Local 1181, CWA, 3 OCB 2d 23 (BCB 2010)

(IP) (Docket No. BCB-2762-09).

Summary of Decision: The Union alleged that the New York City Police Department violated the NYCCBL § 12-306(a)(1) and (3) by changing a Union member's shift, disciplining her, and diminishing her supervisory duties. The City argued that its actions were taken for legitimate business reasons, not anti-union animus. The Board found that the Union failed to establish retaliation motivated by anti-union animus. Accordingly, the improper practice petition was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1181, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On April 24, 2009, Local 1181, Communications Workers of America, AFL-CIO ("Union") filed a verified improper practice petition alleging that the City of New York ("City") violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3), when the New York City Police Department ("NYPD" or "Department") took certain actions regarding the employment of Angela Willis, including instructing her to decrease her supervision of a specific employee, assigning her to a

different shift upon her return from leave, and issuing a command discipline, in retaliation for her union activity. The City argues that the NYPD's actions were not motivated by anti-union animus and did not constitute adverse employment actions. This Board finds that the Union did not establish a causal link between the actions alleged and any protected activity under the NYCCBL. The Board also finds that the NYPD's decision to decrease Willis' supervision of a specific employee and its assignment of Willis to a different shift upon her return from leave did not constitute adverse employment actions. Accordingly, the Board finds that the Union has not established that the NYPD violated the NYCCBL, and the improper practice petition is denied.

BACKGROUND

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

Willis is an Associate Traffic Enforcement Agent ("ATEA"), Assignment Level II, in NYPD's Manhattan Central Enforcement, which enforces parking regulations in the Borough of Manhattan. Willis is a platoon commander who supervises platoon members in their traffic enforcement duties. From 2004 until December 2008, Willis worked the 6:00 a.m. to 2:00 p.m. shift ("AM Shift").

At the time of the relevant events, ATEA III Julio Toro supervised platoon commanders, including Willis. Toro was supervised by ATEA III Beverly D. Smith, the Commanding Officer of Manhattan Central Enforcement. Smith was supervised by Deputy Director of Field Operations Franklin Sepulveda.

Concurrent with the events described below, an internal Union election took place.

Nominations were conducted on January 9, 2009, and thereafter a mail ballot election was held. Willis and Commanding Officer Smith both ran for Vice-President; ATEA I Walter Hill ran for President. The results were posted on March 10, 2009. Willis won the election for Vice-President; Smith and Hill both lost their respective contests and protested the election results. According to an article in the *Chief-Leader* included in the City's pleadings, one of the grounds for their protest was that return addresses were removed from 95, or about one-third, of the mail ballots, and those ballots were therefore disqualified; Smith and Hill believed this raised a suspicion of tampering. Smith testified that she protested the way in which the election was conducted as she believed it contravened the Union's constitution. When questioned about whether she won or lost the election, Smith's testimony was unclear, stating that "it didn't make a difference whether I won, [Willis] won, because, we all are obligated, we're sworn to do a job for the union." (Tr. 166).

Shift Assignment

In late 2008, Willis was injured on the job. She went out on leave beginning in early December 2008. Willis called the office weekly to give an update about her health status, as required by the NYPD. In her absence, one ATEA II remained on the AM Shift. As of February 6, 2009, a newly appointed ATEA II, Lisa Long-Waithe, was transferred into the AM Shift from another command, filling the position left vacant by Willis' absence. When Willis returned to work in March 2009, she was put on a shift from 12:00 p.m. to 8:00 p.m. ("PM Shift").

Willis testified that in January 2009, she discussed with her physician that she wanted to get back to work and that she hoped to do so in March. Willis testified that her physician advised against it but that she wanted to be back at work in March because she was concerned about maintaining her shift assignment. She testified, "I [didn't] want to lose my position . . . [The

Department] won't wait for you forever and I knew it, and I earned that position there and I wanted to hold it . . . I told [the doctor in January] that I needed to come back, I would be coming back in March." (Tr. 39-40). In a letter dated February 25, 2009, Willis' physician, Dr. Leo E. Batash, wrote a letter stating that Willis would be "able to return to work on or about 3/2/09 on full time, regular duties." (City Ex. 8). On March 2, 2009, when Willis returned to work, she submitted this letter and also learned that she would be assigned to the PM shift.

