SBA, 4 OCB2d 50 (BCB 2011)

(IP) (Docket No. BCB-2882-10).

Summary of Decision: The Union alleged that the City retaliated against Petitioner for testifying at a grievance arbitration and reporting information regarding a new protocol within Petitioner's precinct to the NYPD's Data Integrity Unit. The Union alleged that in retaliation for this protected activity, Petitioner was transferred to a less desirable shift, reinstated to a performance monitoring program, and denied an opportunity to work overtime. The City argued that it did not retaliate against Petitioner for engaging in protected activity, and that even if the Union established a *prima facie* case, the City had legitimate business reasons for its actions. The Board found that the Union's *prima facie* case was unrebutted as to Petitioner's placement in the performance monitoring program and his shift assignment. However, the Board also found that the City demonstrated that it had a legitimate business reason to rescind Petitioner's overtime assignment. Accordingly, the Petition was granted, in part, and denied, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SERGEANTS BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.
and SERGEANT JOSEPH MCGLONE,

Petitioners,

- and -

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

Respondents.

DECISION AND ORDER

On August 16, 2010, the Sergeants Benevolent Association of the City of New York ("SBA" or "Union") and Sergeant Joseph McGlone ("Petitioner") filed a verified Improper Practice Petition

against the City of New York ("City") and the New York City Police Department ("NYPD"). Petitioners claim that the City and the NYPD violated NYCCBL § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by retaliating against Petitioner for testifying at a grievance arbitration and reporting information regarding a new protocol within Petitioner's precinct to the NYPD's Data Integrity Unit. The Union alleges that in retaliation for his protected activity, Petitioner was transferred to a less desirable shift, reinstated to a performance monitoring program, and denied an opportunity to work overtime.[1] The City argues that it did not retaliate against Petitioner for engaging in protected activity, and that even if the Union establishes a *prima facie* case, the City had legitimate business reasons for its actions. The Board finds that Union's *prima facie* case was unrebutted as to Petitioner's placement in the performance monitoring program and his shift assignment. However, the Board also finds that the City demonstrated that it had a legitimate business reason to rescind Petitioner's overtime assignment. Accordingly, the Petition is granted, in part, and denied, in part.

BACKGROUND

The Trial Examiner held two days of hearing, and found that the totality of the record established the following relevant facts. Three witnesses testified on behalf of the Union: Petitioner, another sergeant in the 5th Precinct ("Sergeant"), and a police officer in the 5th Precinct ("Police Officer"). Two witnesses testified for the City: the Commanding Officer and the Operations

[1] At the hearing, Petitioner alleged that he made leave requests that were denied in retaliation for his protected activity. These allegations were not contained in the Improper Practice Petition. The Trial Examiner found these allegations untimely and allowed testimony regarding these allegations only as background information.

Coordinator.

Petitioner joined the NYPD in 1992, and was promoted to sergeant in 2001. In January 2007, Petitioner engaged in off-duty misconduct to which he pled guilty to Departmental charges in a settlement, and was thereafter placed on modified duty. In March 2008, Petitioner was restored to full duty and was ordered to report to his new assignment at the 5th Precinct. Since transferring to the 5th Precinct, Petitioner has consistently received positive performance appraisals. He received an overall rating of 4 out of 5 on his annual evaluations in 2009 and 2010.

Petitioner has been an officer of the Union since January 2009. At all relevant times, NYPD management was aware of Petitioner's status as a Union officer.

Grand Larceny Protocol

In October 2009, copies of a document concerning an initiative pertaining to grand larceny reports ("Grand Larceny Protocol") were posted at the 5th Precinct. The Grand Larceny Protocol directed that in order to file a grand larceny complaint, complainants must disclose certain personal information including: (1) a copy of a credit report, (2) a credit card, bank statement, or cellular phone bill, and (3) valid identification with proof of address, such as a New York State issued identification, passport, or birth certificate. The document describing the requirements was posted in the precinct, stating that grand larceny reports would not be taken without the listed information. The document also states that it was under "[a]uthority of C.O, 5th Precinct." (Union Ex. 6).

Petitioner viewed the Grand Larceny Protocol as "an obvious attempt to discourage people from making a complaint." (Tr. 52).[2] Petitioner discussed the new requirements with other Union

[2] References to the official transcript are noted herein as "Tr. ___." References to Exhibits are noted as "Ex. ___."

members, noting their concerns over whether enforcing the new requirement would put sergeants in "jeopardy" because they believed it required them to take an impermissible action. (Tr. 55). Petitioner testified that he informed the other officers in the 5th Precinct that he would submit a complaint to the NYPD's Data Integrity Unit ("DIU").

Petitioner testified that he contacted the DIU to report the Grand Larceny Protocol; he called the DIU from the 5th Precinct desk and provided his name and phone number. (Tr. 56). Thereafter, he faxed a copy of the Grand Larceny Protocol document to the DIU. The Grand Larceny Protocol documents posted in the 5th Precinct were taken down the following day.[3]

The 5th Precinct's Commanding Officer testified that the DIU informed him that someone faxed the Grand Larceny Protocol document to the DIU and that the 5th Precinct could not demand the information listed on the Grand Larceny Protocol document. Thereafter, the Grand Larceny Protocol documents were taken down. The Commanding Officer stated the following regarding his conversation with a DIU employee:

> [The DIU Captain] said, "We just received something, this idea that you are trying to do is not a good idea, it shouldn't be put into place, it shouldn't be implemented." . . . I said, "Okay, thanks, that was something that we were going to kick around, I don't know how you got it, but okay, we are not going to implement it." . . . So after he said not to implement it we told everyone to take it down."

(Tr. 188-89).

