Local 376, *DC 37*, 5 OCB2d 31 (BCB 2012)

(IP) (Docket No. BCB-2887-10)

Summary of Decision*:** The Union alleged that, because a Union member invoked her right to contest disciplinary charges with the representation of her Union, DOT retaliated against her by pursuing unrelated disciplinary charges, in violation of NYCCBL § 12-306(a)(1) and (3). The City argued that the Union did not establish a *prima facie* case of retaliation, that DOT had a legitimate business interest in ensuring that employees comply with the DOT Code of Conduct, and that DOT's actions were taken pursuant to its managerial right to discipline its employees. The Board found that the Union established a *prima facie* case of retaliation, but that, ultimately, the City was able to establish that it brought disciplinary charges against Solli for legitimate business reasons. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 376, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Respondent.

DECISION AND ORDER

On August 17, 2010, District Council 37, Local 376, AFSCME, AFL-CIO ("Union"), on behalf of Donna Solli, filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Transportation ("DOT"). The Union alleges that, because Solli invoked her right to contest disciplinary

charges with the representation of her Union, DOT retaliated against her by pursuing unrelated disciplinary charges in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City argues that the Union has not established a *prima facie* case of retaliation, that DOT had a legitimate business interest in ensuring that employees comply with the DOT Code of Conduct, and that DOT's actions were taken pursuant to its managerial right to discipline its employees. This Board finds that the Union established a *prima facie* case of retaliation, but that the City was able to establish that it brought disciplinary charges against Solli for legitimate business reasons. Accordingly, the petition is denied.

BACKGROUND

After a one-day evidentiary hearing, the Trial Examiner found that the totality of the record established the following relevant facts.[1] Solli is employed by DOT and serves in the title of Highway Repairer. She is a member of the Union. At the hearing, testimony was taken from Solli and Disciplinary Counsel Erica Caraway ("DOT Counsel") of the DOT Office of the Advocate, which investigates complaints of employee misconduct.

---

[1] On October 7, 2011, the City filed a pre-hearing motion to exclude all evidence concerning the parties' settlement discussions before the New York City Office of Administrative Trials and Hearings ("OATH"). Because the Union's central retaliation claim concerned statements that the City allegedly made during the settlement discussions and exclusion of that evidence might affect the resolution of this matter, the Board considered the City's motion. In an interim decision in this matter, the Board found that that testimony concerning the settlement discussions was admissible, denied the City's motion, and ordered that the matter proceed to hearing. *See DC 37, L. 376*, 4 OCB2d 60 (BCB 2011).

On December 9, 2009, DOT received a disciplinary complaint alleging that an on-duty physical assault occurred between Solli and another DOT employee. On December 10, 2009, DOT interviewed a Supervisor Highway Repairer who witnessed the physical altercation. After concluding its investigation, on March 23, 2010, DOT charged both Solli and the other employee involved in the incident. On March 23, 2010, DOT served Solli with charges stating that she engaged in a verbal and physical altercation with, and spoke discourteously to, another employee in violation of DOT's Code of Conduct ("Code"). In pertinent part, the charges against Solli were as follows:

> CHARGE I: The Respondent is in violation of Paragraph 11 of the Code in that she created or induced any breach of the peace while on duty.
>
> Specification 1: On December 9, 2009, the Respondent engaged in a physical altercation with fellow DOT employee [] in the locker room of the DOT facility at 10 Pitt Street in Manhattan.
>
> Specification 2: On December 9, 2009, the Respondent engaged in a verbal altercation with fellow DOT employee [] in the locker room of the DOT facility at 10 Pitt Street in Manhattan.
>
> Specification 3: On December 9, 2009, the Respondent spoke discourteously to fellow DOT employee [] in the locker room of the DOT facility at 10 Pitt Street in Manhattan.
>
> CHARGE II: The Respondent is in violation of Paragraph 3 of the Code in that she spoke or acted discourteously, or used boisterous, abusive or vulgar language, in any relationship with the public or with other DOT personnel, while on duty.
>
> CHARGE III: The Respondent is in violation of Paragraph 31 of the Code in that she performed her assigned duties improperly or inefficiently or neglected or refused to perform duties.

> CHARGE IV: The Respondent is in violation of Paragraph 2 of the Code in that she engaged in conduct prejudicial to the good order and discipline of the DOT.
>
> CHARGE V: The Respondent is in violation of Paragraph 1 of the Code in that she engaged in conduct tending to bring the City of New York, DOT or any other City agency into disrepute.