As to Willis' communications with the NYPD regarding her leave, Willis testified that, in January, she called the office and spoke with Smith, telling her that she would be back on March 2. Smith denied having direct contact with Willis during her absence from work. Smith acknowledged that she may have seen Willis at the Union office but that if Willis had discussed her desire to return to work, she would not have remembered because she does not handle work-related matters when she is not working. Smith testified that, prior to Willis' actual return, she had no knowledge of when Willis would return.

Sepulveda testified that he could have become aware of Willis' return date one or two weeks prior to her return. Although he could not recall specifically, Toro stated that Willis most likely notified someone at NYPD of her return date prior to her return as that is NYPD's practice. The command's telephone log includes a notation dated February 9, explaining that Willis would provide certain documentation regarding leave the following day.

In December 2008, Smith spoke with Sepulveda about the need to fill the AM Shift with an additional supervisor. Smith and Sepulveda both testified that the NYPD needed more supervisors on the AM Shift, particularly based upon the flow of traffic during the holiday season, Thanksgiving through New Year. Also, in October 2008, the City began implementing a program called "Block

the Box," which focuses on catching cars in the "box" delineating a street intersection. Smith and Sepulveda stated that this new program created a need for more supervision. Smith stated that she did not request a particular person but asked for an additional supervisor with knowledge and experience with Manhattan traffic to cover the morning Block the Box program. According to Sepulveda, after discussing the matter with Smith and Toro, they realized that Willis' absence required that another supervisor be put on the shift.

Sepulveda listed several factors that he considers when making staffing decisions involving location and shift transfers, which include seniority and whether employees desire a transfer. He also stated that the Department has an internal policy of not transferring employees who have been recently promoted. However, he added that meeting the Department's commitment to safety is the paramount concern and the needs of the Department supersede other considerations. Sepulveda stated that Long-Waithe requested a transfer to the AM Shift that coincided with the Department's needs. Sepulveda did not know why the AM Shift was not filled until February 2009 despite the City's asserted need to fill the position due to the holiday season. He speculated that the delay could have been due to needs of the command where Long-Waithe was assigned at that time. He also acknowledged that Willis had more seniority than Long-Waithe.

Sepulveda testified that it was his decision to transfer Long-Waithe into the AM Shift, and that at the time he decided to fill Willis' position, he was unaware of when she would be back and was also unaware of her participation in any Union election. After Willis returned to work, Smith recommended to Sepulveda that "Long-Waithe was doing an outstanding job . . . so we should try [Willis] on the P.M. [Shift]." (Tr. 227-28). Although Willis wanted to return to the AM Shift in which Long-Waithe had been serving for about one month, Sepulveda thought it would not be "fair

to [Long-Waithe], who was there for a period of time doing a good job, outstanding job, to offset her and put her now on the [PM Shift]." (Tr. 226).

Supervisory Duties

Willis' role as a supervisor entails that she "sign" her subordinates. "Signing" is a method by which a supervisor demonstrates that she has reviewed a subordinate's work in the field. Sepulveda testified that a supervisor "can sign just about anybody that's a subordinate to them." (Tr. 198).

Sometime after she returned to work in March 2009, Willis attempted to sign ATEA I Hill, who had been a candidate for President in the Union election. Willis stated that she asked to see Hill's field patrol material to sign him. According to Willis, Hill responded "You can't sign me, I'm not assigned to you, Supervisor Smith told me that you are not supposed to sign me." (Tr. 28). Willis stated that she spoke with Toro about Hill, and Toro told her "Don't sign him, don't supervise him and don't say anything to him." (Tr. 29). Willis also stated that Smith told her "Don't bother [Hill] . . . . Don't call him, in the field, don't supervise him, don't sign him. He works directly for me." (Tr. 43-44). According to Toro, Willis would attempt to sign Hill at the end of his [shift] when he had other duties to attend to; he described this dynamic as Willis "hounding" Hill, "chasing him down." (Tr. 86).