The Commanding Officer testified that he did not know who reported the Grand Larceny Protocol to the DIU and that he did not become aware that Petitioner claims he made the report until the instant Improper Practice Petition was filed. The Commanding Officer stated, "I really don't care

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[3] Petitioner testified that although he was a Union officer, any police officer could call the DIU to report an integrity issue.

who did this because it helped us . . . it circumvented the problems that would have popped up in the future if this was implemented." (Tr. 218).

The Sergeant testifying on behalf of the Union stated that he had a conversation with the Operations Coordinator after Petitioner made his report to the DIU. The Sergeant testified that the conversation took place while he was working behind the 5th Precinct desk; the only people present were himself and the Operations Coordinator. He related the conversation as follows:

> I'm not exactly sure of the exact words, but in substance, [the Operations Coordinator] said that that person is done here, he knows who sent this document to Data Integrity, he has a friend in Data Integrity, and that person is done.

(Tr. 120). The Sergeant stated that he believed the Operations Coordinator was referring to Petitioner because he knew that the previous evening, Petitioner contacted the DIU regarding the Grand Larceny Protocol. The Sergeant testified that, after this conversation, he attempted to contact Petitioner, and thereafter told him what the Operations Coordinator said. Regarding his view of what might happen, the Sergeant testified that he told Petitioner, "I wouldn't want to be you." (Tr. 121).

Petitioner confirmed that the Sergeant told him about the conversation with the Operations Coordinator. Petitioner testified that the Sergeant told him the following regarding the conversation:

> [The Operations Coordinator] told him that he knew someone over in Data Integrity and that they told him that it was me who sent it over and then he said that [the Operations Coordinator] said that I was dead, done, finished. And we kind of had a laugh about it. I remember saying something to him, "what is this, the mafia?" or something like that, and we just talked about this report and me sending it over there and . . . what effect it would have on me.

(Tr. 58).

The Operations Coordinator testified that he never had a conversation with the Sergeant

regarding the Grand Larceny Protocol. He also testified that he does not know anyone assigned to the DIU.

PBA Arbitration

On January 21, 2010, Petitioner testified at an arbitration in support of a grievance filed by the Patrolman's Benevolent Association ("PBA"). He testified regarding knowledge he gained as a sergeant in the 5th Precinct. At the arbitration, the Commanding Officer and the Operations Coordinator both testified on behalf of the NYPD.

A Police Officer who car pools to work with Petitioner testified that he had a conversation with the Operations Coordinator after the PBA arbitration. He stated that he had been working on the Evening Tour, but had been notified recently that he would be moved to the Day Tour. He stated that he wanted to remain on the Evening Tour because he "had two kids at home and [he] couldn't afford the daycare possibility" presented by being assigned to the Day tour.

The Police Officer stated that he asked the Operations Coordinator if it would be possible for him to stay on the Evening Tour. According to the Police Officer, the Operations Coordinator stated that Petitioner's testimony in support of the PBA's position in the arbitration made the Commanding Officer and the Operations Coordinator "look like an idiot." (Tr. 175). The Police Officer testified that, in response to his request to work the Evening Tour, the Operations Coordinator stated, "I don't know what's going to happen now." (Tr. 176-77). The Police Officer interpreted the Operations Coordinator's statement to mean "now that you car pool with them, I don't know what [the Commanding Officer is] going to do" regarding his request to be assigned to the Evening Tour. (Tr. 175-77).

The Operations Coordinator testified that he never discussed Petitioner's testimony at the

PBA arbitration with this Police Officer. He stated that he would never have such a conversation because Petitioner and that Police Officer are "really good friends, they car pooled together." (Tr. 320). He further stated, "I'm not an asshole. [H]ow would I even talk to [the Police Officer] about [Petitioner], if I had something bad to say to best friends. I mean, I'm not stupid." (Tr. 320).

Scheduled Tour Assignments

In the 5th Precinct, sergeants work one of three patrol tours; from 8:00 AM to 4:00 PM ("Day Tour"); from 4:00 PM to 12:00 AM ("Evening Tour"), or from 12:00 AM to 8:00 AM ("Midnight Tour"). The 5th Precinct also assigns sergeants to other tours, including assigning one sergeant to a unit that monitors business conditions in the precinct ("Business Conditions"). Pursuant to the collective bargaining agreement between the Union and the City, sergeants assigned on the Midnight Tour and Evening Tour receive a 10% night differential in addition to their salary.

Three sergeants serve on the Day Tour, and three sergeants serve on the Evening Tour. The Commanding Officer testified that his goal was to have two of the three sergeants on every tour be "senior" sergeants, and one sergeant be "junior." (Tr. 198). He explained that he considered "senior" sergeants those with more experience; "junior" sergeants are relatively young and less experienced. The Commanding Officer explained he wanted to ensure that there is at least one senior sergeant on duty to work with the junior sergeant. He also stated that he prefers to put sergeants new to the precinct in Business Conditions to give them an opportunity to become familiar with the command.

When Petitioner was first assigned to the 5th Precinct in March 2008, he was scheduled to work the Midnight Tour. In October 2008, Petitioner requested reassignment to the Evening Tour. Petitioner was thereafter moved to the Evening Tour. For working the Evening Tour, Petitioner

received a night differential of approximately $8,000 per year.

In April 2010, a mutual transfer of two junior sergeants occurred in which a junior sergeant from another precinct was exchanged for a junior sergeant at the 5th Precinct. The sergeant who was transferred out of the 5th Precinct was working on the Day Tour before he left. The Commanding Officer testified that he put the newly-transferred junior sergeant into the Business Conditions unit instead of the newly-created vacancy on the Day Tour because "he's a new sergeant coming into the command, I wanted him to learn the command before I put him [on the Day Tour]." (Tr. 197). At the same time that the new sergeant was put into the schedule, many changes were made to the scheduling roster of sergeants at the 5th Precinct. Among these changes, Petitioner was transferred from the Evening Tour to the Day Tour. As a result of Petitioner's change to the Day Tour, he lost the $8,000 annual night differential.