(Ans., Ex. 1)

On April 21, 2010, DOT held an informal conference at which it recommended the penalty of a 30-day suspension without pay. Solli refused the offer, and DOT informed the Union that Solli could exercise her right, pursuant to § 75 of the Civil Service Law ("CSL"), to a hearing at the Office of Administrative Trials and Hearings ("OATH"). DOT offered both employees charged in the incident the opportunity to settle the charges; while Solli refused the offer, the other employee involved accepted a 20-day suspension.

On May 5, 2010, DOT issued an Informal Conference Decision and Recommended Penalty, which substantiated all of the charges and recommended a 30-day suspension without pay. It informed Solli that she could either accept the decision by signing a waiver of her rights under CSL § 75 or reject the recommended penalty and proceed to OATH. On May 10, 2010, Solli and the Union refused the recommended penalty. Solli submitted a written election exercising her right to a hearing at OATH.

On May 24, 2010, DOT received a new disciplinary complaint against Solli alleging that Solli refused to follow her supervisor's orders at a DOT worksite. Subsequent charges specified that Solli allegedly refused to complete certain pothole assignments on May 20, 2010.

On August 2, 2010, a pretrial conference was held at OATH before an administrative law judge ("ALJ") regarding the March 2010 disciplinary charges. Solli testified that that the ALJ first spoke with DOT Counsel in private and then spoke to Solli and the Union attorney. She testified that the ALJ "said that if you do not accept [DOT Counsel's] recommendation [and] penalty today, that she was going to bring you up on further charges, additional charges that stemmed from [the May] incident ." (Tr. 28) According to Solli, the ALJ conveyed to her that if she would accept DOT's settlement offer of a 20-day suspension, DOT Counsel would overlook the additional charges, but otherwise the charges would be amended to add the second complaint. Solli stated that she and the Union Counsel told the ALJ that they would not accept DOT's offer, and that the ALJ told them to set dates for trial. Solli testified that DOT Counsel was not in the room during that conversation with the ALJ and the Union.

DOT Counsel testified that, when the OATH pretrial conference started, she sat with the ALJ, Union Counsel, and Solli. DOT Counsel explained:

> The [ALJ] will ask each party to explain the matter before the court. Because I was acting on behalf of the Petitioner [DOT], I summarized what the disciplinary matter was before the court today, and also apprise[d] the court that there were pending charges that were going to be amended to the original complaint stemming from the December 2009 incident.

(Tr. 56) Regarding her caucus with the ALJ, DOT Counsel testified:

> [B]efore we went in, he asked us were there any settlement discussions, and I said, no, there were no settlement discussions between myself and [Union Counsel] as it pertained to the complaint, and during our caucus, I summarized to him who we were bringing in as witnesses regarding this matter, and he disclosed what he felt would be the strengths and weaknesses with our arguments, and I indicated to him, you know, well, we are still proceeding

> with this, and we also feel that with the amended allegations, that we felt were substantiated, that would bolster our case, and we would still seek the 30-day suspension without pay. We were still receptive to the 20-day suspension as a settlement, but if we were unable to reach a settlement, we would proceed with our recommended penalty of 30 days suspension without pay.

(Tr. 57-58) She also stated that, at the time of the OATH pretrial conference, her offer of a 20-day suspension without pay would cover the original charges and the new complaint, and that she discussed this offer with the ALJ.

DOT Counsel initially stated that she discussed the 20-day suspension settlement offer only during her private caucus with the ALJ. Thereafter, she testified that she offered the 20-day settlement during the pretrial conference, with the Union present. She also testified that she could not "recall what [she] said in the hearing room regarding the amended charges or any settlement discussions in front of [Union Counsel] and [the ALJ]." (Tr. 75) In response to whether the 20-day settlement offer was discussed outside of her private caucus with the ALJ, she later testified that she "believe[d] so [but could not] recall if it had come up with the ALJ and the parties present." (Tr. 82) However, DOT Counsel "absolutely" denied that she said that if Solli did not take the offered 20-day suspension, she would bring her up on additional charges. (Tr. 59)

Thus, DOT Counsel's testimony is not clear regarding what and to whom she communicated regarding the 20-day suspension settlement offer. Still, it is clear that DOT Counsel intended that Solli be made aware that she could settle all of the charges for a 20-day suspension, and that this offer was ultimately communicated to Solli during the course of the OATH pretrial conference.