Smith stated that she spoke with Toro about Willis' supervision of Hill after Hill complained that Willis would sign him ten minutes before his shift was over. According to Smith, for Willis "to sign Hill within that hour before it's time to go. . . could be constituted as harassment. It's definitely not fair. The Department gives him 15 minutes to change his clothes." (Tr. 142). Smith's testimony was unclear as to Willis' supervisory responsibility for Hill. Smith acknowledged that Hill would

be expected to follow "most reasonable directions" from Willis. (Tr. 141). Smith stated that she did not intend for Willis to not supervise Hill at all but to "stop hindering him with pettiness, because it can look like harassment." (Tr. 182). She testified that another employee was Hill's immediate supervisor, but also stated that in the event of an accident, Willis would be expected to respond to Hill's call. However, she also stated that Hill was working on an Internal Affairs Bureau ("IAB") initiative, and as such he did not report to either of them.

Sepulveda acknowledged that Willis was entitled to sign Hill; however, he heard of an incident of her signing Hill ten or fifteen minutes before the end of his shift, which he said is not the normal practice of the Department.

Command Discipline

Willis performs patrol reviews of employees that she supervises to monitor their performance and check their equipment, among other things. Toro and Smith both stated that patrol reviews are used by supervisors to evaluate the performance of agents; patrol reviews are not used to monitor supervisors. Toro stated that there is "no such thing" as a patrol review of a supervisor. (Tr. 80).

On April 16, 2009, Willis did patrol-related work in a vehicle driven by a ATEA I Beth Davenport, a supervisor subordinate to Willis. Willis characterized this as a patrol review of Davenport. Willis stated that both Davenport's subordinates and her direct supervisor had been complaining about her work. Willis stated that she was responsible for conducting Davenport's final evaluation and decided to use a patrol review to do this. Smith stated that Davenport "is one of the better supervisors . . . sign[ing] more traffic agents than any of the other supervisors" on the PM shift. (Tr. 139-140). According to Smith,"absolutely no reason" existed for Willis to perform a patrol review of Davenport. (Tr. 139-140).

Willis stated that she decided to ride with Davenport on the day in question in order to form her own opinion of Davenport's work. After driving together, Willis told Davenport to return to the command because Willis had to change out of her uniform to attend to Union business. Willis stated that she allowed Davenport to use the ladies' room and retrieve a check when they returned to the command. While Willis and Davenport were in the building, Smith saw both of them. Smith asked Willis why she was back at the command, not in the field. Willis stated that she told Smith that she had returned to change her clothes in order to perform Union business and that Smith refused to allow her to change clothes. Willis returned to the vehicle and waited for Davenport to return to drive her to her Union business.

Smith also spoke with Davenport and asked her why she was not logged in the interruption log or in the field supporting her traffic agents. Smith sent her to see Toro to explain the situation. Smith stated that she did not remember whether Davenport mentioned that she had been driving with Willis.

Davenport related these events to Toro, as directed by Smith, and thereafter wrote a corresponding memorandum. While Davenport was speaking with these superiors, Willis waited for her in the car. Davenport took longer than Willis anticipated to return to the car. When she did return, Willis inquired regarding the delay, and according to Willis, Davenport responded that Smith told her to write a complaint about Willis. Davenport then drove Willis to her Union business.