As of March 2010, immediately prior to Petitioner's shift change, the composition of the shifts were as follows: the Day Tour was composed of one senior sergeant and two junior sergeants; the Evening Tour was composed of three senior sergeants; there was one junior sergeant assigned to monitor Business Conditions.

After the April 2010 shift changes, the composition of the shifts was as follows: on the Day Tour, there were two senior sergeants and one junior sergeant; on the Evening Tour, there were two senior sergeants and one junior sergeant; there was one junior sergeant on Business Conditions.

The schedule created in April 2010 is in accordance with the goals that the Commanding Officer articulated in his testimony. However, even before the April 2010 shift changes, the same composition of senior and junior sergeants existed: four senior sergeants and three junior sergeants.

The Commanding Officer testified that the Evening Tour Platoon Commander spoke with

him to request that Petitioner be transferred back to the Evening Tour, and the Commanding Officer told him "[n]ot yet," without explaining why. (Tr. 235). Since the April 2010 scheduling changes, the senior sergeants who were then assigned to the Evening Tour have all been replaced by sergeants with less seniority. Currently, Petitioner has more seniority in terms of time in rank and service in the 5th Precinct than all of the sergeants on the Evening Tour. All of the sergeants currently on the Evening Tour have been in the 5th Precinct for a year or less; two have been sergeants for less than one year. Also, aside from the April 2010 tour changes, the record contains no other instance where an officer new to the precinct was assigned to Business Conditions to familiarize the officer with command protocols. Notably, Petitioner was not assigned to Business Conditions when he arrived in the 5th Precinct because, the Commanding Officer testified, "he's a senior sergeant, he could adapt." (Tr. 204). Petitioner was slotted directly into the open slot upon his arrival to the 5th Precinct.

Performance Monitoring Program

The Performance Monitoring Program ("PMP") is a NYPD program run by the Performance Analysis Section, which is designed to monitor and improve the performance of officers who have disciplinary or performance problems through mentoring and enhanced supervision. There are three levels in PMP: Level I, Level II, and Level III. There is a higher degree of monitoring at each successive level. The NYPD's Chief of Personnel issued a document entitled "Performance Monitoring Programs," that reads, in pertinent part:

LEVEL II

COMMAND/CO'S RESPONSIBILITIES:

- Counsel member regarding the negative behavior. Explain ramifications of officer's placement in Level II-Monitoring

and the effect it will have on his/her career.
- Ensure close supervision and thorough documentation of all behavior (positive and negative).
- Advise Borough Commander of all members in command who are being monitored.
- Confer with Performance Monitoring Unit concerning assignments.
- Review current assignment/tour, and make adjustments if appropriate.
- Prepare and submit Quarterly Performance Profile to the Performance Monitoring Unit by the 15th of the month for the prior Quarter, and forward a copy to the Borough/Overhead Command.

DURATION
- 18 months (when member is removed from monitoring program, the CPI entry is also removed).
- The twelfth (12) month review will focus on quarterly profiles, command recommendations and the most recent annual performance evaluation.
- **May be recommended for removal, continuation in the program for an additional six months or upgraded to Level III if behavior does not improve.**

(Ans., Ex. 2) (emphasis added).

The Commanding Officer testified that he delegates his duties related to the PMP to Petitioner's supervising lieutenant and to the 5th Precinct's Integrity Control Officer ("ICO"). The PMP requires that the Commanding Officer review employees quarterly, and the Commanding Officer charges the ICO with this duty.

In March 2008, when Petitioner was restored to full duty, he was placed in PMP Level II as a result of his off-duty misconduct. Petitioner was informed by the Performance Monitoring Unit that he would be in PMP Level II for a period of 18 months, or until August 2009. It is undisputed that during the first 18 months, Petitioner did not meet with the Commanding Officer, or with the ICO. Petitioner stated that after the 18 months passed, he spoke with the ICO about being released

from the PMP, and the ICO told him that he would look into it. Petitioner stated that the ICO told him that the Precinct received a letter concerning Petitioner's release from the PMP, which required the Commanding Officer's signature. Petitioner also stated that thereafter the ICO told Petitioner that the Commanding Officer decided to extend Petitioner's time in Level II for an additional six months, until March 2010, to serve the maximum term of two years in PMP Level II. Per the PMP regulations, as of March 2010, the duration of Petitioner's two years in PMP Level II was completed.

The Commanding Officer testified that the ICO told him that the 5th Precinct was contacted by the Performance Analysis Section regarding Petitioner's placement in the PMP. He testified that the ICO reported that the Performance Analysis Section was "looking to move [Petitioner] out of performance Level [II] and drop him to [Level I] . . . I think the recommendation was should he stay in [Level II] or are we going to drop him to [Level I]." (Tr. 201). The Commanding Officer stated that he recommended that they "drop him to [Level I]." (Tr. 201). The Commanding Officer testified that he had no direct conversations with the Performance Analysis Section. He also affirmed that the ICO and Petitioner's supervising lieutenants had only positive reports regarding Petitioner.

In May 2010, Petitioner received notice from the Performance Analysis Section that he had been placed in PMP Level I, retroactive to March 2010. The notification, dated May 25, 2010, states, in pertinent part:

> This notice is to inform you of your placement in the Level I – Command Monitoring program. The reason for your inclusion is based on a review of your Central Personnel Index, CCRB record and overall disciplinary history. Placement in this program is effective as of March 24, 2010.
>
> Your supervisors have been informed of your placement in

> monitoring and will closely monitor and evaluate your performance. Continued negative behavior or performance according to Department standards, while in this program, may have a negative impact on your career potential. You will remain in this monitoring program for a minimum of twelve months, your Commanding Officer will be asked to submit a recommendation regarding continued monitoring, removal from the program, or upgrade to Level II monitoring.

