's conversation with Commissioner Horn, Captain Nelson approached CO Valentin and requested a written report regarding why CO Valentin was off Rikers Island, with which CO Valentin complied.

According to Judith LaPook, who is the Chief of Staff for the Department of Probation for DOC, she was with Commissioner Horn at the Roma Deli. She testified that they stopped at this deli for her to get some breakfast, and, in fact, she entered the deli. While inside, she noticed a man “wearing items of clothing that identified him as being a member of [DOC].” (Tr. 784). She also “observed [this man wearing] a patch that concerned [her].” (*Id.*). The patch was of “a creature-like comic book like character,” which resembles the character of The Thing from the Fantastic Four

²⁵ Corroborating CO Valentin’s testimony, Captain Nelson testified that “potato chips, cookies, candy [and] . . . granola bars” are available in ESU lounge; a CO could go to a cafeteria within a facility on Rikers Island and “be given some food”; and there is a medical facility near ESU base. (Tr. 1015).

comic book, with the words “it's clobberin' time” on it (“Patch”). Chief of Staff LaPook became upset because “we're of course very concerned about the [DOC] operation, the way [DOC] operates, how they treat the inmates in our custody.” (Tr. 785). She believed that this image portrayed DOC as using unnecessary force on its inmates. She was also concerned about “the public's image of corrections, that we are just a bunch of guards who are out there beating up the inmates and that we don't treat them with respect.” (Tr. 787). After obtaining her breakfast, she exited the Roma Deli, entered the car, and waited for the CO in question to exit the building. Commissioner Horn's driver identified the CO in question as CO Valentin, and they proceeded to follow CO Valentin back to Rikers Island.²⁶ Upon returning to ESU base, Commissioner Horn exited the vehicle, but Chief of Staff LaPook remained in the car.

According to Commissioner Horn, after getting her breakfast, Chief of Staff LaPook entered the vehicle and “was quite upset.” (Tr. 794). She informed him what she had observed while in the Roma Deli. Commissioner Horn testified that Chief of Staff LaPook's description of the Patch also concerned him. He “felt that that was not the culture of [DOC], . . . [and] wearing a patch that indicated that kind of attitude was most disconcerting.” (Tr. 795). After identifying CO Valentin and following him back to ESU base, Commissioner Horn exited the vehicle, confronted CO Valentin and asked him “what shift he was working . . . [and] if he had permission to leave the island.” (Tr. 797). CO Valentin “told me that his captain had given him permission to leave the

²⁶ On cross-examination, CO Valentin testified that he did not recall wearing the “fraternal organization” jacket but, since it was October and he does own a jacket with “a patch with the Thing on it,” he could have been wearing this jacket at the time Chief of Staff LaPook saw him outside the Roma Deli. (Tr. 625).

island.”²⁷ (*Id.*). Later, Commissioner Horn spoke with Captain Nelson and ADW Caputo and asked Captain Nelson if he had given CO Valentin “permission to leave the island and he told me he had not.” (Tr. 797-798). He then told Captain Nelson and ADW Caputo that he was “very upset about the Patch, [and] about the fact that a member of ESU . . . was not on the island, and had this been an emergency, [CO Valentin] would not have been available to respond and told them to deal with it.” (Tr. 800-801).

ADW Caputo testified that on October 18, 2005, Commissioner Horn was at ESU compound and asked him whether he allows COs to “go off island for meal,” to which ADW Caputo responded, “yes . . . , however, before they leave, they need to ask permission from a supervisor.” (Tr. 1247). When informed that CO Valentin represented that he had, in fact, received permission to leave Rikers Island, ADW Caputo called Captain Nelson over, and asked him if he had given CO Valentin permission to leave Rikers Island. Captain Nelson indicated that he did not give CO Valentin such authorization. “The commissioner [then] instructed me to have him written up, bring up on discipline charges.” (*Id.*). According to ADW Caputo, Commissioner Horn also “mentioned” that CO Valentin “was out of uniform . . . but . . . didn’t really dwell on it.” (Tr. 1248).

According to Captain Nelson’s testimony, on October 18, 2005, Commissioner Horn approached him as he walked to his office that morning. Commissioner Horn “asked me if I had given any officers permission to be off island, . . . and I responded by saying, no.” (Tr. 977). After ascertaining that Commissioner Horn had seen CO Valentin at the Roma Deli, Captain Nelson asked if CO Valentin indicated “that I had given [him] permission to be off island? And he said, yes.” (Tr.

²⁷ On cross-examination, CO Valentin testified that he did not recall Commissioner Horn asking him if he had authorization to leave ESU base and go to the Roma Deli or if he had sought such permission.

978). Captain Nelson then informed Commissioner Horn that he had not granted such authorization and did not know that CO Valentin was off of Rikers Island. According to Captain Nelson, if CO Valentin wanted to go off Rikers Island to pick up food, “[h]e would normally ask for permission to go out and get lunch,” and permission was usually granted. (Tr. 980).

That same day, Captain Nelson authored a written report concerning his encounter with Commissioner Horn, and, in this statement, he wrote that Commissioner Horn “witnessed . . . [CO] Valentin on 21st Avenue at Roma Delicatessen and that [CO] Valentin told him that I had given him permission to leave Rikers Island.” (City Ex. 23). Captain Nelson continued writing that he “did not give [CO] Valentin permission to leave Rikers Island. [CO] Valentin was off his post unauthorized and out of uniform.” (*Id.*). On cross-examination, Captain Nelson stated that “besides that one time [involving CO Valentin],” he had never disciplined any CO for leaving ESU compound to go to the Roma Deli without permission. (Tr. 1105).

The next day, on October 19, 2005, Captain Nelson approached CO Valentin and informed him that he “was being disciplined” for being off Rikers Island without permission. (Tr. 524). However, CO Valentin testified that he was not served with the CD regarding his departure from ESU base to go to the Roma Deli (“Roma Deli Incident”). Instead, Captain Nelson showed a CD to CO Valentin with three disciplinary charges on it but did not give it to him because “[ADW] Caputo wanted it [the CD] brought to his office so that he could add additional charges to it.” (Tr. 526). The three initial charges included violation of DOC Regulation 3.05.130 “members shall not leave their place of assignment without permission,” DOC Regulation 3.20.030 “conduct unbecoming an officer” and the Uniform Directive “uniformed members while on duty shall wear the prescribed uniform.” (Union Ex. 44). According to Captain Miller, he has never disciplined a

CO who was wearing the particular jacket with the Patch on it, even though he has observed other COs wearing that particular jacket “while on duty.” (Tr. 761). Furthermore, according to Captain Nelson, “when I initially prepared it [the CD concerning the Roma Deli Incident], I think it was three [charges], and then I was asked [by ADW Caputo] to add one more to it.” (Tr. 1108). He then resubmitted his disciplinary charges with four violations because “four . . . means a [MOC].” (Tr. 1109).

On October 28, 2005, CO Valentin attended a labor-management meeting at ESU base with Warden Gonzalez, ADW Caputo and ADW LaBruzzo. Upon exiting his vehicle, CO Valentin “put on [his] civilian jacket because it was cold outside.” (Union Ex. 36). According to CO Valentin, he had worn a civilian jacket to these meetings “numerous times,” and had never been asked to write a report on the jacket. (Tr. 540). Upon entering the meeting, ADW Caputo requested an ordered report from him to explain “why [he] had a civilian jacket on during a labor-management meeting.” (Union Ex. 36). CO Valentin rationalized his wearing of a civilian jacket by stating he “was not reporting [to the meeting] in the capacity as a Correction Officer at that point; I was reporting as a Union delegate in a labor-management meeting.” (Tr. 633). That same day, CO Valentin complied with ADW Caputo’s request, and submitted such written report. ADW Caputo testified “Warden Gonzalez asked me to get a report from [CO] Valentin on why he was out of uniform.” (Tr. 1251). However, ADW Caputo “wasn’t paying attention to what [CO Valentin] was wearing” and did not notice if CO Valentin was out of uniform. (Tr. 1276).