DOT Counsel testified that she informed the ALJ, at the OATH pretrial conference, that DOT "had concluded its investigation and we were amending the pending matter to add [] the new allegations." (Tr. 78) When asked whether her statement that the investigation was concluded was correct, DOT Counsel testified:

> The pertinent part[] of the investigation as it pertains to substantiating that, that was done [and] concluded. Keep in mind, we may still also get additional people who may want to testify or we may become aware of additional witnesses, but the crux of the complaint was substantiated by . . . August 2nd that necessitated the amendment of the prior charges.

(Tr. 83)

On August 10, 2010, DOT amended its March 24, 2010, charges against Solli in order to incorporate the complaint it received in May 2010. Solli was served with these amended charges on August 11, 2010. In pertinent part, the charges were amended as follows:

> CHARGE III: The Respondent is in violation of Paragraph 31 of the Code in that she performed her assigned duties improperly or inefficiently or neglected or refused to perform duties.
>
> Specification 2: On May 20, 2010, the Respondent improperly and/or inefficiently performed her duties when she failed to follow [her supervisor's] directives to complete additional pothole assignments in the borough of Manhattan.
>
> CHARGE IV: The respondent is in violation of Paragraph 30 of the Code in that she failed, refused or neglected to obey any lawful order of a supervisor or superior, or interfered with any person carrying out such order.
>
> Specification 1: On May 20, 2010, the Respondent failed, refused or neglected to follow the orders of [her supervisor] to complete additional pothole assignments in the borough of Manhattan.

> Specification 2: On May 20, 2010, Assistant Director instructed [several employees] not to punch out at the conclusion of the May 20, 2010 work shift. The respondent refused to follow the orders of [the Assistant Director] and instructed said employees to punch out in direct violation of [the Assistant Director's] directives.

(Ans., Ex. 6)

Thereafter, an informal conference on the amended charges was held at the DOT Office of the Advocate. Solli and DOT Counsel both testified that a settlement was not discussed. DOT continued to seek the 30-day suspension without pay for the entire matter, including the December 2009 incident and the May 2010 incident.

On September 20, 2010, a trial was held at OATH to adjudicate all of the charges against Solli. DOT Counsel advised the ALJ that, if the charges were sustained, DOT would request that the ALJ implement DOT's recommended 30-day suspension without pay. On January 26, 2011, OATH issued the ALJ's Report and Recommendation, finding that DOT did not establish the charges relating to the December 9, 2009, physical and verbal altercation, but did establish the charges related to the May 2010 insubordination. The ALJ recommended an eight-day suspension. On September 12, 2011, the DOT Commissioner adopted the OATH recommendation. Solli was suspended without pay from September 26 through October 3, 2011.

DOT Counsel testified that the length of time it takes to investigate a complaint depends on various factors, but that the investigation must be completed within the 18-month statute of limitations. She explained that DOT investigated the first incident, occurring in December 2009, immediately after it was reported because it involved allegations of physical assault at a worksite between "safety sensitive employees." (Tr.

61) She explained that DOT "would take an allegation like this very seriously and try to call in people as quickly as possible and as expeditiously as possible." (Tr. 61)

She testified that the second complaint, from May 2010, involved insubordination, not a physical altercation. When she was asked specifically about how that complaint was handled, she stated that "[a]t that time, again, the complaints are randomly assigned to investigators and an investigation is commenced." (Tr. 54) When she was asked specifically when the May 2010 complaint was investigated, she stated that "[u]pon our notice of the complaint an investigation, again case files are generated, are amended, and the investigation starts after we receive the notice." (Tr. 67) She could not recall to which specific investigator the matter was assigned.

DOT Counsel further stated that DOT wanted to amend the charges against Solli to include the alleged insubordination because the charges were substantiated. The charges were not issued right away because "an informal conference had already been held with the December 2009 incident, so we were in the process of amending those charges to add the substantiated allegations . . . from the May 2010 incident." (Tr. 55-56) DOT Counsel also testified that, during the period when the complaints regarding Solli were made, the DOT Office of the Advocate was "severely short staffed." (Tr. 45)

The record evidence regarding DOT's investigation of insubordination charges against Solli includes a September 13, 2010 letter from DOT Counsel to Union Counsel concerning the evidence that DOT compiled in support of Solli's disciplinary case. This letter states that on or about August 6, 2010, the Supervisor Highway Repairer who initially reported Solli's alleged insubordination was interviewed regarding this charge.