Davenport did not testify at the hearing. However, in her memorandum, Davenport wrote that Willis told her that she needed to patrol with her. The two went out on patrol and each signed a few agents, and then she drove them back to the command so that Willis could change clothes in order to attend to Union business. Willis initially told her to stay downstairs in the vehicle, but when

she asked her if she could use the restroom and pick up her paycheck, Willis allowed her to do so. When Smith asked her why she was in the command, Davenport told her that she was using the restroom and bringing Willis back to the command. Smith asked her why she was patrolling with Willis and told her that they were not supposed to ride together. Davenport told Smith that Willis ordered her to ride with her. Smith then instructed her to relate this information to Toro, and she complied.

According to Willis, Toro told her that Smith directed him to write Willis a command discipline. Willis testified that Toro said, "See what I had to do to you? I told you to stay out of [Smith's] way. She has a big problem with you." (Tr. 27). In contrast, Smith and Toro both testified that Smith did not instruct Toro to issue the command discipline and that they did not discuss the matter prior to Toro's writing the command discipline.

On April 21, 2009, Toro signed the following report on the command discipline regarding Willis' "[f]ailure to properly perform or improperly perform patrol or other assignment":

> On Thursday, April 16, 2009, at approximately 1315 hours said ATEA II Angela Willis took it upon herself to go into the field on patrol with ATEA I Beth Davenport in [a vehicle], despite being previously instructed on numerous occasions by the undersigned that there were no personal driver privileges for Platoon Commanders unless special conditions call for it and even then must be authorized by a command head or the office of OEEO.
>
> ATEA I Beth Davenport stated upon being interviewed by the undersigned that she was instructed by Platoon Commander Willis to drive her and at no time did Commander Willis mention to her she was conducting a . . . patrol [review] with her. She further stated that they both signed several agents simultaneously as noted on the . . . Field Activity Reports attached.

(City Ex. 4). In her capacity as the command discipline hearing officer, Smith wrote the final

disposition "Guilty" under Toro's report. On May 15, 2009, Smith wrote an additional "Summary of Investigation and Disposition of Complaint," which stated:

> Willis has refused to see and understand that when her supervisor instructs her what not to do she is to follow those instructions given to her. . . . Willis did patrol with ATEA I Davenport without permission.

(City Ex. 4).

Toro stated that supervisors such as Willis are not allowed to have drivers; they are to drive themselves on patrol. According to Toro, he issued this command discipline because Willis "had a habit of going into the field on patrol and self-appointing herself [a] driver, without authorization." (Tr. 77). Toro stated that he found Willis in the field with other employees driving her around and he spoke with her about this practice multiple times over many months. Willis continued to disregard his orders. Therefore, he decided that he needed to issue a command discipline. He also stated that her behavior in this instance especially warranted a write-up because she was using a subordinate supervisor as a driver, not an agent as she had previously. Toro stated that, previously, he issued six or seven command disciplines to Willis for disregarding instructions and policy.

Regarding whether Toro or Smith ever spoke with her about using transportation from other employees for personal reasons, Willis stated, "I don't use transportation for personal reasons. Never have, never will." (Tr. 43-44).

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the City violated NYCCBL § 12-306(a)(1) and § 12-306(a)(3)because Willis' participation in the Union election played a role in the City's decision to change her shift,

issue her a command discipline, and limit her supervisory duties.[1] The link to her protected activity is demonstrated by the circumstances surrounding the City's decision making, most particularly the timing of events. The City presented contradictory evidence regarding its presented legitimate business reasons.

As to the dispute over when the NYPD learned that Willis would be returning to work, the Union argues that the NYPD knew her return date before it filled the AM Shift. Willis testified she told Smith sometime in January. City exhibits indicate that on February 9, 2009, another employee told Manhattan Central Enforcement that he spoke with Willis regarding her return. Toro stated that if Willis had returned without notifying NYPD ahead of time, this would have caused a problem and Sepulveda testified that he heard about Willis' return two weeks prior to her return.