On November 7, 2005, Captain Nelson served the MOC which originated from the Roma Deli Incident on CO Valentin and which contained 16 disciplinary charges therein. According to CO Valentin, when Captain Nelson served the MOC on CO Valentin, Captain Nelson “told [CO

Valentin] that [ADW] Caputo added additional charges to the CD making it a [MOC], . . . and that they could transfer me with a MOC.” (Tr. 529). According to Bryk, he received the disciplinary file regarding the Roma Deli Incident, he reviewed the contents of the file, which included the unresolved MOC regarding the Chair Incident, and witness statements from Commissioner Horn and Chief of Staff LaPook. Again, Bryk testified that when he drafted these disciplinary charges, he based the issuance of such charges upon his own review of the file and not solely on the CD arising out of the Roma Deli Incident contained therein. However, this MOC, originating from the Roma Deli Incident, contained a total of 16 charges. In addition to the three previous violations, the new disciplinary charges include violations of DOC Regulations “3.05.120,” “3.20.300,” “3.10.030,” and “2.30.010”;²⁸ none of which appeared on any disciplinary charge or document served upon CO Valentin prior to this date. (Joint Ex. 2).

Also, on November 7, 2005, CO Valentin submitted a written grievance concerning the improper staffing utilized by ESU and its tactical extraction teams, which are responsible for entering cells of inmates and removing them. Again, these managerial decisions were under the authority and purview of ADW Caputo and Captain Lewis. According to this grievance, these extractions teams are to be manned by no less than eight COs, each with a specific duty to accomplish, including video recording the incident, applying the mechanical restraints on the inmate

²⁸ DOC Regulation 3.05.120 states, in pertinent part: “Members of [DOC] are responsible for the efficient performance of their duties and for the proper supervision of any inmates under their direction.” DOC Regulation 3.20.300 states, in pertinent part: “all behavior which threatens the good order and discipline and all conduct of a nature to bring discredit up [DOC] shall be acted upon by [DOC].” DOC Regulation 3.10.030 states, in pertinent part: “All employees of [DOC] shall report for duty punctually at the time directed and shall not leave before the completion of their tour of duty.” DOC Regulation 2.30.010 states, in pertinent part: COs shall be held responsible for the safety, sanitation, and security of their posts, for the proper care, custody control, and treatment of inmates.”

and operating the shield as the first CO into the inmate's cell. (Union Ex. 37).

Additionally, on November 7, 2005, Warden Gonzalez authorized ADW Caputo to review and approve Command Level Order 09/05, entitled "Emergency Service Unit Sanitation Procedures." (Union Ex. 29). This document sets forth the policy behind this order, the personnel involved in the sanitation process of ESU compound, and the measures to be undertaken in order to properly complete sanitization of ESU compound. According to CO Valentin, when confronted with this new order, he spoke with Captain Nelson about the rationale behind the implementation of such an order. He testified that Captain Nelson indicated that the reason for Command Level Order 09/05 was because ADW Caputo did not like CO Valentin. (Tr. 481). Captain Nelson testified but was not asked about whether he made this comment.

The next day, November 8, 2005, Captain Nelson ordered CO Valentin to submit a written report on "why sanitation was not conducted" that day. (Union Ex. 38). CO Valentin testified that Captain Nelson informed him that ADW Caputo was actually the person who wanted the report and that he was merely carrying out orders. CO Valentin explained that sanitation did not occur that day because there was no vehicle available "to pick up the inmates and the rear gate to the facility [was] closed, which inhibited me from picking up the [inmates]." (Tr. 550-551). He further explained that without a vehicle, inmates cannot be transported, and, sanitation duties cannot be completed. However, Captain Nelson testified that CO Valentin "wasn't confined to just one vehicle . . . [and that] he had other vehicles at his disposal." (Tr. 1046).

On November 23, 2005, CO Valentin was working the sanitation post. He attempted to secure a group of inmates for the detail, but was delayed in retrieving them because this particular group was due to go to the commissary. After picking up these inmates and beginning sanitation

duties, Captain Nelson informed CO Valentin at 11:50 a.m. that ADW Caputo wanted those inmates returned for “the count.” (City Ex. 15). However, since the rear gate is always closed between 11:30 a.m. and 12:30 p.m. for “the count,” CO Valentin could not return the inmates. (*Id.*). According to CO Valentin, since inmates are occasionally out of the facility during the afternoon count, there is a procedure by which the CO submits a count slip. Nevertheless, ADW Caputo insisted on the return of the inmates and arranged specifically for the rear gate to be opened and the inmates escorted into the facility. Afterward, CO Valentin was ordered to submit a report concerning “why [he] did not return the inmates to [the facility].” (*Id.*).

On Monday November 28, 2005, CO Valentin reported for duty and noticed that he had been removed from the sanitation post for the day, replaced with CO Negrón, and placed onto the RRT post that was vacated by CO Negrón. So, he confronted Captain Nelson about that decision. According to CO Valle, who was standing in Captain Nelson’s office when CO Valentin entered the room, CO Valentin asked Captain Nelson why he was removed from his sanitation post, and Captain Nelson responded that “he knew it was inappropriate to remove [the Union delegate] from his post, but [ADW Caputo] stated to do it anyway.” (Tr. 170).

Captain Nelson testified that he did not make those statements attributed to him by CO Valentin on November 28, 2005, and that he could not recall whether CO Valle was in his office when CO Valentin spoke with him that day in his office. (Tr. 1014). Captain Nelson also testified that, although CO Valentin was shift reduced from the sanitation post to the RRT, the sanitation post was not re-opened and backfilled. According to Captain Nelson, CO Negrón was only temporarily and accidentally placed into the sanitation post, because he was then actually reassigned to the emergency equipment post, so that CO Negrón could “do payroll . . . [which] he normally does on

Mondays.” (Tr. 1042). After the payroll duties are completed, CO Negron then “uses part of the day for sanitation detail.” (*Id.*). However, on cross-examination, ADW Caputo admitted that the list of duties assigned to the emergency equipment post does not include “payroll.” (Tr. 1275).

The next day, CO Valentin submitted a grievance concerning this incident. Specifically, the grievance stated that “ADW Caputo removed [CO Valentin] from his legally awarded post” and placed him on the RRT. (Union Ex. 39). Furthermore, the CO’s schedule for November 28, 2005 was attached to this grievance and indicated that CO Valentin was, in fact, temporarily removed from the sanitation post and was placed on the RRT for that day, while CO Negron was removed from the RRT and placed into the sanitation post. (*Id.*). CO Valentin explained that, since there was adequate staff to man the RRT, ten COs, and the sanitation post at the same time, “there was no need to remove me from my post only to backfill it with another officer.” (Tr. 562; see also City Ex. 30). CO Valentin further testified that “backfilling my post [was] . . . a violation of the [shift reduction] order” (*Id.*), and was “one of many retaliatory acts [by ADW Caputo] for my union activities.” (Union Ex. 39).

On December 14, 2005, Captain Nelson requested that CO Valentin submit another written report concerning “why sanitation was not conducted” that day. (Union Ex. 40). According to CO Valentin, he told Captain Nelson and ADW Caputo that day that there were no “functioning” vehicles available that day, thus sanitation could not be done. (Tr. 568). He further testified that, nevertheless, Captain Nelson said “write it [the report] anyway, and I wrote it.” (*Id.*).