(Union Ex. 13).

Cancellation of Ordered Overtime

In the 5th Precinct, employees receive overtime either by assignment or by volunteering for overtime hours. Generally, the Operations Coordinator assigns employees to perform specific overtime assignments.[4]

During September 2010, Petitioner was assigned initially to work overtime for the United Nations General Assembly ("UNGA"), but this assignment was rescinded the same week it was assigned. Instead, Petitioner worked his regular 5th Precinct Day Tour and testified that he did not work any overtime that week.

The Operations Coordinator responsible for scheduling overtime hours in the 5th Precinct testified that during the week of September 20, 2010, the Chief of Patrol put in a request for a Vehicle Borne Explosive Device ("VBED") trained sergeant to work the UNGA detail. (Tr. 298-

[4] The Union alleges that when Petitioner was moved to the Day Tour, he received fewer opportunities to perform overtime. We have reviewed Petitioner's overtime hours from both years and we see no discernable pattern tending to show that he worked significantly fewer overtime hours after his change to the Day Tour. In the months in 2010 after his transfer to the Day Tour, he worked overtime as follows: April 2010, 12:57; May 2010, 15:48 hours; June 2010, 14:37 hours; July 2010, 3:40 hours; August 2010, 4:00 hours; September 2010, 10:27 hours; October 2010, 12:13 hours; November 2010, 23:23 hours; December 2010, 9:57 hours. In the same months in 2009, he worked overtime as follows: April 2009, 3:00 hours; May 2009, 37:57 hours; June 2009, 34:42 hours; July 2009, 0:00 hours; August 2009, 5:23 hours; September 2009, 36:34 hours; October 2009, 18:32 hours; November 2009, 23:12 hours; December 2009, 4:28 hours.

301). There are two VBED-trained sergeants in the 5th Precinct: Petitioner, assigned to the Day Tour, and another sergeant assigned to the Midnight Tour.

The Operations Coordinator testified that during the week of September 20, 2010, the San Gennaro Feast was taking place in the 5th Precinct in Little Italy for two weeks, from 10:00 AM to 12:30 AM. The Operations Coordinator further testified that he needed every available sergeant during the daytime hours to patrol the precinct and monitor the San Gennaro Feast.

The Operations Coordinator stated that a 5th Precinct Police Administrative Aide issued the UNGA detail assignment to Petitioner by mistake and without the Operations Coordinator's approval. The Operations Coordinator offered testimony explaining that he detailed the other VBED-trained sergeant, and not Petitioner, to UNGA for the week of September 20, 2010 because the other sergeant's tour was not impacted by the San Gennaro Feast since he worked the Midnight Tour and not the Day Tour. Thus, he stated that Petitioner's UNGA overtime assignment was rescinded for coverage reasons.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the City violated NYCCBL § 12-306(a)(1) and (3) by retaliating against Petitioner for engaging in protected activity.[5] The record shows that Petitioner engaged in

[5] NYCCBL § 12-306(a) 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 . . .

protected activity, the employer had knowledge of this activity, adverse employment action was taken against the employee, and there is a nexus between the protected activity and the adverse employment action.

It is undisputed that Petitioner's testimony at a PBA arbitration hearing is protected activity under NYCCBL § 12-305. Petitioner also engaged in protected activity by registering a complaint with the DIU regarding the Grand Larceny Protocol in his capacity as a Union official and acted on behalf of all the sergeants in the 5th Precinct. In support of its argument, the Union cites to *UFA*, 1 OCB2d 10 at 21(BCB 2008), in which the Board found that employees are engaged in protected activity when they act "in their capacity as Union officers sanctioned by their Union to protect the interests of their members' safety, and . . . they were not acting in their own interest." The Union members believed that the Grand Larceny Protocol "put members in the position of violating the privacy rights of victims as a condition of filing a criminal complaint [and] would likely have . . . subjected them to legal liability." (Union's Br. at 22). By registering the complaint with the DIU, Petitioner was advocating on their behalf as a Union official.

The Commanding Officer and Operations Coordinator knew that Petitioner engaged in protected union activity. The City acknowledges that both of these witnesses knew about Petitioner's testimony at the PBA grievance hearing at which they were present. While the City's witnesses testified incredulously that they did not know that Petitioner made the report to the DIU, the Sergeant, a credible, disinterested witness, testified about a conversation indicating that the

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> (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. . . .

Operations Coordinator knew that Petitioner made the complaint.

As to the adverse employment actions taken against Petitioner, the change in Petitioner's work assignment to the Day Tour resulted in a "significant reduction in pay through the loss of shift differential and the loss of overtime opportunities." (Union's Br. at 23). Further, disciplinary action taken against Petitioner; namely, the imposition of his placement in PMP Level I is an adverse employment action.

The Union asserts that there is a nexus between the protected activity and the adverse employment actions taken against Petitioner. Petitioner's complaint with the DIU resulted in the Commanding Officer being ordered to rescind the new Grand Larceny Protocol, which was administered under his authority. The testimony of the Sergeant, a credible, disinterested witness, indicates that the Operations Coordinator knew who registered the complaint and stated that "that person is done." (Union's Br. at 24). At the PBA arbitration, Petitioner's testimony on behalf of the PBA generally contradicted that of the Commanding Officer and the Operations Coordinator, made in support of the NYPD. The Police Officer's testimony demonstrates that the Operations Coordinator was irate that Petitioner "made the CO and I look like an idiot." (Union's Br. at 24).

The Union asserts that the employer's asserted reasons for its actions do not survive examination. As to the transfer to the Day Tour, the Commanding Officer admitted that he did not consider transferring Petitioner back to the Evening Tour even after a complete turnover in the Evening Tour's officers, and even after the Evening Tour supervisor requested specifically that Petitioner be put back to his tour. As to the PMP, the Union argues that the Commanding Officer "recommended, and thereby caused" Petitioner's reinstatement in the PMP. (Union's Br. at 25). Thereafter, the Commanding Officer failed to supervise Petitioner as required by the PMP. Thus,

there was no valid basis for the Commanding Officer to recommend that Petitioner be in the PMP after Petitioner was "removed entirely" from the PMP on March 12, 2010. (Union's Br. at 25).

The transfer to Day Tour, reinstatement into PMP, rescinding of assignment to overtime, and denial of leave requests all closely followed Petitioner's engagement in protected activity. Despite the City's claims that there were legitimate business reasons for each of the actions taken against Petitioner, the Union asserts that these reasons are pretextual, and are not supported by the "incredible testimony" of the Commanding Officer and the Operations Coordinator.

As remedies, the Union seeks an order restoring Petitioner to an assignment on the Evening Tour, and an order that Respondents pay Petitioner the $ 8,000 annual night differential he lost and the overtime hours he would have worked at the UNGA had his assignment not been rescinded.

City's Position

The City argues that the Union has failed to establish a *prima facie* case of retaliation, and therefore, its claims should be denied. Moreover, should the Board find that the Union made out its *prima facie* case, the City has established legitimate business reasons for the allegedly adverse actions.

Pursuant to NYCCBL § 12-307(b), an employer has the prerogative to schedule employees according to its needs. The NYPD was merely exercising its managerial right to assign Petitioner to a specific tour and its managerial right is not restricted by the collective bargaining agreement. The City acted when a sergeant on the Day Tour was transferred out of the 5th Precinct and replaced with a new sergeant. As a result, in April 2010, the Precinct management rescheduled many sergeants, including Petitioner, in order to improve the distribution of senior and junior sergeants throughout the scheduled tours.

The NYPD did not take adverse actions against Petitioner in retaliation for protected activity. In fact, Petitioner's submission of the Grand Larceny Protocol to the DIU was not protected activity. By Petitioner's own admission, any NYPD employee could have contacted the DIU regardless of union affiliation. The City argues that Petitioner was not exercising any union or collectively bargained right, for example, running in a union election, filing a grievance, or participating in a labor-management meeting. The Board has found cases with much greater union involvement to be unprotected by the NYCCBL, such as in *UFA*, 49 OCB 4 at 10-11 (BCB 1992), where, under the union's advice, employees slowed down their work.

In addition, the City contends that even if the Board finds Petitioner's act of sending the Grand Larceny Protocol to the DIU to be protected union activity, the Union has not established a casual link between the protected activity and the alleged adverse actions. To establish a causal link, the Union relies largely on the testimony of other officers, which is unreliable, internally inconsistent, and should be discredited. For example, these officers were unable to recall the Operations Coordinator's precise words and they have personal relationships with Petitioner. In addition, Petitioner's testimony contradicts the Sergeant's testimony. While the Sergeant testified that the Operations Coordinator "claimed to have a friend in the [DIU] who told him who faxed the Grand Larceny Protocol to DIU, and that the person who faxed the protocol was 'done,'" he never claimed that the Operations Coordinator specifically identified the person that sent the Grand Larceny Protocol to the DIU. (City's Br. at 28). Petitioner's testimony contradicted the Sergeant's testimony; Petitioner testified that the Sergeant told him that the Operations Coordinator said that "he knew someone [at the DIU] and that they told him that it was me who sent it over . . . and he said

that [the Operations Coordinator] said that I was dead." (City's Br. at 28). Instead, the Board should credit the testimony of the Operations Coordinator because he testified "candidly and credibly [and] without contradiction" that he did not make the statements attributed to him by the other officers. (City's Br. at 27-28). He testified that he has no friends in the DIU and did not discuss the Grand Larceny Protocol with the Sergeant.

The Police Officer testified that the Operations Coordinator told him that Petitioner's testimony at the PBA arbitration made him "look like an idiot and the [Commanding Officer] look like an idiot." (City's Br. at 28). However, Petitioner's testimony at the PBA arbitration could not be construed to make the Operations Coordinator and the Commanding Officer "look like idiots." (City's Br. at 28). Moreover, the Operations Coordinator testified that he knew the Police Officer and Petitioner were friends, therefore, he would not have discussed Petitioner's testimony with the Police Officer or say disparaging things about Petitioner to the Police Officer.

Further, the Union fails to allege any adverse action taken by the employer against Petitioner. The City argues that Petitioner's movement from Level II to Level I disciplinary monitoring does not constitute an adverse action. In fact, the City insists that this shift in level actually reflects an improvement from an employee perspective because Level I is a less restrictive form of disciplinary monitoring than Level II. Indeed, moving Petitioner from Level II to Level I was a "favorable" employment action and therefore, could not be considered retaliatory. Moreover, the Commanding Officer merely approved the Performance Monitoring Unit's decision to move Petitioner from Level II to Level I. The memorandum that Petitioner received was issued not by the 5th Precinct, but by the Performance Monitoring Unit, which shows that a wholly separate unit made the decision to keep Petitioner in the PMP.

The Union also argues that the 5th Precinct had a pattern of improperly applying the PMP requirements to Petitioner. However, this argument undercuts the Union's retaliation claim because the alleged "pattern" began well before Petitioner's first alleged protected activity. Any misapplication of PMP regulations occurring when Petitioner was moved into PMP Level I in May 2010 cannot be retaliatory as it was part of pattern beginning long before Petitioner engaged in any protected activity.

Further, the Union cannot establish that the NYPD agent responsible for the allegedly adverse action was aware of the purported protected activity. The Union's only allegations regarding "retaliatory intent" are the Operations Coordinator's statements. Aside from the incredibility of the Union's witnesses, the evidence of record shows that the Operations Coordinator played no role in reassigning Petitioner from the Evening Tour to the Day Tour, and also had no role in Petitioner's movement from PMP Level II to PMP Level I.

Finally, the City argues that even if the Union is successful in establishing a *prima facie* violation of NYCCBL §12-306(a)(1) and (3), the City has established a legitimate business reason for each of the allegedly adverse actions. Regarding the change to the Day Tour, and the City would have taken such action even in the absence of protected employee conduct because it was motivated by a desire to pair junior and senior sergeants to ensure at least one senior sergeant on-duty at all times. As to the rescinded overtime assignment, the City contends that Petitioner was initially granted this assignment in error. The assignment was thereafter rescinded when the Operations Coordinator determined that the overtime assignment would be given to a different sergeant to allow the 5th Precinct to better allocate resources during the San Gennaro Feast. The City also had a legitimate business reason for moving Petitioner from PMP Level II to PMP Level I. Petitioner was

initially placed in PMP Level II, and then the NYPD, after "weighing the gravity of [his] misconduct and the absence of additional misconduct, justly determined that [Petitioner] would be moved from Level II to the lesser Level I effective March 1, 2010." (City's Br. at 35). The Performance Monitoring Unit's memorandum to Petitioner clearly indicates that this decision was based on a review of Petitioner's disciplinary history among other things.

With respect to an independent violation of NYCCBL 12-306(a)(1), the City contends the Union has not alleged facts supporting the charge that the City's conduct was "inherently destructive" of Petitioner's NYCCBL §12-305 rights. The City further argues that the employer's rescheduling of Petitioner's tour, moving Petitioner from Level II to Level I performance monitoring, denying leave requests and rescinding overtime notifications do not meet the Board's standard for a finding of independent interference. Therefore, the Union's claims are not actionable under NYCCBL §12-306(a)(1).

DISCUSSION

The Union claims that, in retaliation for testifying at an arbitration and making a report to the DIU, the NYPD placed Petitioner back in the PMP, changed his shift from the Evening Tour to the Day Tour, and rescinded an overtime assignment. We find that the Union demonstrated that some, but not all, of the adverse actions were taken in retaliation for Petitioner's protected activity. Specifically, we find that the Union put forth a *prima facie* case as to each of its claims, but the City demonstrated a legitimate business reason for rescinding Petitioner's overtime assignment.

In *Bowman*, 39 OCB 51 (BCB 1987), we adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), to determine whether an employer has violated NYCCBL §12-306(a)(1)

and (3). This test states that a petitioner must make out a *prima facie* case 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; *Edwards*, 1 OCB2d 22, at 16 (BCB 2008). Where the petitioner alleges sufficient facts to state a *prima facie* case, "the employer may attempt to refute [the] petitioner's showing on one or both elements or to demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *Kaplin*, 3 OCB2d 28, at 13-14 (BCB 2010) (citation omitted). In the instant case, the Union has carried its burden of establishing a *prima facie* case on both prongs.

In establishing a *prima facie* case, the Board recognizes that "the existence of retaliatory or anti-union animus must be proven indirectly, through the use of circumstantial evidence, absent an outright admission." *SSEU, Local 371*, 77 OCB 35, at 15 (BCB 2006) (internal citations omitted). Even so, "allegations of improper motivation must be based on specific, probative facts. *Colella*, 79 OCB 27, at 54 (BCB 2007) (internal citations omitted).

We find that the Union has established the first prong of the *Bowman* test by demonstrating that the employer knew of Petitioner's union activity. The Union asserts that Petitioner engaged in protected activity by testifying at the PBA arbitration and by reporting the Grand Larceny Protocol to the DIU. An employee's "filing and processing of grievances constitutes protected activity under the NYCCBL, and an employer's participation in those proceedings is sufficient to establish its knowledge of the employee's protected activity." *Colella*, 79 OCB 27, at 53 (BCB 2007); *Chambers*, 47 OCB 41 (BCB 1991). The Commanding Officer and the Operations Coordinator both

testified at the same PBA arbitration as Petitioner, and there is no dispute that they were aware of his testimony.

We also find that Petitioner was engaged in protected activity when he reported the Grand Larceny Protocol to DIU. By taking this action, Petitioner was seeking to protect fellow union members from a potential hazard created by their work assignment. As we have long held, for an act to constitute protected activity, it "must be related, if only indirectly, to the employment relationship between the City and bargaining unit employees." *UFA*, 1 OCB2d 10, at 20-21 (BCB 2008) (internal citations omitted); *see also Bd. of Educ. of Deer Park Union Free Sch. Dist.*, 10 PERB ¶ 4594, at 4689 (1977), *affd*, 11 PERB ¶ 3043 (1978). The action "must at least be in furtherance of the collective welfare of employees, as distinguished from the welfare of an individual." *UFA*, 1 OCB2d 10, at 20-21.

In *UFA*, we found that when union officers spoke out at various FDNY meetings and made public statements regarding work equipment that impacted firefighter health and safety, they were engaged in protected activity as they were "acting in their capacity as Union officers sanctioned by their Union to protect the interests of their members' safety, and that they were not acting in their own interest." *Id.* at 21. Likewise, in this case, Petitioner discussed with other Union members the potential dangers, such as legal liability, that could result from their compliance with the Grand Larceny Protocols, and thereafter made a report to the DIU, an internal body of the NYPD. Petitioner made his report on behalf of the other union members, not merely on his own behalf. Further, Petitioner's report directly concerned his Union members' terms and conditions of

employment. Therefore, we find that Petitioner's report to the DIU constitutes protected activity.[6]

We find that the Operations Coordinator told the Sergeant that he knew who reported the Grand Larceny Protocol to the DIU, and that he was unhappy with the person that made the report. The Sergeant testified that the Operations Coordinator told him that a DIU employee informed him who reported the Grand Larceny Protocol, and that the person that made the report is "done."[7] (Tr. 120). Several elements support a finding that the Sergeant's testimony is credible. The Sergeant has no personal interest in this matter. Further, his recollection was detailed and consistent with the totality of the record. Moreover, Petitioner's discussion of contemporaneous events corroborates the Sergeant's testimony. Petitioner related his impression of this information, stating that he understood that the Operations Coordinator's contact at DIU told him that Petitioner reported the Grand Larceny Protocol, and that he was "dead, done, finished." (Tr. 58). The City argues that Petitioner's testimony conflicts with the Sergeant's because while the Sergeant stated that the Operations Coordinator never identified the name of the person that made the report, Petitioner stated that the Sergeant told him a DIU employee told the Operations Coordinator that Petitioner made the report. We find that that, given the context in which these statements were made, specifically, that Petitioner was indeed the person that made the report to the DIU, Petitioner's understanding is logical that he would be the person that the Operations Coordinator meant to be

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[6] The City cites many cases where the Board found no protected activity, but none are relevant. Indeed, the City cites cases where, unlike here, the Board found no relationship to the employment relationship or where the Board found the employee's actions were not taken in furtherance of the collective welfare, but instead on behalf of the individual. As discussed above, the facts here are akin to *UFA*, 1 OCB2d 10 (BCB 2008), and not to the cases cited by the City.

[7] Petitioner made the complaint to DIU, and therefore, we find it more than likely that Petitioner would be the employee identified by the Operations Coordinator's contact at DIU.

"dead, done, finished." (Tr. 58). Therefore, we find that Petitioner's testimony corroborates the Sergeant's testimony.

On the other hand, the Operations Coordinator denied that he had such a conversation with the Sergeant, and also testified that he does not know anyone assigned to the DIU. Of the contradicting testimony, the Sergeant's testimony is more credible. Unlike the Sergeant, the Operations Coordinator's actions are challenged directly here; he is not a disinterested witness. The Operations Coordinator's testimony is also not supported by other evidence in the record. Therefore, we find the Union has established both that the Employer had knowledge of Petitioner's protected activity, and that the Employer was unhappy with Petitioner because of this protected activity and intended to retaliate.

Like the Sergeant, the Police Officer has no vested interest in this matter. The Police Officer testified that the Operations Coordinator communicated his displeasure that Petitioner's testimony reflected poorly on himself and the Commanding Officer. This communication occurred in the context of a conversation regarding the Police Officer's request that his tour not be changed because the Day Tour would conflict with his child care needs. He stated that the Operations Coordinator insinuated that because Petitioner testified in support of a union in an arbitration counter to NYPD management, the Police Officer's request could be impacted because of his relationship with Petitioner. The City did not dispute the context of the Police Officer's account, particularly that he was unhappy being assigned to the Day Tour and was requesting that the Operations Coordinator change his shift. In contrast, the Operations Coordinator, whose actions are challenged here, vehemently denied the possibility that conversation to which the Police Officer testified occurred. Concerning his alleged conversation with the Police Officer, he explained that he would not make

such a statement because the Police Officer and Petitioner are "good friends" because they drive to work together. (Tr. 320). However, the Operations Coordinator was a superior of both the Police Officer and Petitioner. We find it equally plausible that the Operations Coordinator would make this statement to Petitioner's friend in order to ensure that his sentiment was communicated to Petitioner. In sum, based on our weighing of the testimony and evidence of record, we find that the Union has established anti-union animus.

Next, we find all of the employer's actions taken against the Petitioner are potentially actionable, namely the PMP Level I placement, the shift change to the Day Tour, and the decision to rescind overtime. While an employer may, within its managerial prerogative, take such actions, the actions may not be taken for a retaliatory purpose. *See Local 1181, CWA*, 3 OCB 2d 23 (BCB 2010) (staffing and scheduling decisions may not be made in retaliation for protected activity); *Colella*, 79 OCB 27 (BCB 2007) (finding a violation of NYCCBL § 12-306(a)(3) where the petitioner was denied overtime and was terminated). We are not persuaded that Petitioner's placement in PMP Level I was an improvement in his circumstance as argued by the Employer. According to the PMP Guidelines, PMP Level II is prescribed to last a maximum of two years. By the time Petitioner was placed retroactively in PMP Level I, in May 2010, his two years in PMP Level II was completed, according to PMP regulations.[8] We find that the NYPD's decision to put Petitioner back into PMP constitutes an adverse action, and not an improvement in his circumstance. In sum, we find that the Union has established a *prima facie* case that the City retaliated against Petitioner for his protected activity.

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[8] The City offered no reason why NYPD placed Petitioner in PMP retroactively to March 2010.

Where "a petitioner has established a credible *prima facie* case and there is sufficient evidence to find that the employer's asserted justification is false, we may conclude that the employer engaged in unlawful activity." *DEA*, 79 OCB 40, at 28 (BCB 2007) (citations omitted). The City offers little explanation for the decision to place Petitioner in PMP Level I, asserting only that the decision was not in the control of the Commanding Officer and was instead made by another department. However, the Commanding Officer testified that the PMP contacted the 5th Precinct for a recommendation on whether Petitioner should remain in the PMP, and the Commanding Officer responded affirmatively. Aside from what appears to be a form letter from the Performance Analysis Section, there is no specific reason given in the record for Petitioner's placement in PMP, Level I.

The City also argues that the Commanding Officer and the NYPD had long been improperly applying the PMP regulations to Petitioner, and because this practice of improper application predated Petitioner's protected activity, the *prima facie* case should be defeated. However, lax or inconsistent application of the PMP rules during the period in which Petitioner was legitimately in PMP Level II does not create a legitimate business reason for placing him retroactively in PMP Level I after his term in PMP Level II was completed. The City offered no evidence that they regularly, or ever, moved employees from PMP Level II to PMP Level I, even though the PMP regulations provide only that upon completion of the first 18 months of PMP Level II, employees may either "be recommended for removal, continuation in the program for an additional six months or upgraded to Level III if behavior does not improve." (Ans., Ex. 2).

The notification Petitioner received regarding his placement in PMP Level I discusses the general reasons for inclusion in PMP Level I, the Central Personnel Index, the CCRB record, and overall disciplinary history, and negative behavior or performance. These cited reasons are not

substantiated by the record. Petitioner's Central Personnel Index and CCRB record were not introduced. To the extent the record contains evidence of Petitioner's behavior and performance, the evidence is entirely positive. The Commanding Officer stated that Petitioner performed well, and Petitioner's performance evaluations in the 5th Precinct are uniformly positive. As we have stated, "when a public employer offers, as a legitimate business defense, a reason that is unsupported by or inconsistent with the record, the defense will not be credited by this Board." *DC 37*, *Local 1113*, 77 OCB 33, at 35 (BCB 2006); *see also DEA,* 79 OCB 40, at 28-29 (BCB 2007). Accordingly, we find that the City has not provided a legitimate business reason for placing Petitioner in PMP Level I.

We also reject the legitimate business reason offered by the City regarding the shift change because it is directly countered by the record. The Commanding Officer stated that he instituted the shift changes that resulted in Petitioner's move to the Day tour in order to accommodate his desire to have a balance of junior and senior sergeants on every shift. However, directly preceding the shift change, the senior sergeants were not spread throughout the tours in accordance with the Commanding Officer's asserted desire to spread the experienced sergeants. In fact, the composition of junior and senior sergeants in the 5th Precinct was the same before and after the April 2010 shift changes. Morever, since the shift change was implemented, the Evening Tour is now composed of sergeants that all have significantly less experience than Petitioner. All of the sergeants currently assigned to the Evening tour have been in the 5th Precinct for a year or less; two of them have been sergeants for less than one year.

The Commanding Officer admitted that Petitioner's supervising lieutenant requested specifically that Petitioner be transferred back to the Evening Tour, and without giving an

explanation, the Commanding Officer refused, stating "not yet." (Tr. 235). In making our finding we note the procedural irregularity of keeping Petitioner on the Day Tour while staffing the Evening Tour in a manner running contrary to the Commanding Officer's stated protocol, combined with the decision to reinstate Petitioner to the PMP after his period in PMP Level II had expired with no demonstrated behavior needing correction. Where, as here, proffered legitimate business reasons "are unsupported and/or inconsistent with the record, this Board will find that the public employer committed an improper practice." *SBA*, 75 OCB 22, at 24 (BCB 2005); *see also DC 37*, 1 OCB2d 6, at 34-35 (BCB 2008), *affd., Matter of Roberts v. Board of Collective Barg.*, Index No. 104695/2008 (Sup. Ct. N.Y. Co. Feb. 16., 2010) (Board found proffered legitimate business reasons were unsupported by the record).

We are, however, convinced that the City legitimately rescinded Petitioner's overtime. While the daytime San Gennaro Festival was ongoing over many days, a sergeant was needed for an overtime assignment to cover the UNGA, which also occurred during the day. A Principal Administrative Aide notified Petitioner that he would be assigned to work the UNGA, but thereafter informed him that this assignment was rescinded. The Operations Coordinator testified that given that the San Gennaro Festival was taking place during the day, the precinct had greatest staffing needs on the Day Tour. The Operations Coordinator testified that he decided a sergeant who did not work on the Day Tour should be assigned to the UNGA, so as not to reduce coverage for the San Gennaro Festival. Therefore, Petitioner's assignment to the UNGA was rescinded, and the assignment was given instead to a sergeant that worked the Midnight Tour. We find this explanation reasonable and supported by the record. The Union did not dispute that the San Gennaro Festival took place during the day and that there was resultant greater staffing need on the Day Tour. The

Union also did not dispute that the UNGA also took place during the day. Although the Union did not know which sergeant ultimately worked the UNGA shift, there is no evidence countering the City's contention that the UNGA shift was worked by a sergeant who was assigned to the Midnight Tour. We find that given the staffing needs of the precinct during this particular time, this decision to put the other sergeant that worked the Midnight Tour on the UNGA assignment was logical, and would have occurred in the absence of Petitioner's protected activity. *Kaplin*, 3 OCB2d 28, at 13-14 (BCB 2010).

Accordingly, we find that the Union has established that the NYPD retaliated against Petitioner for his protected activity when it changed his shift to the Day Tour and when it reinstated him in the PMP. However, we also find that the City has established a legitimate business reason for rescinding Petitioner's assignment to work overtime at the UNGA.

ORDER

ORDERED, that the improper practice petition, docketed as BCB-2882-10, filed by the Sergeants' Benevolent Association and Joseph McGlone be, and the same hereby is, granted as to claims that the City and the New York City Police Department violated NYCCBL § 12-306(a)(1) and (3) by assigning him to the Day Tour and reinstating him in the Performance Monitoring Program in retaliation for his protected activity, and dismissed as to all other claims;

ORDERED, that the New York City Police Department reassign Joseph McGlone to the Evening Tour; pay him the prescribed differential he would have received had his shift not been improperly changed, from the date in April 2010 on which he was assigned to the Day Tour until the date he is reassigned to the Evening Tour; and determine any future changes to his assignment without regard to his protected activity; and

ORDERED, that any determination whether Joseph McGlone should be placed in the Performance Monitoring Program be made without regard to his protected activity.

Dated: New York, New York
October 28, 2011

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent in part (as to overtime assignment)

CHARLES G. MOERDLER
MEMBER

I dissent in part (as to overtime assignment)

PETER PEPPER
MEMBER