In contrast, the Union contends that Smith's testimony, that she had no idea when Willis was coming back and she did not learn of Willis' return date until she actually returned, is not credible. Smith initially stated that she had no communication with Willis from December 5, 2008 until March 2, 2009. However, on cross-examination, she admitted that she probably did see her and talk to her in January 2009. Smith acknowledged that if Willis told her at that time when she would be returning, Smith would not have listened to her. In the Union's view, Smith's testimony regarding

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

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

the election further undermined her credibility. Specifically, Smith testified that she did not know what the results of the election were, or whether she won, and that it did not matter because the election was so flawed that she was contesting the results. The Union also asserts that when Smith testified about the election, her demeanor was agitated and contentious. According to the Union, this same attitude affected her behavior toward Willis. In addition, Smith appears to have rushed Long-Waithe's transfer so that it would occur before Willis' return.

Willis had worked at Manhattan Central Enforcement for five to six years and had been working on the AM Shift for at least two years when she went out on leave in December 2008. In contrast, at the time Long-Waithe was transferred into the AM Shift, she had just become an ATEA II. Sepulveda testified that he instituted a policy that employee seniority, including seniority as to particular facility and shift, would be taken into account when making staffing decisions. Further, Sepulveda testified that there was another policy of not moving people who, like Long-Waithe, had just been appointed to their title or recently promoted. Thus, the Union asserts, his testimony that moving Long-Waithe to the PM Shift would not be fair to her is at odds with his stated policy. The Union submits that fairness to Willis was not considered due to her Union activity. Although the City asserts that Sepulveda was responsible for making the decision to transfer Willis to another shift, the Union maintains that the evidence suggests otherwise. Sepulveda testified that Smith asked him to transfer an ATEA to the AM Shift to replace Willis; she recommended that Long-Waithe be put on the AM shift and Willis be moved to the PM shift and Sepulveda went along with Smith's recommendations.

The City initially argued that the command could manage without Willis during the holiday season, but that, after the holiday season, they needed someone to take her place on the AM Shift.

However, the City's witnesses testified that there is more traffic during the holiday season; therefore, more traffic supervisors are required at that time. Smith and Sepulveda also testified that they determined in December 2008 that a new supervisor was needed. However, after reviewing their affidavits that accompanied the City's Answer during the hearing, they then testified that they made this determination in January 2009, not December 2008.

Regarding the command discipline, the Union stated that Davenport's memorandum shows that it was initiated by Smith, not by Toro. Smith also approved the command discipline. In Davenport's memorandum, she states that Smith inquired about her patrolling with Willis and told her to complain to Toro about the patrolling. While Smith denied this conversation on cross-examination, the Union contends that her testimony contradicts the documents in evidence and points again to her lack of credibility. Further, although Smith and Toro testified that Willis was not authorized to perform a patrol review of an ATEA I, no written document was presented providing such. While Toro stated that he had never heard of a patrol review of an ATEA I, he never stated that it was prohibited by policy.

Regarding Willis' supervision of Hill, Smith and Hill were on the same slate in the Union election and both appealed the election results. In the Union's view, Smith's testimony on the issues surrounding Willis' supervision of Hill was again contradictory. Smith stated at one point that Willis did have supervisory authority over Hill but also stated that she told Willis to focus more on supervising other employees instead of Hill. She further stated that Willis did not have supervisory authority over Hill because Hill was working on a special program concerning the Internal Affairs Bureau with which Willis was not involved.

City's Position

The City argues that the Union's improper practice petition should be denied in its entirety. As to the claim that the City acted in retaliation for Willis' participation in the Union election, the Union has failed to make the necessary showing required by the Board's standard. Although the City acknowledges Willis' protected activity, the Union has failed to show that such activity motivated any of the City's actions. Thus, the City asserts that on this record, the Union has failed to make a *prima facie* case.