Further, in a September 17, 2010 letter, DOT Counsel wrote that, on that day, DOT interviewed an Area Supervisor regarding the May 2010 insubordination complaint.

In her September 13, 2010 letter to Union Counsel, DOT Counsel included the May 20, 2010 statement written by the Supervisor Highway Repairer, regarding Solli's alleged insubordination that day. The enclosures also included a chain of emails concerning the May 2010 incident. DOT Counsel testified that she requested that DOT's Director of Manhattan Roadway Repair and Maintenance ("DOT Director") forward the email chain to her, because she "[j]ust wanted to make sure [she] had all documents relating to the incident." (Tr. 65) The DOT Director did so on September 13, 2010, when he forwarded to DOT Counsel the information he sent her previously on May 21, 2010. (Union Ex. 4)

The email chain forwarded on September 13, 2010 contains two other messages, both written in May 2010. In the first message, sent on May 20, 2010, a DOT supervisor wrote to the DOT Director about a call he received from the Supervisor Highway Repairer complaining that Solli refused to follow his orders. The second message, sent the following day, May 21, 2010, the DOT Director forwarded the message to DOT Counsel, stating, "I was out yesterday, however here is what transpired. See information below. I will have [the Supervisor Highway Repairer's] statement delivered to you on Monday."[2] (Union Ex. 4) He also noted that he met with Solli earlier that day and told

[2] Regarding when she started reviewing the May 2010 documentation, DOT Counsel stated that the DOT Director originally sent the messages to her on May 21, 2010, which was a Friday. She noted that he sent her the message at 5:16 PM, and testified that, "[o]bviously, I would not be looking at that at 5:16 PM, since I'm normally in from 7 o'clock in the morning. I probably just left." (Tr. 65) When asked whether she received the emails prior to September 13, 2010, she stated, "I may have received it before. I'm not sure. They obviously had an email chain that they had forward[ed] to me, but again,

her that "her work performance on this day was unacceptable and a disruption to [DOT] maintenance operation." (Union Ex. 4)

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the City retaliated against Solli, in violation of NYCCBL §12-306(a)(1) and (3), because she cooperated with the Union in order to challenge the City's false allegations against her. [3] The Union contends that, but for the Union's pursuit of its appeal, the City would never have pursued the unrelated disciplinary charges against Solli and that, by so doing, it was punishing her for utilizing the Union's assistance and deterring other Union members from taking similar action.

The Union underscores that DOT Counsel's testimony was inconsistent regarding whether the Union and Solli were present when DOT Counsel made the allegedly threatening statements, but that she did testify that such statements were made. The Union believes that, but for the Union's pursuit of its appeal, the City would never have

---

it's [5:16 PM], so I mean, I'd print it out, but I had asked him to send me the documentation just for our records and also so that I could disseminate it to all parties." (Tr. 67)

[3] 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;
> >
> > * * *
> >
> > (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[.]

pursued the unrelated disciplinary charges against Solli because DOT Counsel testified that "the amended allegations . . . would bolster [the] case." (Union's Brief at 5 (citing Tr. 57-58)) However, the Union argues that allegedly failing to obey a supervisor does not bolster an allegation that Solli hit her co-worker. Therefore, the City added the charges not to support its initial specification, but instead to coerce Solli into abandoning her appeal.

Although DOT Counsel claimed that the investigation of the additional charges was concluded by the time the OATH pretrial conference was held, the Union asserts that the record suggests otherwise. Specifically, DOT interviewed a Supervisor Highway Repairer the day after the December 2009 event, but did not interview him regarding the May 2010 allegations until August 6, 2010, which was after the OATH pretrial conference. In addition, DOT did not take statements from certain other witnesses until September 2010. Further, while DOT Counsel asserts that an informal conference was held regarding the insubordination charges, the Union contends that no such conference was held and that DOT has not produced a notice of an informal conference or a resulting Informal Conference Decision. Moreover, DOT does not mention an informal conference in any of its papers. According to the Union, no conference was held because "the charges were not worth an informal conference," as the "underlying incident would have long since been forgotten if Solli and her union had not been so obstinate regarding the assault accusation." (Union's Brief at 6)

The Union argues that when an employer threatens "an already–charged employee with entirely unrelated additional charges, when the new allegations would never have been brought if the employee had not been facing the first set," the employer

is acting in retaliation for protected activity. (Union's Brief at 6-7) According to the Union, DOT went beyond mere settlement talks when it threatened Solli by telling her that, if she worked with her Union to challenge the charges, DOT would add more charges in retaliation. The Union recognizes that an employer should be permitted to be lenient on a pending disciplinary matter in exchange for an employee forgoing a hearing. However, an employer should not be permitted to threaten to add completely unrelated charges that it would not pursue, except if an employee maintains her innocence and works with her union to fight the initial charges.

As relief, the Union requests that DOT be directed to make Solli whole, including eight days of back pay and benefits as remedy for her eight day suspension. The Union also requests that the disciplinary charges against Solli be expunged from her personnel record and that the Board order other appropriate relief.

City's Position

The City argues that the Union has not established a *prima facie* case of retaliation, and therefore its petition should be denied. Moreover, should the Board find that the Union established a *prima facie* case, the City had a legitimate business reason for its action, which would have occurred regardless of any protected activity.

The Union has not demonstrated that Solli engaged in protected activity and, thus cannot show a causal link between any protected activity and alleged adverse actions. Solli's exercise of her rights under CSL § 75 derive from, and are protected by, that statute, not from the NYCCBL and, as such, should not be considered activity protected by the NYCCBL. The record contains no evidence connecting Solli's activity with any protected union activity, and, therefore, her petition must be dismissed.

Should the Board find that Solli engaged in protected activity, the Union has not established that any such activity motivated DOT to amend its disciplinary charges against Solli. Indeed, the Union's allegations are speculative and conclusory. Solli and DOT Counsel both testified that the parties had no settlement discussions at the OATH pre-trial conference. Indeed, Solli testified that the ALJ relayed DOT Counsel's offer to her in a private caucus; DOT Counsel also testified that she discussed the possibility of settlement privately with the ALJ. According to the City, the record demonstrates that Solli and DOT Counsel never spoke regarding the alleged settlement offer and that, as the two parties never had such a conversation, DOT Counsel could never have threatened Solli.

The Union has not alleged that DOT Counsel made any statements to Solli that would show improper motivation or anti-union animus. Instead, the Union claims that the ALJ's private communication to Solli in private is evidence that DOT acted in retaliation when it amended the charges against Solli. To establish an improper practice, NYCCBL § 12-306(a)(3) requires that "a public employer or its agents" act in a discriminatory way. However, the ALJ is not an agent of DOT and any statements that the ALJ made to the Union were meant only to explore settlement options instead of proceeding to trial. Thus, the record shows that Solli did not discuss the possibility of settlement with DOT or any agent of DOT at the OATH pretrial conference held on August 2, 2010. Further, there is no evidence that DOT had any retaliatory motivation or that its agents made any threatening remarks. DOT Counsel denied making the allegedly retaliatory statements. Moreover, DOT Counsel testified credibly that she informed Solli and the Union that Solli could exercise her CSL § 75 rights. It would be illogical for

DOT Counsel to have informed Solli of her rights and then have retaliated against her for pursuing them.

As to the timing of DOT's investigations, DOT Counsel explained that investigations concerning physical altercations between co-workers are initiated as quickly as possible. The first complaint against Solli concerned an alleged physical altercation while the second one did not; both sets of charges were investigated in the ordinary course of DOT's business. Further, DOT did not rush to amend the charges against Solli; in fact, the investigations of both sets of complaints took the same amount of time, approximately three months. On May 10, 2010, DOT became aware that Solli would exercise her rights under CSL § 75 when she refused DOT's recommended penalty. The DOT Office of the Advocate received the second disciplinary complaint two weeks later on May 24, 2010, and there is no evidence that DOT acted other than to fully investigate the additional disciplinary complaint before it decided to amend the charges against Solli. DOT Counsel testified that she only told the ALJ about the additional charges because "they were new charges that were going to be amended to the complaint." (City Brief at 22) (citing Tr. 74) Thus, the record demonstrates that the additional charges "were investigated, substantiated and amended to the charges for which Solli had already elected to proceed to an OATH trial," and were not improperly motivated. (City Brief at 22)

Moreover, DOT's actions were taken for a legitimate business reason, and the additional charges would have been issued against Solli even in the absence of protected activity. Specifically, DOT would have issued the additional charges against Solli in order "to ensure that she complies with the [Code]." (City Brief at 23) These actions

were taken pursuant to DOT's managerial right to discipline its employees. Notably, although Solli contends that the amended charges were brought in retaliation, these were the only charges that OATH sustained in Solli's disciplinary case.

Further, the City did not violate NYCCBL § 12-306(a)(1) either derivatively or independently. The Union has not established a violation of NYCCBL §12-306(a)(3), and, thus there can be no derivative violation of NYCCBL § 12-306(a)(1). Further, the Union did not engage in inherently destructive conduct that hindered any union rights or activities. DOT did not restrict Solli's exercise of her CSL § 75 rights; indeed, DOT Counsel informed Solli that she had such rights.

DISCUSSION

The Union claims that DOT violated NYCCBL § 12-306(a)(1) and (3) by serving Solli with additional disciplinary charges in retaliation for her decision to follow her Union's advice to appeal the existing disciplinary charges and invoke her right to a hearing pursuant to CSL § 75. As discussed below, upon a review of all the evidence adduced in this case, we find that although the Union established a *prima facie* case of retaliatory action, the City proved a legitimate business reason that would have resulted in the filing of additional disciplinary charges without regard to any protected activity. Accordingly, the petition is dismissed.

The NYCCBL encourages the settlement of disputes and also recognizes the right of management to discipline employees. *See* NYCCBL §§ 12-302, 12-307, and 12-312(f). However, an employer commits an improper practice when it coerces or attempts to coerce an employee to settle disciplinary charges by inappropriate means, such as

bringing further disciplinary charges against an employee because the employee refuses to settle other charges, when, but for the employee's refusal to settle, the additional disciplinary charges would not have been brought. *See, e.g. Okorie-Ama*, 79 OCB 5 at 16-19 (BCB 2009) (finding no improper practice where record did not support claim of duress); *see County of Chautauqua*, 42 PERB ¶ 4512 (2009) (employer improperly offered to settle a disciplinary matter only if employee withdrew an unrelated grievance); *Mahopac Cent. Sch. Dist.*, 28 PERB ¶ 3045 (1995) (employer engaged in unlawful interference and discrimination when it changed an employee's position in retaliation for filing overtime grievance and rejecting his supervisor's private offer to settle the dispute). Indeed, although an action, such as bringing disciplinary charges, may be within an employer's "managerial prerogative, [such] actions may not be taken for a retaliatory purpose." *SBA*, 4 OCB2d 50, at 25 (BCB 2011); *see also DC 37, L. 376*, 4 OCB2d 60, at 8.

In *Bowman*, 39 OCB 51 (BCB 1987), this Board adopted the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), to determine whether an employer has violated NYCCBL §12-306(a)(3). This standard provides that 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; *Edwards*, 1 OCB2d 22, at 16 (BCB 2008). If a petitioner is able to establish 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)).

After examining the record before us, we find that the Union has set forth a showing sufficient to establish a *prima facie* case of a violation of NYCCBL § 12-306(a)(1) and (3). Specifically, the Union adduced evidence tending to show that because Solli decided not to settle the altercation charges and instead go forward to a hearing, DOT Counsel amended the charges against her to include the insubordination charge. We underscore that this Board generally encourages the dispute resolution process, and favors negotiated settlements. Likewise, we see no problem in resolving a potential charge by settlement negotiations before a charge is ever filed. However, as discussed below, we find DOT Counsel's explanation for her actions to be contradicted by the documentary evidence of record. Were we to have found the City's only witness, DOT Counsel, credible, her proffered explanation for her decision to amend the charges following the OATH pretrial conference could have undermined the Union's *prima facie* case. However, we find that her explanation not being found to be credible, in fact, supports the Union's *prima facie* case.

Contrary to the City's contention, we find that Solli was engaged in protected activity when she sought the assistance of her Union to appeal DOT's disciplinary charges against her. We have long held that, in certain circumstances, participation in representation outside the grievance process may be considered union activity, where such representation is "related, if only indirectly, to the employment relationship between the City and the bargaining unit employee." *Kingsley*, 1 OCB2d 31, at 14 (BCB 2008);

see also McNabb, 41 OCB 48, at 13-22 (BCB 1988) (citing *UFA*, 1 OCB2d 10, at 21 (BCB 2008); *Bd. of Educ. of Deer Park Union Free Sch. Dist.*, 10 PERB ¶ 4594, at 4689 (1977), *affd.*, 11 PERB ¶ 3043 (1978)). Undoubtedly, Solli's decision to invoke, with Union representation, her rights, pursuant to CSL § 75, to appeal her employer's disciplinary charges against her pertains to her employment relationship with the City and meets the definition of activity protected by the NYCCBL. Indeed, we have previously found that "participation at a union's behest in a § 75 disciplinary hearing clearly is protected activity." *SSEU, L. 371*, 79 OCB 34, at 10, fn. 2 (BCB 2007).

Further, it is clear and undisputed that DOT Counsel, the agent responsible for deciding to serve Solli with additional disciplinary charges, knew before adding the new charges that Solli refused to settle DOT's initial charges against her. *Cf. Porter*, 4 OCB 2d 9 (BCB 2011) (no *prima facie* case where employer decided to file disciplinary charges against employee before it had knowledge of her protected activity).

In establishing the motive component of the *Bowman/Salamanca* standard, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Benjamin*, 4 OCB2d 6, at 16 (BCB 2011) (citations omitted); *CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). However, a "petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22 (BCB 2005). A union may defeat the employer's defense when it is able to "show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reason." *DC 37, L. 376*, 1 OCB2d 40, at 17 (BCB 2008) (citing *Johnson v. County of Nassau*, 480 F.Supp.2d 581, 594 (E.D.N.Y. 2007)).

Although "temporal proximity alone is not sufficient to establish causation, the temporal proximity between the protected union activity and the allegedly retaliatory action, in conjunction with other facts supporting a finding of improper motivation, [may be] sufficient to satisfy the second element of the *Bowman/Salamanca* test." *Feder*, 4 OCB2d 46, at 44 (BCB 2011). Circumstantial evidence may be used to establish motivation; proof that an employer's purported reason for its actions is pretextual may constitute such evidence. *See Town of Independence*, 23 PERB ¶ 3020 (1990) ("anti-union animus may be established by statements or by circumstantial evidence, which may be rebutted by presentation of legitimate business reasons for the action taken, unless found to be pretextual"); *see also County of Monroe*, 35 PERB ¶ 4586 (PERB's "position can fairly be stated as close temporal proximity of the complained of event to the exercise of protected activity, while circumstantial, may raise a suspicion of animus which may be bolstered by a finding that the stated justification for the action taken is wholly pretextual."). Moreover, as we have held, "[t]he offering of shifting and inconsistent rationales for challenged behaviour strongly raises the question that [an explanation] constitutes a self-serving *post hoc* justification for retaliatory conduct and does not warrant belief." *SSEU, Local 371*, 77 OCB 35, at 20 (BCB 2006).

After reviewing the record, we find that the Union has established its *prima facie* case that DOT Counsel served Solli with additional disciplinary charges because Solli refused to accept DOT's settlement offer, and instead decided to go forward to a hearing. DOT Counsel testified that, by the time of the OATH pretrial conference, DOT's investigation of the May 2010 complaint "was done [and] concluded." (Tr. 83) She testified that, by the day of the OATH pretrial conference, August 2, 2010, she had

already determined that the charges were substantiated, which "necessitated the amendment of the prior charges." (Tr. 83) However, the record clearly establishes otherwise; the record includes no documentary evidence of any investigation being performed prior to the August 2, 2010 OATH pretrial conference. DOT Counsel repeatedly made clear that if Solli settled the December 2009 altercation charge, she would not be charged for the May 2010 insubordination complaint; she testified that she had concluded her investigation and was ready to amend the charges against Solli if she chose not to settle the first charge. Although DOT Counsel testified that she was prepared to bring the second set of charges by the time of OATH pretrial conference and, thus, her actions were not retaliatory, this explanation is belied by the documentary evidence. The documentary evidence discredits the City's contention that DOT conducted any investigation into the insubordination complaint before attending the OATH pre-trial conference at which the Union refused to settle the preceding altercation charge. All documents pertaining to an investigation of the insubordination charges post-date the OATH pretrial conference. Indeed, the Supervisor Highway Repairer who initially reported Solli's alleged insubordination was not interviewed regarding this charge until August 6, 2010, several days after the OATH pretrial conference. Further, it was not until September 17, 2010, that DOT interviewed an Area Supervisor as a potential witness regarding the events underlying the insubordination charge.[4] These

[4] We find no merit to the City's contention that it is somehow absolved from its actions because the statements at issue were not directly communicated to Solli and the Union by DOT Counsel, but were instead relayed by the ALJ during the OATH pretrial conference. First, we see no reason to believe that the ALJ had any inkling that DOT Counsel's representations to him were untrue, or that she was not acting in good faith to explore the possibility of a voluntary settlement. Moreover, the record is clear that DOT Counsel intended that the Union be aware of her offer not to bring the second set of charges if the

facts suggest that DOT Counsel's interest in bringing charges for the insubordination complaint did not arise until after that time. Accordingly, we find that the Union has established a *prima facie case* that Solli's decision to reject DOT Counsel's settlement offer and go to hearing with her Union was a motivating factor in the employer's decision to serve her with insubordination charges stemming from the May 2010 complaint.

As the Union has established a "a *prima facie* violation of NYCCBL § 12-306(a)(3), the burden then shifts to the employer who may attempt to refute petitioner's showing on one or both elements or to demonstrate that a legitimate business reason would have caused the employer to take the action complained of even in the absence of protected conduct." *Feder*, 4 OCB2d 46, at 45 (BCB 2011), *see DC 37*, 1 OCB2d 5, at 64 (BCB 2008) (citing *SBA*, 75 OCB 22, at 22 (BCB 2005)); *see also CEU, L. 237*, 77 OCB 24, at 18-19 (BCB 2006); *SSEU, L. 371*, 77 OCB 35, at 18; *Lamberti*, 77 OCB 21, at 17 (BCB 2006).

Although the City's testimony did not refute the petitioner's *prima facie* case, we find that the City has set forth a legitimate business reason for serving Solli with disciplinary charges arising from the May 2010 insubordination complaint. Solli's direct supervisor made the initial complaint of insubordination to his superiors on May 20, 2010, the day it occurred, and thereafter the DOT Director immediately forwarded the reported complaint to DOT Counsel. There is no evidence, and the Union does not allege, that Solli's supervisor complained of her insubordination in retaliation for

---

Union and Solli accepted the 20-day penalty. We note that the City does not deny, and, we have already held in the interim decision in this matter, that "the mere fact that settlement was being discussed does not shield a party from an improper practice claim for conduct that may violate the NYCCBL." *DC 37, L. 376*, 4 OCB2d 60, at 8.

protected activity. Further, there is no evidence or allegation that the DOT Director forwarded the insubordination complaint in order to retaliate against Solli. We also note that DOT took about the same length of time to bring charges in both the first and second complaints, i.e., about three months. Moreover, an OATH ALJ, after an evidentiary hearing the fairness of which has not been questioned, found that Solli was guilty of insubordination and, as a result, suspended her for eight days. No basis in the record exists upon which we could conclude that the insubordination complaint was pretextual or that Solli was singled out for disparate treatment based on her protected conduct. *Compare SSEU, Local 371*, 77 OCB 35, at 18-19 (BCB 2006) (finding employer's asserted legitimate business reason was pretexual where employer "relied on dubious evidence and stale charges" in seeking to terminate employee), *Colella*, 79 OCB 27, at 61 (BCB 2007) (finding employer's asserted legitimate business reason was pretextual where there was a "lack of proof that [employee] engaged in most of the charged misconduct").

Based on the combination of these facts, we find that even if DOT Counsel's decision to bring the insubordination charges were motivated, in part, by Solli's protected activity, we are satisfied that the complaint of insubordination from Solli's supervisor would have resulted in disciplinary charges in any event. Indeed, we have long held that "even if it is established that a desire to frustrate union activity is a motivating factor [in an employer's action], the employer is nevertheless held to have complied with the NYCCBL where it is proven that the action complained of would have occurred in any event for valid reasons." *DC 37, Local 1113*, 77 OCB 33 (BCB 2006) (quoting *CWA, Local 1180*, 43 OCB 17, at 17 (BCB 1989). Given that Solli's supervisor complained of

her insubordination, and an OATH ALJ ultimately found that his complaint was legitimate, we find that Solli would have been disciplined for valid reasons regardless of DOT Counsel's motivation.

Thus, we find that the Union has not established a violation of NYCCBL § 12-306(a)(3), and (1) derivatively. Accordingly, the petition is denied.

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, docketed as BCB-2887-10, filed by District Council 37, Local 376, AFSCME, AFL-CIO and Donna Solli against the City of New York and the New York City Department of Transportation, be, and hereby is, denied.

Dated: October 5, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent. GABRIELLE SEMEL
MEMBER

I dissent. PETER B. PEPPER
MEMBER