On December 23, 2005, the Union filed its Reply in the instant matter alleging that, since July 2005, CO Valentin was further subjected to discriminatory treatment by Captain Lewis and ADW Caputo in violation of the NYCCBL. The Union claimed DOC discriminated against CO

Valentin by continuing to shift reduce him from the sanitation post, levying disciplinary charges against him as a result of the Roma Deli Incident, reprimanding him for wearing a non-DOC issued jacket during a labor-management meeting, and harassing him concerning the failure to complete all of the sanitation duties. As a remedy, the Union sought an order finding that the agency violated these provisions of the NYCCBL, expunging CO Valentin's disciplinary record of the disciplinary charges that arose as a result of his protected union activity, and enjoining DOC from engaging in any further discriminatory/retaliatory conduct directed toward CO Valentin.

On February 1, 2006, CO Valentin entered into a Negotiated Plea Agreement regarding the disciplinary charges that stemmed from the Chair Incident. In this agreement, CO Valentin accepted the penalty of "Reprimand," which "stays on [his] record." (Tr. 639 and City Ex. 4). Less than a week later, on February 7, 2006, CO Valentin entered into another Negotiated Plea Agreement regarding the disciplinary charges that stemmed from the Roma Deli Incident. In this document, it states that "parties agree that this matter shall be returned to [CO Valentin's] command for disposition by command discipline [and, CO Valentin] agrees to accept whatever lawful penalty the command may impose." (Tr. 1171 and City Ex. 32).

Upon referral back to ESU, on February 8, 2006, a new CD arising out of the Roma Deli Incident was issued against CO Valentin and now included four specific charges and they were: "members shall not leave their place of assignment without permission," "conduct unbecoming an officer," "members shall not render any false reports" and "members while on duty shall wear prescribed uniform." (City Ex. 5). The new CD form contained Captain Nelson's signature, dated February 8, 2006, but Warden Gonzalez's signature indicated that he allegedly signed this document on "10-20-05." (*Id.*). Nevertheless, based upon the February 8, 2006 CD, ADW LaBruzzo found

that CO Valentin, with regard to the Roma Deli Incident, left his post without permission, engaged in conduct unbecoming a CO, rendered a false report, and was out of uniform. CO Valentin was penalized a loss of four days, was permanently “removed from his [sanitation] post” and, pursuant to the February 7, 2006 agreement, accepted the penalty imposed by DOC. (City Ex. 5).

After CO Valentin was permanently removed from the sanitation post, CO Negron was assigned to the sanitation post on Mondays, and CO Michael Williams performs such duties the rest of the week.

POSITION OF THE PARTIES

Union’s Position

The Union claims that DOC, in violation of NYCCBL § 12-306(a)(1) and (3), discriminated against CO Valentin by harassing and disciplining him for his protected union activities, beginning in January 2005.²⁹ It is without a doubt that CO Valentin engaged in protected union activity, such as filing grievances on behalf of himself and his constituency within ESU, drafting written complaints regarding under-staffing of various positions within ESU, willful violations of DOC

²⁹ NYCCBL § 12-306(a)(1) provides, in pertinent part:

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

* * *

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

NYCCBL § 12-305 provides, in relevant part:

Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

directives and regulations by ADW Caputo and Captain Lewis, and a perceived plot to target him for this protected union activity. In addition, Warden Gonzalez, ADW Caputo, and Captain Lewis knew of CO Valentin's activities, which quite often criticized these three superior officers. Accordingly, CO Valentin was subjected to discriminatory discipline concerning, *inter alia*, the Chair Incident and the Roma Deli Incident, was harassed by these superior officers by having to provide written reports on his daily activities, and was transferred out of the sanitation post.

The Union argues that they have established a casual connection between the protected union activity and the adverse actions. COBA highlights the fact that, when ADW Caputo and Warden Gonzalez joined ESU, the number of grievances and written complaints authored by CO Valentin on behalf of his constituency increased dramatically. Within three months of their arrival, DOC levied disciplinary charges against CO Valentin as a result of the Chair incident. During the time these two superior officers oversaw ESU, CO Valentin continued to file grievances, and author written complaints criticizing the manner in which ADW Caputo and Captain Lewis administered ESU. When the Roma Deli Incident occurred, ADW Caputo took this opportunity to change Captain Nelson's CD by increasing the amount of charges included in this disciplinary action and to ensure that CO Valentin would be presented with a MOC, not a CD. As a result of these exaggerated disciplinary charges, DOC removed CO Valentin from his rightfully awarded post on the sanitation detail.

The Union further contends that DOC's business reasons for disciplining CO Valentin as a result of the Chair Incident and the Roma Deli Incident are a pretext for DOC's discriminatory actions. With respect to the Chair Incident, witnesses from both parties testified that DOC regulations require COs to rise when a superior officer enters the room, but these same witnesses

stated that this rarely occurs and that a CO's failure to do so rarely results in discipline. Furthermore, the disciplinary charge alleging that CO Valentin was out of uniform again highlights the pretextual nature of DOC's actions, since witnesses testified that no superior officer on March 29, 2005 reported CO Valentin out of uniform at anytime during the course of that day. With regard to the Roma Deli Incident, again, at no time prior to the issuance and receipt of the disciplinary charges had any superior officer informed CO Valentin that he was out of uniform. Also, Captain Nelson, who originally authored the disciplinary charges against CO Valentin testified that he had never disciplined a CO for leaving Rikers Island without permission to patronize the Roma Deli.

City's Position

The City contends that the Union's claims that DOC violated NYCCBL § 12-306(a)(1) and (3) HRA are unsubstantiated because COBA cannot establish a causal connection between CO Valentin's protected union activity and DOC's decisions to discipline CO Valentin for a variety of offenses. Though DOC does not dispute that CO Valentin's filing of grievances and written complaints against DOC and its management is protected union activity as defined by the Board of Collective Bargaining ("Board"), the Union has not demonstrated that CO Valentin's actions were the impetus for DOC's actions taken against CO Valentin as alleged in the Union's improper practice petition herein.

Specifically, the City contends that the levying of disciplinary charges against CO Valentin is not evidence of anti-union animus and in no way violates the rights of this employee under the NYCCBL. Concerning the Chair Incident, CO Valentin refused to rise to his feet when Captain Lewis entered the room within ESU base where the log book was located, refused a direct order from Captain Lewis, and was wearing a non-DOC issued jacket. As such, DOC proffered disciplinary

charges against CO Valentin for being out of uniform, disobeying an order, insubordination, and conduct unbecoming a CO. In fact, CO Valentin pled to engaging in such actions and received a reprimand as a result fo the Chair Incident. With regard to the Roma Deli Incident, CO Valentin left Rikers Island without permission from Captain Nelson in the middle of his shift, while wearing a non-DOC issued jacket with an offensive patch on it that advocated violence against prisoners, and, when confronted about his actions by Commissioner Horn, informed Commissioner Horn that he had, in fact, obtained authorization to leave his post. Accordingly, DOC proffered disciplinary charges against CO Valentin for being out of uniform, abandoning his post without permission, rendering a false report, and conduct unbecoming a CO. Eventually, CO Valentin pled guilty to the allegations contained in the set of disciplinary charges arising out of the Roma Deli Incident. Therefore, all disciplinary actions taken by DOC against CO Valentin were not motivated by anti-union animus, but rather DOC's desire to properly discipline a CO for acting in such an improper manner.

Assuming *arguendo* that the Union establishes a *prima facie* case against DOC for violating NYCCBL § 12-306(a)(1) and (3), DOC argues that then they would have engaged in the actions complained of in the instant matter even in the absence of CO Valentin's protected union activity. CO Valentin admitted in his testimony that he did not stand up when Captain Lewis entered the ESU base, he did not relinquish his chair, and disobeyed several direct orders from Captain Lewis. He also admitted in his testimony that he did in fact leave Rikers Island without obtaining permission from Captain Nelson to patronize the Roma Deli. Furthermore, neutral, third-party witnesses testified that CO Valentin was wearing a non-DOC issued jacket with an offensive patch on it. Moreover, DOC's Division of Trials and Litigation, upon investigating the request for charges from

ESU in both incidents, ascertained that CO Valentin had, in fact, engaged in actions that warranted the discipline contained in the MOCs. Therefore, even if COBA establishes a *prima facie* case against DOC, no violation of the NYCCBL occurred based upon the legitimate business reasons proffered herein.

DISCUSSION

The issue presented in the instant matter is whether DOC discriminated and retaliated against CO Valentin for his numerous acts of protected union activity by disciplining CO Valentin for the Chair Incident and the Roma Deli Incident, by shift reducing him from the sanitation post, by reprimanding him for wearing non-DOC issued articles of clothing, and by harassing him concerning the failure to complete all of the sanitation duties. Based upon the totality of the record, which included over 1,300 pages of testimony and over 80 exhibits, we find that DOC discriminated and retaliated against CO Valentin when it proffered exaggerated disciplinary charges against him as a result of the Chair Incident. We further find that, even though four of the disciplinary charges levied against CO Valentin arising out of the Roma Deli Incident were not motivated by anti-union animus, DOC's issuance and augmentation of the other disciplinary charges arising out of that incident violated the NYCCBL.

In considering discrimination and/or retaliation cases under the NYCCBL, this Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, which states that, to establish a *prima facie* case, a petitioner must demonstrate that:

1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. The employee's union activity was a motivating factor in the employer's decision.

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

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements, or may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU*, 77 OCB 35, at 18 (BCB 2006); *see also Lamberti*, 77 OCB 21, at 17 (BCB 2006); *DC 37*, 1 OCB2d 5, at 64 (BCB 2008); *City Employees Union, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

Here, we find that the Union has satisfied the first element of the *Bowman-Salamanca* test. It is undisputed that CO Valentin has a long history of engaging in protected union activity. CO Valentin filed grievances on January 31, 2005, April 20, 2005, and November 29, 2005 and authored nine memoranda, from January 5, 2005 to December 14, 2005, that criticized the manner in which ADW Caputo and Captain Lewis administered ESU, highlighted numerous alleged violations of DOC rules and regulations by these two superior officers, and expressed the discontent amongst COs within ESU. Furthermore, CO Marrero and CO Valle testified that CO Valentin was a zealous advocate who took positions that were often contrary to DOC administration. Moreover, even though some of the City's witnesses denied knowledge of CO Valentin's protected union activity, the City in its Post-Hearing Brief, dated July 11, 2008, "acknowledge[d] that [CO Valentin], by filing grievances was engaged in union activity." (City Post-Hearing Brief, p. 12). Therefore, we conclude that the Union has satisfied the first element of the *Bowman-Salamanca* standard.

Regarding the motivation behind the employment action in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77

OCB 15, at 26; *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). In addition, while temporal proximity alone is not sufficient to establish causation, the “repeated, suspicious, temporal proximity” between the protected union activity and the allegedly retaliatory action, in conjunction with other facts supporting a finding of improper motivation, is sufficient to satisfy the second element of the *Bowman-Salamanca* test. *Colella*, 79 OCB 27, at 55 (BCB 2008) citing *SSEU, Local 371*, 77 OCB 35, at 15-16 (BCB 2006).

Here, we find that COBA has satisfied its burden of production by demonstrating that a causal connection existed between CO Valentin’s protected union activity and the specific, timely, alleged acts of discrimination and retaliation, thereby establishing *prima facie* violations of the NYCCBL.

We find that, prior to January 2005, the relationship between the Union and the superior officers within ESU was “harmonious.” (Tr. 234). CO Valentin credibly testified that, after ADW Caputo’s appointment to ESU, the relationship between the Union and DOC management changed. This is further evidenced by the fact that CO Valentin, COBA’s representative within ESU, did not file a grievance prior to January 2005, and that after ADW Caputo’s appointment, CO Valentin filed three sets of grievances, the first one being on January 31, 2005. In addition, in the month following the Chair Incident, ESU management refused to schedule the April 2005 labor-management meeting, which typically should have occurred in mid-month, but was never held. According to CO Valentin’s unrefuted and credible testimony, these meetings were held every month, and to not

conduct one was “highly unusual.” (Tr. 425). Then, within a month after filing his November 7, 2005 grievance concerning improper staffing levels on the tactical extraction teams, CO Valentin was requested to author a written report on his alleged failure to conduct sanitation detail and, contrary to routine, was ordered to return the inmates assigned to his sanitation detail before they completed their tasks and during the afternoon count. Furthermore, after CO Valentin’s filing of this same grievance, his sanitation post was shift reduced and backfilled with CO Negrón, while CO Valentin was placed on the RRT to fill CO Negrón’s vacant post, which was in direct contradiction of DOC’s shift reduction regulation. We find that these instances are illustrative of the “repeated, suspicious temporal proximity” between CO Valentin’s protect union activity and alleged acts of discrimination and retaliation. *SSEU, Local 371, 77 OCB 35*, at 15.

Further, we note that CO Valentin filed numerous written memoranda and three grievances that were specifically critical of ADW Caputo and Captain Lewis. The record establishes that these memoranda criticized the staffing decisions of these two superior officers with regards to the RRT and the assignment of overtime to COs, and highlighted potential violations of DOC rules and regulations carried out at the direction of ADW Caputo and Captain Lewis. The record demonstrates that these memoranda and grievances angered ADW Caputo and Captain Lewis as evidenced by their expressed desire to exact some type of retribution against CO Valentin. After the Chair Incident, COs Villaroel, Vernon, and Marrero all credibly testified that Captain Lewis wanted CO Valentin transferred out of ESU. Additionally, CO Negrón credibly testified that Captain Nelson informed him that “he knew it was inappropriate to remove [the Union delegate] from his post, but [ADW Caputo] stated to [*sic*] do it anyway.” (Tr. 170).

More specifically, we find that ADW Caputo and Captain Lewis expressed their dislike for

CO Valentin due to his position as COBA delegate within ESU. On one occasion, CO Valentin requested information from ADW Caputo regarding an investigation into the staffing levels and overtime assignments that he was undertaking at the behest of COBA members within ESU, and ADW Caputo flatly rejected this request. On another occasion, ADW Caputo simply ignored CO Valentin's expressed concern as COBA delegate that a security detail was understaffed, lacked the necessary equipment, and was given poor intelligence. Captain Lewis wrote in his March 30, 2005 memorandum that CO Valentin was "the subject of numerous supervisors' complaints . . . [and] these charges were not adjudicated or minimized because of COBA intervention. Therefore, an environment of insubordination and overall disrespect for supervisors has been exacerbated." (City Ex. 2). Based upon the record in the instant matter, we find that Captain Lewis viewed COBA as a negative force in ESU that inhibited the disciplining of CO Valentin and created an environment of "overall disrespect." (*Id.*).

Further evidence of DOC's hostility toward CO Valentin was this agency's issuance of Command Level Order 07/05. This order regarding the securing of firearms at ESU base expressly designated the CO assigned to the sanitation post during the shift that began at 7:00 a.m. to assist the CO assigned to ESU base. However, during the other two shifts, no other CO, regardless of the post, was assigned to assist in the securing of firearms. Though the Command Level Order 07/05 is innocuous on its face, CO Valentin was ESU sanitation officer when this command level order was promulgated.³⁰ See DC 37, 1 OCB2d 5, at 72; see e.g., *Hayut v. State University of New York*, 352

³⁰ Seemingly another neutral regulation, Command Level Order 09/05 concerned the sanitation post. CO Valentin credibly testified that, when he asked Captain Nelson the reason for the promulgation of this particular order, Captain Nelson stated that ADW Caputo issued this order because he did not like CO Valentin. When given the opportunity to refute this claim, the City did
(continued...)

F.3d 733, 747 (2nd Cir. 2003) (perceivably innocuous acts, when taken in context, can rise to an actionably discriminatory level). Furthermore, Captain Nelson testified that, when CO Valentin was removed from the sanitation post, the CO assigned to the sanitation post was no longer required to assist in these duties. See *DC 37, Local 376*, 73 OCB 15, at 14-15 (BCB 2004) (the agency's failure to treat petitioner in a similar fashion as other employees who had accidents involving equipment demonstrated to the Board that petitioner's punishment was in retaliation for his protected union activity); see also *Convention Center Operating Corp.*, 28 PERB 4675 (1995), *aff'd*, 29 PERB 3022 (1996) (termination of employees without legitimate explanation for disparity of treatment or severity of penalty led to conclusion of retaliation).

This environment of hostility stemming from CO Valentin's protected union activity illuminates the intentions underlying the timely, alleged acts of discrimination on the part of DOC management which the Union contends violated the NYCCBL. With regard to the Chair Incident, based upon the record in the instant matter, we find that Captain Lewis did not strike CO Valentin in a violent and inappropriate manner, that CO Valentin disobeyed two direct orders from Captain Lewis to relinquish his seat, that CO Valentin should have relinquished his seat at that time, and that CO Valentin was wearing a non-DOC issued vest at that time. Based upon the credible testimony of COs Valentin and Ubides, as well as Captain Miller, we also find that there were four available seats within four feet of Captain Lewis, that Captain Lewis deliberately ignored the assistance of CO Ubides, and that Captain Lewis signed the log book in ESU base while standing. We further find

³⁰(...continued)

not ask Captain Nelson whether he made this statement. Therefore, we take the unrefuted testimony of CO Valentin indicating that the issuance of this command level order was motivated by discriminatory intent.

that, the day after the Chair Incident, CO Ubides, as per his testimony, was assigned to the sanitation post by Captain McCarthy who told CO Ubides that the superior officers within ESU wanted CO Valentin transferred out of the unit.

As a result of the Chair Incident, CO Valentin was temporarily removed from the sanitation post the following day. Later, in April 2005, DOC initially charged CO Valentin with four specific disciplinary charges relating to the Chair Incident, but, on June 1, 2005, CO Valentin received a MOC that contained 15 disciplinary charges. Even though Bryk testified that his issuance of disciplinary charges through a MOC was based upon his review of the file, we cannot ignore the fact that Bryk testified that he considered the CD authored at the command level by Captain Lewis. The augmentation of a CD containing four charges to a MOC containing 15 charges, many of which were not included in the original CD, supports the Union's contention that DOC targeted CO Valentin and took affirmative action to increase the existing CD to give the impression that CO Valentin's actions were more egregious than they actually were. Furthermore, the alleged violation of DOC regulation 4.30.020 addressed the submission of a false or misleading report, which, based on the record in the instant matter, did not occur during the Chair Incident. Based upon the above facts, we find that COBA has set forth sufficient credible evidence demonstrating that DOC's proffering of disciplinary charges against CO Valentin as a result of the Chair Incident was done so in a retaliatory manner for his protected union activity, thereby satisfying its burden of a *prima facie* case.

With regard to the Roma Deli Incident, the record demonstrates that CO Valentin left the premises to patronize the Roma Deli and that CO Valentin did not obtain permission from his superior officers to do so. Furthermore, we find that Commissioner Horn and Chief of Staff LaPook, who offered credible and consistent depictions of the event in question, witnessed CO Valentin off

of Rikers Island wearing a jacket with the Patch on it which disturbed these two high ranking DOC officials. Commissioner Horn later learned that CO Valentin had left his post without prior authorization from his superior officers, and as a result, CO Valentin received a CD that charged him with these three offenses: “members shall not leave their place of assignment without permission,” “conduct unbecoming an officer” and “uniformed members while on duty shall wear the prescribed uniform.” (Union Ex. 44). In fact, CO Valentin admitted that he was away from his post and that, since it was October and he does own a jacket with the Patch on it, he could have been wearing this jacket at the time Chief of Staff LaPook saw him outside the Roma Deli. Instead of serving CO Valentin with this CD, Captain Nelson testified that, the following day, he approached CO Valentin and informed him that he was going to be disciplined for being off Rikers Island without permission. He then showed the CD with the three disciplinary charges to CO Valentin, but did not give it to him because ADW Caputo wanted this CD brought to his office “so that he could add additional charges to it.” (Tr. 526). Captain Nelson further testified that, when he initially prepared this CD with three charges on it, he was later asked by ADW Caputo to “add one more to it . . . [because] four . . . means a [MOC].” (Tr. 1108-1109).

We find that ADW Caputo, who was the subject of many of the complaints authored by CO Valentin, as COBA delegate within ESU, clearly demonstrated that he intended to pursue heightened and unfair discipline against CO Valentin as a result of the Roma Deli Incident. In October 2005, DOC initially charged CO Valentin with three specific disciplinary charges immediately after the Roma Deli Incident, but, on November 7, 2005, CO Valentin received a MOC that contained 16 disciplinary charges. Again, even though Bryk testified that his issuance of disciplinary charges through a MOC was based upon his review of the file, we cannot overlook the fact that Bryk testified

that he considered the CD authored at the command level by Captain Nelson, which ADW Caputo ordered Captain Nelson to intentionally augment, and that the MOC was an augmentation of a CD that contained only three charges. Furthermore, as with the MOC arising out of the Chair Incident, many of the 16 disciplinary charges that appeared on the MOC arising out of the Roma Deli Incident were not included in the original CD. Accordingly, we find that DOC targeted CO Valentin and took affirmative actions to augment the disciplinary charges against CO Valentin, immediately after the Roma Deli Incident. Therefore, we find that the Union satisfied its *prima facie* burden of production in demonstrating that DOC's issuance of these exaggerated disciplinary charges as a result of the Roma Deli Incident against CO Valentin was causally connected to CO Valentin's protected union activity.

Where, as here, a petitioner alleges sufficient facts concerning the first two elements of the *Salamanca-Bowman* test to make out a *prima facie* case, "the employer may choose to attempt to refute the 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*, 79 OCB 40, at 26 (BCB 2007) citing *Howe*, 77 OCB 32, at 20-21 (BCB 2006); *see also Local 237, City Employees Union*, 77 OCB 24 (BCB 2006).

Overall, the City attempts to refute the claims asserted by the Union and avers that no causal connection exists between CO Valentin's protect union activity and any adverse employment actions taken against him. In addition to DOC's lack of anti-union animus as the motivation for the measures taken against CO Valentin, the City further argues that, assuming *arguendo* that the Board found a *prima facie* violation of the NYCCBL, DOC had legitimate business reasons for any and all actions taken against CO Valentin.

According to the City, previous wardens and ADWs took issue with CO Valentin's failure to properly complete the duties assigned to him. In 2003, prior to ADW Caputo's arrival at ESU, CO Valentin was ordered to submit a report concerning his failure to wax the floor in Captain Lewis's office, despite Captain Lewis's expressed desire to the contrary. In 2004, CO Valentin was again asked to submit a written report concerning his failure to sanitize the Administrative Trailer on ESU base before 8:00 a.m., and as a result thereof, CO Valentin was given a Corrective Interview Report. Additionally, prior to ADW Caputo's arrival at ESU, CO Valentin displayed a disregard of authority, which is evidenced by several incidents in where CO Valentin appeared out of uniform or parked his private vehicle in unauthorized spots on ESU base. Based upon these events, the City contends that CO Valentin's depiction that he had a harmonious relationship with ESU management prior to ADW Caputo's arrival at ESU is unfounded.

With respect to the specific incidents at issue in the instant matter, the City argues that DOC had a legitimate business reason for disciplining CO Valentin concerning the Chair Incident. The City argues that DOC was justified in proffering disciplinary charges against CO Valentin for this incident because CO Valentin disobeyed two direct orders and there was no DOC rule that justified such disobedience. Even though COs Valentin and Ubides testified that they did not routinely stand and salute a superior officer upon his/her entrance into a room and such failure was not normally a disciplinable offense, DOC Regulation 3.20.120 states COs shall stand at attention and salute a superior officer before addressing or when addressed by that superior officer. Furthermore, although CO Valentin, who wore a non-DOC issued navy blue vest which was not noticed by his superior officers at roll call to stay warm on the day of the Chair Incident, the Uniform Directive expressly states that "uniformed members of [DOC] shall wear at all times while on duty, the regulation duty

uniform prescribed by the Commissioner and the Chief of Department . . . [and] members shall not deviate from, modify or interchange in any manner, the prescribed uniform.” (Union Ex. 16). Moreover, CO Valentin admitted that he violated these rules, during his testimony in the instant matter and by executing the Negotiated Plea Agreement on February 1, 2006. Based upon these facts in evidence, the City contends that these facts demonstrate a legitimate business reason for proffering disciplinary charges against CO Valentin as a result of the Chair Incident.

If CO Valentin, as contended by the Union, believed that Captain Lewis violated DOC Regulations and unfairly targeted him, the City contends that CO Valentin should have followed the labor maxim of “obey now, grieve later.” *See Cunningham*, 51 OCB 15, at 43 (BCB 1993); *Earp*, 39 OCB 53, at 7 (BCB 1987). In *Patrolmen’s Benevolent Association*, 63 OCB 16 (BCB 1999), a police officer who had a union picketing sign criticizing his captain in his car was told by that captain to dispose of the sign. Believing that such a sign constituted protected union activity, he refused this captain’s direct orders, and was subsequently transferred. This Board dismissed this police officer’s improper practice petition because his disobedience violated the police department’s regulations, and he should have complied with the order and then initiate an improper practice petition. *Id.*, at 9-10. Here, according to the City, if CO Valentin believed Captain Lewis’s actions violated the NYCCBL, he should have complied with Captain Lewis’s orders and then initiate an improper practice petition or grieve DOC’s behavior.

Concerning the Roma Deli Incident, the City contends that it had a legitimate business reason to discipline CO Valentin because of his actions during this incident. According to the testimony of Commissioner Horn and Chief of Staff LaPook, CO Valentin was at the Roma Deli, not at his assigned post and was wearing a jacket that contained the Patch, which portrayed COs as “a bunch

of guards who are out there beating up the inmates,” and did not accurately depict “the culture of [DOC].” (Tr. 787). Additionally, according to the testimony of Captain Nelson, CO Valentin was away from his post without prior authorization from his direct supervisor. Furthermore, CO Valentin agreed to a Negotiated Plea Agreement on February 7, 2006 concerning this incident and accepted the factual findings therein. Based upon these facts in evidence, the City contends that any disciplinary measure taken against CO Valentin resulting from the Roma Deli Incident is supported by the evidence in the instant matter and provides DOC a legitimate business reason for disciplining CO Valentin.

In defense of the issuances of the MOCs arising out of these two specific instances, the City argues that the more serious sets of disciplinary charges originated from DOC’s Division of Trials and Litigation, not the command level. Since it is this division’s duty to examine the entire file and draft charges accordingly, ADW Caputo and Captain Lewis did not have influence over the levying of the MOCs concerning these two incidents, thereby breaking the causal link between CO Valentin’s protected union activity and the adverse employment actions taken against him by DOC. Bryk testified that he is not “restricted in drafting charges to the violation of the directive and the . . . rule and regulations” cited at the command level, and that, based on his experience, the decision to refer a CD to his office for a MOC occurs after the parties cannot resolve the dispute at the command level. (Tr. 1164). Bryk also testified that the issuance of a MOC usually depends upon the gravity of the misconduct, and not the actual number of disciplinary charges alleged. Based upon these facts in evidence, the City contends that the issuance of the MOCs were motivated by legitimate business reasons.

Although DOC proffered arguably legitimate business reasons for the adverse employment

actions it took against CO Valentin, we, nevertheless, find that a majority of DOC's actions in the instant matter was a pretext for discrimination. In order to properly and completely address the issue of pretext, we need to examine the credibility of the key witnesses involved herein. CO Valentin's testimony is predominantly credible. Most of CO Valentin's testimony was corroborated, when possible, by other witnesses, including those called by the City such as Captain Miller. Additionally, CO Valentin's testimony concerning certain events went unrefuted by the City, even though the City had opportunities to present witnesses who could have contradicted his testimony or to ask witnesses who appeared in this matter about certain claims made by CO Valentin. *See Colella*, 79 OCB 27, at 57 (BCB 2007) ("failure to adduce testimony contravening [petitioner's] account from the very witnesses whose actions are at issue, and who were present to be asked, is telling, and we find that it enhances the credibility of [petitioner's] account"). *See, e.g., Schwartz v. New York City Dept. of Educ.*, 22 A.D.3d 672, 673 (2d Dept. 2005); *Brown v. Village Mobil Serv. Station, Inc.*, 167 A.D.2d 158, 159 (1st Dept. 1990). Furthermore, we find that CO Valentin's credibility is bolstered by his admissions of owning and wearing a non-DOC issued jacket with the Patch on it at ESU during his tour, refusing direct orders from Captain Lewis, and acknowledging that no DOC rule exists that would allow a CO to disregard a direct order from a superior officer. Although we find Commissioner Horn's version of the Roma Deli Incident to be accurate and find some of CO Valentin's testimony to be slightly hyperbolic, we also find that, overall, most of CO Valentin's testimony was realistic and credible.

On the other hand, we find that Captain Lewis and ADW Caputo, for the most part, did not provide credible testimony. Captain Lewis's testimony largely conflicted with consistent accounts of events provided by CO Valentin as well as several disinterested witnesses such as Captain Miller

and COs Villaroel and Ubides. Furthermore, Captain Lewis testified that staffing decisions, such as whether to shift reduce a particular post, to assign a CO to overtime, and to staff a security detail with certain COs, were not his responsibility. According to him, those decisions were ultimately the responsibility of Captain Nelson and ADW Caputo. However, Captain Lewis later contradicted part of this testimony stating that he did in fact have the authority to assign COs to posts, make shift reductions, and was in charge of assigning COs to security details. Moreover, Captain Lewis contradicted himself when he testified that six COs should be assigned to security details, but, on at least one occasion, June 14, 2005, he purposely assigned only two COs to a particular security detail. *See DC 37*, 1 OCB2d 5, at 66-67 (finding witnesses incredible because their testimony contained inconsistencies with the existing evidence as well as several outright misrepresentations).

With regard to the testimony of ADW Caputo, he testified that Commissioner Horn did not “dwell” on the Patch during the Roma Deli Incident. However, based upon the testimony of Commissioner Horn and Chief of Staff LaPook, the Patch was the impetus for Commissioner Horn confronting CO Valentin and both Commissioner Horn and Chief of Staff LaPook stated in very clear terms that the Patch was “disconcerting” and they were “upset” that a CO would have something on their jacket that would depict DOC in such an unfavorable light. Furthermore, ADW Caputo stated that Commissioner Horn did not express his concern for the Patch until later on that day at a team meeting. Commissioner Horn’s credible testimony did not mention such a meeting, and rather, stated his displeasure for the Patch when he confronted ADW Caputo that morning.

In a separate incident, the schedule from November 28, 2005 indicated that CO Negron was removed from the RRT, then placed in the sanitation post, and then placed in the emergency equipment post. According to ADW Caputo, the rationale for this change in posts was to allow CO

Negron to do the payroll, not perform the sanitation detail. However, on cross-examination, ADW Caputo admitted that payroll is not one of the requirements of the CO assigned to the emergency equipment post. Furthermore, Captain Nelson testified that after CO Negron would do the payroll, he would spend the remainder of the day conducting the sanitation detail. Accordingly, the rationale offered by ADW Caputo is belied by the fact that the post to which he was eventually assigned does not do payroll and, CO Negron, in fact, performed the duties of the sanitation CO that day. Accordingly, we cannot credit ADW Caputo's testimony in this matter. *See SBA, 75 OCB 22*, at 25-26 (superior officer's testimony was found to be unreliable because it was "inconsistent with the evidence," was "not supported by the facts," and was "logically inconsistent").

In addition to DOC's proffered unreliable testimony, we further find that several documents presented by the City and DOC, which the Union called into question, could not be deemed probative because the City could not satisfy its burden of proof establishing their authenticity. First, City Exhibit 21, which consists of the three pages of the January 15, 2003 CD and, according to Captain Lewis, was served on CO Valentin. However, City Exhibit 21 is not signed by CO Valentin or any superior officer. Furthermore, CO Valentin credibly testified that he never received this CD, that a meeting with his administrative captain in January 2003 concerning this CD never occurred, and that this CD was never in his personnel record. Accordingly, we cannot give this document any weight as a business record, nor has any other ground for its admission into the record in the instant matter been provided.

Next, according to the City, City Exhibit 7 sets the hours of the sanitation post as only 7:00 a.m. to 3:00 p.m. However, this document, on its face, appears to be nothing more than a photocopied sheet from a log book containing the post name and number, the alleged tour, and the

person to whom it was awarded. In addition, the credible testimony by CO Valentin and several other witnesses demonstrates that CO Valentin never worked those hours and actually worked from 6:00 a.m. to 2:00 p.m. Therefore, we find that City Exhibits 7 and 21 lacked the necessary proof of authenticity to find them reliable. As such, we cannot find any exculpatory evidence in these documents.

In addition to submitting these unreliable documents, we further note that the City's failure to provide a possibly incriminating document requires this Board to draw an adverse inference from such failure. During the hearing in the instant matter, CO Valentin testified that he was shift reduced on August 9, 2005, and the sanitation post was backfilled by another CO. In response to this contention, the City produced the CO schedule sheet from that day, which indicated CO Valentin was assigned to the sanitation post, not the RRT, and the sanitation post was not backfilled. However, the Union averred that CO Valentin was shift reduced in the middle of his tour and this change would not have been noted on the daily CO schedule sheet, but rather would have been noted in ESU base log book.

Throughout the hearing in the instant matter, the Union made several requests for these log book pages from that day. However, the City failed to disclose such documents, even though the City later introduced another exhibit which included pages from that same log book but from a different day. Therefore, we draw an adverse inference against the City for its failure to produce documents that were in the exclusive control of DOC, were routinely maintained by this agency, as evidenced by the City's production of other pages from ESU log book, and could have potentially corroborated the Union's claim. *See DC 37, Local 376, 1 OCB2d 40, at 19* (adverse inference was drawn by the Board when the agency failed to produce a witness that could have either corroborated

or refuted the union's claim); *Colella*, 79 OCB 27, at 63 (BCB 2007) (an adverse inference may be drawn when a party fails to produce documentary evidence which is within its control and which it is naturally expected to produce); *see also People v. Gonzalez*, 68 N.Y.2d 424 (1986).

With this credibility determination established, we now turn to the examination of the specific events where COBA alleged DOC violated the NYCCBL, but where the City proffered business reasons purportedly exculpating this agency. Concerning the Chair Incident, we find that the proffered business reason by DOC is unfounded. According to Captain Miller's credible testimony, Captain Lewis overreacted to CO Valentin's actions and was just "blowing off steam." (Tr. 740). Furthermore, CO Ubides, like CO Valentin, did not stand and salute Captain Lewis upon his entrance into ESU base, but he, unlike CO Valentin, did not receive any disciplinary charges for his failure to do so. *See DC 37, Local 376*, 73 OCB 15, at 14-15. With regard to Captain Lewis' accusation that CO Valentin was out of uniform during this event, we find that similarly situated COs were not routinely disciplined for such an offense. In fact, Captains Miller and Lewis and CO Ubides, when testifying about this event, never mentioned that CO Valentin was out of uniform, indicating that wearing such attire was not remarkable. *DEA*, 79 OCB 40, at 28 (BCB 2007) (holding that the agency's punitive acts, including placement on foot patrol and deprivation of a cell phone, toward an employee who sought out union assistance for poor performance evaluations violated the NYCCBL because, in part, "no other [similarly situated] employees were so deprived").

Another factor that undermines the City's proffered business reason regarding the Chair Incident is the City's reliance on Captain Lewis's memorandum, dated March 30, 2005. City Exhibit 2 was authored by Captain Lewis in support of the requested disciplinary action levied against CO Valentin and was designed to portray CO Valentin as a disciplinary problem. However within its

16 enclosures, this document contains a MOC, dated April 14, 2005 and executed by various DOC officials on April 22 and 25, 2005, which was approximately one month after this document had been allegedly drafted and submitted by Captain Lewis. Further within these enclosures, Captain Lewis attached a single page of a CD from January 15, 2003, which lacked the requisite number of pages and was unsigned by CO Valentin or any DOC superior officer. As such, we find this document, in its entirety, unreliable. *See, e.g., In the Matter of the Claim of Sherman*, 267 A.D.2d at 569; *In the Matter of the Claim of Basile*, 252 A.D.2d at 645. Accordingly, we find City Exhibit 2 to be another example of DOC's attempt to portray CO Valentin in the most unfavorable light.

In addressing the City's argument that CO Valentin should have "obeyed now, grieve later," we find that, though this is a age-old labor maxim that has been applied by this Board, we cannot allow DOC to hide behind such a defense in the instant matter. In *Sciarillo*, 59 OCB 23 (BCB 1997), the union alleged that the suspension of a shop steward, who had engaged in a verbal altercation with a direct supervisor in front of other bargaining unit members, was based upon the shop steward's aggressive manner representing his constituents and that he had testified against this particular supervisor in a previous improper practice matter. The City contended that the shop steward's suspension was warranted since he disobeyed several direct orders from the supervisor to exit the assignment room, even though there were approximately 20 other employees in that same room. Based upon the testimony of the witnesses to this altercation, we found that "the outburst [by the shop steward], by itself, was insufficient evidence from which an inference of improper motivation might be drawn." *Id.*, at 21. However, since no other employee was asked to leave or was suspended, and in the light of the existing relationship between the shop steward and the supervisor, the Board found that the supervisor's "intent was not to maintain discipline, but to force

[the shop steward] to submit to his order in the presence of the members.” *Id.*, at 22-23.

Similarly here, we find that CO Valentin was given direct orders to relinquish his chair for the sole purpose to harass him because there were four chairs within four feet of where CO Valentin was sitting. Furthermore, these direct orders occurred in front of CO Ubides and Captain Miller. However, only CO Valentin was brought up on disciplinary charges for failing to stand and salute Captain Lewis, even though CO Ubides testified without contradiction that he also failed to stand and salute Captain Lewis. Consistent with the previously cited decision, we find that Captain Lewis’s orders were not designed to maintain order within the rank and file, but rather to harass CO Valentin in front of CO Ubides and Captain Miller. Further in line with *Sciarillo*, “this ruling is based upon its facts and is not intended in any way to change existing law” or overturn the age-old maxim of “obey now, grieve later.” *Id.*, at 23.

Based upon the specific facts within the extensive record in the instant matter, we find that the actions taken against CO Valentin as a result of the Chair Incident were motivated by DOC’s anti-union animus and were discriminatory in nature, and the business reasons alleged by the City are not legitimate. *See Colella*, 79 OCB 27, at 61; DC 37, AFSCME, 77 OCB 33, at 35 (noting that “when a public employer offers, as a legitimate business defense, a reason that is unsupported by or inconsistent with the record, the December 3, 2008 defense will not be credited by this Board”). Therefore, we find that COBA satisfied its burden of persuasion with regard to this specific incident, and that DOC committed a violation of NYCCBL § 12-306(a)(1) and (3).

With regard to the Roma Deli Incident, we find that the four disciplinary charges proffered against CO Valentin in the February 8, 2006 CD to be motivated by legitimate, non-Union related business reasons. This CD alleged that CO Valentin violated these DOC regulations: “members

shall not leave their place of assignment without permission,” “conduct unbecoming an officer,” “members shall not render any false reports” and “members while on duty shall wear prescribed uniform.” (City Ex. 5). After a review of the extensive record in this matter, we find that these four disciplinary charges were based in fact and not motivated by anti-union animus. Furthermore, even though the disciplinary charges of filing a false report was not included in the initial CD arising out of this incident, we credit Commissioner Horn when he testified that he asked CO Valentin whether permission from his direct supervisor was obtained to leave Rikers Island, and that CO Valentin responded that such authorization had been obtained. Therefore, we cannot find that DOC violated the NYCCBL with regard to these specific disciplinary charges.

Nevertheless, this finding does not insulate DOC from all liability with regard to the Roma Deli Incident. DOC’s decisions to send the initial October 19, 2005 CD to DOC’s Division of Trials and Litigation and to issue the November 7, 2005 MOC were motivated by anti-union animus and were retaliatory in nature. We further find that DOC’s proffered business reasons concerning these decisions were unpersuasive. The direct testimony of Captain Nelson indicated that CO Valentin was the only CO disciplined for leaving Rikers Island to go to the Roma Deli and that ADW Caputo wanted the CD arising out of the Roma Deli Incident to be augmented into a MOC so that CO Valentin could be transferred out of ESU. These factors illuminate ADW Caputo’s anti-union motivation behind sending this case to DOC’s Division of Trials and Litigation. We further note that, although CO Valentin’s jacket with the Patch on it offended Commissioner Horn and Chief of Staff LaPook, COs routinely wore this style of jacket without fear of discipline for either being out of uniform or of portraying COs in a disconcerting manner, as credibly testified by Captain Miller. In light of the penalty levied against CO Valentin, the failure of DOC to discipline COs in an

even-handed, non-discriminatory manner, and the particular testimony of Captains Nelson and Miller, we find that the City's proffered business reasons do not justify the issuance of the MOC and that DOC's exaggeration of the disciplinary charges arising out of the Roma Deli Incident violated NYCCBL § 12-306(a)(1) and (3).

Therefore, based upon the specific facts within the extensive record in the instant matter, we find that DOC's proffering of the four disciplinary charges arising out of the Roma Deli Incident did not violate the NYCCBL. However, we also find that DOC's exaggeration of the original CD into a MOC was motivated by DOC's anti-union animus and was discriminatory in nature, and the business reasons alleged by the City with regard to these specific actions are not legitimate. *See DC 37, 1 OCB2d 5, at 74-75* (finding that the agency violated the NYCCBL with regard to its actions taken against a shop steward, but further finding that its decision not to promote that employee was not motivated by anti-union animus.) Therefore, we find that COBA, in part, satisfied its burden of persuasion with regard to the Roma Deli Incident, and that DOC, in part, committed a violation of NYCCBL § 12-306(a)(1) and (3).

With regard to remedies in the instant matter, we order that, due to the violations of NYCCBL § 12-306(a)(1) and (3), DOC and its management shall cease and desist from engaging in all discriminatory actions aimed at discouraging membership and participation in COBA and engaging in a campaign of retaliation and discrimination directed against CO Valentin. Furthermore, DOC shall post the attached notice detailing its violations of the NYCCBL. However, we cannot order DOC to expunge the disciplinary charges levied upon CO Valentin that were discussed herein because, as of February 2006, CO Valentin executed two Negotiated Plea Agreements concerning the disciplinary charges that arose from the Chair and Roma Deli Incidents. In said agreements, CO

Valentin accepted a reprimand for the Chair Incident and whatever lawful penalty ESU may impose concerning the Roma Deli Incident.

In New York State law, “stipulations of settlement are favored ... and are not lightly cast aside.” *Hallock v. State of New York*, 64 N.Y.2d 224, 230 (1984). Indeed, in subsequent cases, the Court of Appeals has reaffirmed what it terms “our State’s strong policy promoting settlement.” *Bonnette v. Long Island College Hospital*, 3 N.Y.3d 281, 286 (2004). For a stipulation to be set aside, the party seeking to do so must establish “cause sufficient to invalidate a contract such as fraud, duress, collusion, or mistake.” *Feuer v. Darkanot*, 2007 N.Y. App. Div. LEXIS 782 (2d Dept. January 23, 2007), citing *Hallock, supra*; see also, *Matter of City of New York*, 12 Misc.3d 1171A, 820 N.Y.S.2d 842 (Sup. Ct. Kings. Co. 2006). Thus, stipulations of settlement resolving disciplinary charges against public employees have routinely been upheld and found to bar actions arising from the claims settled, in the absence of a specific showing that the stipulation was invalid. See, e.g., *Quinlan v. New York City Fire Department*, 14 A.D.3d 320 (1st Dept. 2005), following *Matter of Abramovich v. Board of Educ.*, 46 N.Y.2d 450, cert. den., 445 U.S. 845 (1979); see also *Matter of Croman v. City University of New York*, 277 A.D.2d 185 (1st Dept. 2001).

In the instant case, the Union has not alleged any basis upon which this Board could conclude that CO Valentin executed these plea agreements under fraud, duress, collusion or mistake. Accordingly, we cannot overturn the agreed-upon penalties that have already been levied by DOC against CO Valentin for his actions in the Chair and Roma Deli Incidents.

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 Corrections Officers Benevolent Association, docketed as BCB-2493-05, be, and the same hereby is granted; and it is further

ORDERED, that Department of Corrections cease and desist from: engaging in all discriminatory actions aimed at discouraging membership and participation in Corrections Officers Benevolent Association; interfering with, restraining and/or coercing Correction Officer William Valentin and all other New York City Department of Corrections employees from engaging in protected activity; and engaging in a campaign of retaliation and discrimination; and it is further

ORDERED, that the New York City Department of Corrections post of notices indicating its violation of New York City Collective Bargaining Law 12-306(a)(1) and (3) in the instant matter.

Dated: New York, New York
March 9, 2009

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 2 OCB2d 7 (BCB 2009), determining an improper practice petition between Correction Officers' Benevolent Association, and the City of New York and the New York City Department of Corrections.

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 Corrections Officers Benevolent Association, docketed as BCB-2493-05, be, and the same hereby is granted; and it is further

ORDERED, that Department of Corrections cease and desist from: engaging in all discriminatory actions aimed at discouraging membership and participation in Corrections Officers Benevolent Association; interfering with, restraining and/or coercing Correction Officer William Valentin and all other New York City Department of Corrections employees from engaging in protected activity; and engaging in a campaign of retaliation and discrimination; and it is further

ORDERED, that the New York City Department of Corrections post of notices indicating its violation of New York City Collective Bargaining Law 12-306(a)(1) and (3) in the instant matter.

The New York City Department of Corrections
(Department)

Dated:

(Posted By)

(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.