Moreover, the City asserts that it had a legitimate business reason for all of its actions. The City has a right pursuant to NYCCBL § 12-307(b) to assign and schedule its employees.[2] When an employee is on an extended leave of absence, the date of return from which is uncertain, management has the right to assign another employee to fill the vacant position. Willis testified that she contacted the office repeatedly to tell them when she would return to work. However, the records in evidence indicate only that, on the occasion of each of her calls, she merely notified her supervisors that she would continue to be out for another week. As support for its position, the City notes that the first document indicating Willis' projected return date is dated February 2009. Further, even if the NYPD knew when she was going to return, management still has the right to schedule an employee to fill an open tour, as it did here. All of the City's witnesses testified that Long-Waithe was put on the AM Shift because there was a need to fill that position and that Willis was put on the

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[2] NYCCBL § 12-307(b) states, in pertinent part:

> It is the right of the City, or any other public employer, acting through its agencies to determine the standards of service to be offered by its agencies; . . . direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization . . . .

PM Shift because there was an opening on that shift upon her return. Further, Sepulveda testified that he was not aware of Union election candidates and that it was his decision to put Long-Waithe on the AM Shift. Thus, although the Union argues that these decisions were motivated by anti-union animus, the City asserts that the record shows otherwise.

As to the command discipline, Willis was using another employee as a personal driver, which is not permitted. She had been warned previously not to engage in that practice, but she persisted in doing so. Here too, there is no evidence that this action was taken as a result of Willis' participation in the Union election. Willis testified that she was in the vehicle with Davenport because she was performing a patrol review, but both Toro and Smith testified that traffic supervisors such as Davenport are not given patrol reviews.

As to the claim regarding the supervision of Hill, the City argues this action also was unrelated to Willis' union activity and was taken for a legitimate business reason. Although the Union claims that Smith told Willis not to supervise Hill because he was running in the Union election on an opposing slate, this was not the reason for the City's action. As Smith and Toro testified, Willis was never told not to supervise Hill; she was told not to harass him and not to "sign" him very close to the end of his shift. Moreover, Sepulveda testified that, when he heard of Willis' practice of "signing" Hill right before his shift was over, Sepulveda directed his subordinates to have this conversation with Willis.

The City contends that the Union's case is based on the premise that Smith took these actions against Willis in retaliation for her Union activity. However, the record shows that all the actions were taken for legitimate business reasons. Moreover, they were taken at the direction of Sepulveda who had no knowledge of Willis' participation in the election.

DISCUSSION

The Union claims that the City took adverse actions against Willis: changing her shift assignment, issuing a command discipline, and directing her not to supervise a particular subordinate. The Union alleges these actions were taken in retaliation for her protected activity, in violation of NYCCBL § 12-306(a)(3). While the Union demonstrated the Department's knowledge of Willis' protected activity and has shown Smith's antagonism towards her, the credible evidence does not establish that Willis' protected activity motivated the three allegedly adverse actions.

As this Board stated in *Bowman*, 39 OCB 51 (BCB 1987), adopting the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), in order to establish a *prima facie* case of discrimination or retaliation under the NYCCBL, 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 COBA*, 2 OCB2d 7 (BCB 2009).

If a petitioner alleges sufficient facts to establish 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).

We find that the Union has shown that Willis engaged in protected activity when she ran in the Union election and thereafter served as Vice President. It is undisputed that Smith knew of Willis' protected activity. While other agents of the City, namely Toro and Sepulveda, may have

been unaware of Willis' protected activity, we find that Smith played a part in all of the allegedly adverse actions. However, the record does not establish that any of the City's actions were motivated by anti-union animus.

As to the shift change, to the extent that the Union argues that Willis's seniority in her position and her tenure on the AM Shift entitled her to be reinstated to that position upon her return from her leave of absence, there is no basis for such a finding, contractual or otherwise. The record contains no evidence that the NYPD has an obligation to hold a position open during an employee's absence or to reinstate an employee returning from leave to a particular position. Indeed, when she testified, Willis underscored her concern that if she was out of work for a long time, she could lose her assignment. Implicit in her concern is an acknowledgment that the NYPD's practice was to fill open positions.

Moreover, at the time the position was filled, the NYPD was not aware of when Willis would return. Therefore, we cannot conclude that the NYPD filled the position prior to Willis' return as a form of punishment. The Department's decision was implemented on February 6, 2009, the day on which Long-Waithe started working on the AM Shift. The record establishes that Willis called the command repeatedly to report on her condition during her absence, and we recognize that the Union asserts that Willis notified Smith as early as January 2009 of her intention to return to work in early March. However, it is undisputed that Willis could not return to work without clearance from her physician. The letter from her physician clearing her to return to work is dated February 25, 2009, well after the date the AM Shift was filled. Willis may have clearly notified her employer of her sincere desire and intention to return to work, but she was unable to give notice of a firm return date on which it could rely in making its staffing decisions until February 25, 2009, at the

earliest, when she received the letter from her physician. Therefore, as the City could not have known of Willis' return date until February 25, well after the AM Shift was filled, we find that the NYPD's decision to assign Willis to the PM Shift was not retaliatory.[3]

We also find that a directive not to supervise one particular employee does not rise to the level of an adverse employment action. In order to make out a violation of NYCCBL § 12-306(a)(3), a petitioner must establish an adverse impact. *CSTG*, *Local 375*, 3 OCB2d 14, at 16 (BCB 2010) (dismissing a retaliation claim for failing to demonstrate the employer took any adverse employment action). An employer's decision to increase supervision of an employee or to reduce an employee's duties, without discipline or other negative review, is not sufficient to constitute a retaliatory action. *Andreani,* 2 OCB2d 40, at 29 (BCB 2009). Here, the evidence shows that for all practical purposes, there was no change to Willis' duties after she won the Union election. Further, we do not find the City was motivated by Willis' Union activity. Although Hill was subordinate to Willis, the City's witnesses testified that Willis was inappropriately signing Hill too late in his shift and note that Willis did not dispute this contention.

Finally, we find that the Union has not established that the command discipline was issued to Willis in retaliation for protected activity. Willis testified that she rode in the vehicle driven by Davenport on April 16 in order to evaluate Davenport's work and perform a patrol review. The City witnesses testified that patrol reviews are not used to evaluate supervisors such as Davenport. However, regardless of whether Willis was riding with Davenport with the genuine purpose of

[3] The Union makes several arguments regarding the way in which the NYPD should have handled the vacancy left by Willis' absence. The Union also alleged that the City's asserted reasons for filling the vacancy were inconsistent. However, absent a showing that the Department's actions were motivated by anti-union animus, we do not evaluate the Department's decision-making process.

performing a patrol review, Willis' own testimony establishes that, even after reviewing Davenport's work, Willis used Davenport to drive her to perform Union business.

Toro testified that he had spoken with Willis repeatedly regarding her practice of using other employees to drive her around. Although he had not previously given Willis a command discipline for having other employees drive her, he stated that he decided to write her up because he viewed this occasion as notably different from previous instances. Toro testified that, in the past, he found Willis using lower ranking employees to drive her, not subordinate supervisors as she did on this occasion. Although Willis generally denied using other employees as drivers, we find her denial at odds with her statement that on April 16, 2009, she had Davenport drive her to her Union business. We find her testimony on this point was unresponsive and not a denial of Toro's assertions, and thus we credit Toro's testimony.

Further distinguishing the events of April 16, 2009 from previous occasions is that Smith, the commanding officer observed Willis and Davenport off task during their shift and thereafter Smith ordered Davenport to report the situation to Toro. We find it wholly reasonable that a commanding officer, having observed improper conduct, would take remedial action. Although the Union has established that Smith's negative sentiments towards Willis were due at least in part to the Union election, this does not taint every supervisory action thereafter taken by Smith, nor does it immunize Willis from reprimand for failure to follow rules.

Therefore, we find that the Union has not established that the NYPD violated the NYCCBL § 12-306(a)(1) or(3). Accordingly, the petition is denied in its entirety.

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 Local 1181, Communications Workers of America, AFL-CIO, docketed as BCB-2762-09, be, and the same hereby is denied.

Dated: May 25, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER