DC 37, L. 983, 6 OCB2d 10 (BCB 2013)

(IP) (Docket No. BCB 2975-11)

Summary of Decision: The Union alleged that the NYPD violated NYCCBL § 12-306(a)(1) and (3) by retaliating against its Local's Vice President for engaging in protected union activities. Specifically, the Union alleged that the NYPD improperly determined him to be "partially at fault" for a vehicle accident, required him to serve additional days on foot patrol beyond the penalty that was assessed, denied him overtime opportunities, disciplined him for carrying a camera and for using release time to perform union business, and changed his work location and meal time. The City argued that the Union failed to establish any *prima facie* claims of retaliation, that no adverse employment actions were taken, and that none of the Vice President's actions constituted protected union activities. Further, the City argued that assuming, *arguendo,* the Union established a *prima facie* claim, the actions taken were for legitimate business reasons. The Board held that the NYPD violated NYCCBL § 12-306(a)(1) and (3) when it denied the Vice President overtime opportunities and disciplined him for using release time to perform union business. With respect to the remaining claims, the Board found that the NYPD established a legitimate business reason for its actions. Accordingly, the petition is 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-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCAL 983,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On August 12, 2011, District Council 37, AFSCME, AFL-CIO, filed a verified improper

practice petition on behalf of itself and its affiliated Local 983 (collectively, "DC 37" or "Union") against the City of New York ("City"), and the New York City Police Department ("NYPD" of "Department"). The Union alleges that the NYPD violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") by retaliating against Local 983 Vice President Marvin Robbins ("Robbins") for engaging in protected union activities. Specifically, the Union alleges that the NYPD improperly determined Robbins to be "partially at fault" for a vehicle accident, required him to serve additional days on foot patrol beyond the penalty that was assessed, denied him overtime opportunities, disciplined him for carrying a camera and for using release time to perform union business, and changed his work location and meal time. The City argues that the Union has failed to establish any *prima facie* claims of retaliation, that no adverse employment actions were taken against Robbins, and that none of Robbins' actions constituted protected union activities. The City additionally argues that, assuming, *arguendo*, the Union has established a *prima facie* claim, the actions taken against Robbins were for legitimate business reasons. This Board finds that the NYPD violated NYCCBL § 12-306(a)(1) and (3) when it denied Robbins overtime opportunities and disciplined him for using release time to perform union business. With respect to the remaining claims, the Board found that the NYPD established a legitimate business reason for its actions. Accordingly, the petition is granted, in part, and denied, in part.

BACKGROUND

The Trial Examiner held five days of hearings and found that the totality of the record established the following relevant facts.

DC 37 is an amalgam of 55 local unions representing approximately 120,000 public employees in various agencies, authorities, boards, and corporations throughout the City. Local 983 represents employees in the title of Traffic Enforcement Agent ("TEA"), Levels III and IV. TEAs are employed by the NYPD in its Traffic Enforcement Division ("TED"). The TED is responsible for traffic management as well as the enforcement of parking rules and regulations within the City's five boroughs.

Robbins has been employed as a Level III TEA since 1991 and is assigned to the Bronx Tow Pound. Level III TEAs operate tow trucks and are primarily responsible for removing or immobilizing illegally parked vehicles. In 2005, Robbins was elected to the positions of Vice President and Grievance Delegate for Local 983. In these capacities, he files grievances on behalf of Union members, represents members in command discipline hearings, testifies on behalf of the Union in various proceedings, and attends labor-management meetings. Robbins works at the Tow Pound on Mondays, Wednesdays and Thursdays from 6:00 a.m. until 2:00 p.m. On Tuesdays and Fridays, he is on part-time release to perform union duties.

Inspector Michael Pilecki is the Commanding Officer of the TED. He is responsible for the operational oversight of approximately 3,000 TEAs and civilian employees throughout 19 facilities. Pilecki is aware of Robbins' status as Vice President and Grievance Representative of the Union. He stated that generally issues regarding bargaining and the grievance process are handled through the NYPD's Office of Labor Relations ("OLR"). However, Pilecki testified that was involved in the settlement of at least one grievance that Robbins filed sometime between April and October, 2011.[1] This grievance concerned the need for reflective vests for Level III

[1] Pilecki testified that the grievance was filed approximately a year or a year and a half prior to the date on which he testified, October 16, 2012. The Union asserts that this grievance was filed in or around June, 2011. (Union Br. at 21)

TEAs operating tow trucks in emergency situations at night. In response to this grievance, Pilecki issued a directive that all tow truck operators must carry reflective vests with them at all times. As a result, Pilecki stated that the Department had to purchase these vests.

Robbins testified that he has a business-like, working relationship with Pilecki, and that it is his responsibility to reach out to Pilecki to attempt to rectify members' issues. Robbins also testified that on October 29, 2010, he met with Pilecki to "hash out some of the differences between the union and management . . ." (Tr. 95) According to Robbins, "that was the first time [Pilecki] told me, you know, like before your grievances and before the stories started going out in the paper, I was the best thing to happen to traffic[.] [N]ow because of your grievances and stories in the papers, now I'm the worst thing that happened to traffic. So for me you're the worst." (*Id.*) When asked what the "stories in the paper" referred to, Robbins stated that there were stories in the *New York Post* and the *Daily News* regarding the mismanagement of traffic issues under Pilecki's administration. Robbins' testimony regarding Pilecki's alleged statement was unrebutted.

The NYPD Accident Reduction Program

In 2010, Pilecki initiated an Accident Reduction Program ("ARP") aimed at reducing the number of accidents involving NYPD vehicles. Each command's Executive Officer is designated as the Accident Reduction Coordinator ("ARC") who is responsible for implementing and overseeing accident reduction efforts within the command. Once a week, Pilecki chairs a meeting attended by the ARCs, the NYPD's Deputy Director of Field Operations and one or more members of his executive staff. At this meeting, recurring accidents are identified and discussed. Strategies to avoid these types of accidents are discussed and the ARCs are instructed to communicate the resulting policies and rules to the TEAs during the daily roll call.

Pilecki provided examples of regularly-recurring accidents and the policies that have developed as a result. He described how accidents occur when a TEA attempts to drive a vehicle down a street where cars are legally parked on one side and illegally double-parked on the other side. He testified that he has repeatedly told the ARCs to instruct TEAs that in this situation, they should not attempt to squeeze past the double-parked vehicle. Rather, the TEA should attempt to move the vehicle by asking the operator of the vehicle to do so, or by requesting a tow truck to move it. In the interim, if traffic is becoming backed up, Pilecki stated that the TEA should call a supervisor so that resources can be deployed to the scene to back the vehicles out of the block.

Another component of the ARP meetings is the discussion of individual vehicle accidents and the assessment of the operator's fault. Specifically, each ARC gives a detailed presentation of the accidents that occurred in their command within the prior seven days. The circumstances of each accident are discussed and the ARC makes a recommendation as to whether the TEA should be determined to be "at fault", "not at fault," or "partially at fault." Pilecki testified that he generally agrees with the ARC's recommendation, but when he does not, the determination of fault is put to a vote of the entire committee.

Along with the ARC's presentation, Pilecki testified that he also considers documents that are given to him at the ARP meeting. Pilecki testified that often these documents include a police accident report, known as a "MV-104AN," and a memorandum documenting a supervisory discussion ("Supervisor's Report"). According to Pilecki, the MV-104AN contains a description of the accident prepared by the patrol supervisor of the relevant precinct. The Supervisor's Report documents a conversation that a supervisor has with the TEA involved in

the accident. It also contains an analysis of the accident and the supervisor's recommendations as to how the situation could have been handled.

The category of "partially at fault" was developed by the ARP in late Spring 2011.[2] Prior to Robbins, four employees had been found to be "partially at fault" for a vehicle accident. The first accident occurred one month prior, on June 21, 2011, when a civilian driver collided with a TEA when the driver attempted to change from the right to the middle lane while the TEA was changing from the left to the middle lane. The next accident occurred on June 25, 2011, when a civilian motorist attempting to make a right turn hit the rear driver side of a department vehicle that was double-parked. On July 13, 2011, a TEA hit the side of a civilian's vehicle when the civilian pulled out of a parking spot into oncoming traffic. On July 14, 2011, a civilian motorist backed up into a TEA's vehicle while the motorist was attempting to park. All of these TEAs were assessed a penalty of ten days of intersection duty as a result of being found "partially at fault."

A TEA found to be "at fault" for an accident will generally receive a penalty of 45 days of intersection duties. The TEA will not be permitted to operate a tow truck, but will instead direct traffic in the intersections with Level II TEAs. A determination of "partially at fault" will generally result in a penalty of ten days of intersection duty. The TEA's pay and benefits are not negatively affected as a result of being assigned intersection duties.

Robbins' Accident

On July 20, 2011, Robbins was involved in an on-duty accident while operating an NYPD tow truck. He testified that he was heading southbound on Crotona Parkway in the Bronx

[2] When the ARP was first created, TEAs were only determined to be "at fault" or "not at fault" for accidents. Pilecki testified that, sometime in late Spring 2011, the category of "partially at fault" was created to address situations in which the TEA's actions contributed to the accident but were not the sole cause of such.

when he came upon two Department of Transportation ("DOT") vehicles double-parked on the right-hand side of a one-way street, one behind the other. Because he did not believe he would be able to pass the vehicles safely, he decided to sit and wait. Several cars began to pile up behind him. According to Robbins, two or three minutes later a DOT approached him and stated that he didn't want to hold Robbins up any longer and he would try to move his vehicle closer to the parked cars so that Robbins could drive past. The DOT worker could not move forward because the other DOT vehicle was in front of him, so he backed up. As he did so, the DOT vehicle struck the passenger-side mirror of Robbins' NYPD truck. Robbins stated that at no point in time did he attempt to squeeze his vehicle past the DOT trucks.

In accordance with protocol, Robbins called for a supervisor to respond. Traffic Supervisor Rogers reported to the scene from the Bronx Tow Pound and Sergeant Gonzalez responded from the 42nd Precinct. According to Robbins, the DOT worker told the responding supervisors that the accident was his fault and that Robbins hadn't moved his vehicle or done anything wrong. Robbins stated that an initial report was filled out noting that the accident was not his fault. Upon his return to the Bronx Tow Pound, Robbins was instructed to write a memorandum regarding the accident. He did so. Robbins testified that he believed that was the end of the matter. However, according to Robbins, later in the day Traffic Manager Adami told him that, in accordance with protocol, he had called over to the command center to report the accident. Adami told Robbins that after speaking with someone there, it was Adami's belief that "they" wanted him to do intersection duty. Robbins stated that this was the first time he had heard of a TEA being instructed to do intersection duties prior to an official determination of fault.

Robbins performed intersection duties for the remainder of his shift. The record is silent as to how he was given this assignment. Pilecki denied that he personally ordered anyone to have Robbins perform intersection duties prior to the ARP meeting. Pilecki stated that, other than inquiring as to whether anyone was injured, he generally takes no other action regarding an accident until the ARP meeting.

ARP Meeting and Robbins' Assessment of Fault

Robbins' accident was discussed at a July 21, 2011 ARP meeting. Adami gave a presentation regarding Robbins' accident. According to Pilecki, Adami stated that Robbins attempted to squeeze his vehicle between the two double-parked vehicles and a row of parked cars. Adami also stated that the DOT worker walked into the street and tried to guide Robbins through the spot. When the DOT worker realized that Robbins would not be able to pass through, the DOT worker got into his truck and backed it up, striking the passenger-side mirror of Robbins' tow truck.

Pilecki testified that the committee reviewed the MV-104AN as well as the Supervisor's Report in assessing Robbins' accident. In the "Accident Description/Officer's Notes" section, Sergeant Gonzalez wrote:

> At [time/place/occurrence] Operator of [vehicle] #1 states while traveling [southbound] on Crotona Park East he approached [vehicle] #2 who was double parked. *[Vehicle Operator] #1 attempted to pass on left of [vehicle] #2 but could not fit.* [Vehicle Operator] #2 states while observing [vehicle] #1 could not pass his double parked vehicle, he placed his truck in reverse and struck [vehicle] #1 mirror (side) [with] rear of truck.

(City Ex. 9) (emphasis added) Pilecki stated that he found this description consistent with Adami's presentation of the facts.

Pilecki explained why the committee did not review the "PD 301-153" accident report at the ARP meeting. Pilecki stated that generally this report is not available when the ARP meeting occurs because the patrol supervisor and precinct commander have 20 days to complete it. Additionally, the individual commanders who fill out this form are not aware of what the TED's internal policies are regarding accidents. Therefore, the commander's opinion regarding the driver's level of fault is not dispositive.[3]

Pilecki candidly testified that at the ARP meeting he for Adami's assessment of fault and Adami replied that Robbins should not be found "at fault." Pilecki testified that he did not agree with Adami's assessment, and therefore, in accordance with his usual practice, he asked the committee to vote. He stated that out of a group of approximately 25 people, three or four voted that Robbins was "not at fault" and the rest voted that he was "partially at fault." Pilecki explained that he believed Robbins was at least "partially at fault" and perhaps even "at fault" for the accident because he violated a specific directive, which was given repeatedly, not to attempt to squeeze past double-parked vehicles.

After the vote, Pilecki asked Adami what he thought the penalty should be. Adami initially stated, "you know what, I don't really know." (Tr. 350) Pilecki responded: "I said okay, why don't you have a seat and think about it." (Id.) The next ARC then gave his presentation. Coincidentally, the driver in that accident was also determined to be "partially at fault" and the committee agreed that a ten day penalty would be fair. Pilecki then asked Adami again what he thought Robbins' penalty should be. According to Pilecki, Adami said, "well, yes, okay, I think we should make it ten days[.]" (Tr. 351)

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[3] Nothing in the PD 301-153 differed from Adami's presentation or the MV-104AN, except that Sergeant Gonzalez stated that, "MVO Robbins acted properly by coming to a stop to allow the double parked vehicles to move out of the lane of traffic. The civilian motorist misjudged the distance while reversing." (Union Ex. A)

Robbins testified that subsequent to the ARP meeting, Adami told him: "Listen, I went to 34th Street, I did the best I can, Pilecki wants you to walk. He wants you in the intersection." (Tr. 60) Robbins was officially notified of his ten-day penalty when he reported to the Bronx Tow Pound on Monday July 25, 2011. He was assigned as "relief for post" at the intersection of Bruckner Boulevard and Willis. Robbins explained that this meant that he would relieve Level II TEAs when they needed to take personal or lunch breaks.

Robbins testified that although he was told he would serve ten days on intersection duty, he actually served 11 or 12. The Union presented the testimony of two Level III TEAs who were both assessed penalties of 45 days of intersection duty due to being found to be "at fault" for vehicle accidents. Both testified that they were not required to serve any additional time on intersection duty beyond the 45 days.[4]

Robbins' Possession of a Camera and the Related Letter of Instruction

Robbins testified that for approximately two years prior to July 25, 2011, he carried a camera with him every day while working. His reason for carrying the camera was that he was trying to obtain hazardous duty pay for the Level III TEAs and he used the camera to document dangerous items that were found in towed vehicles, such as guns and drugs. Robbins stated that his supervisors and co-workers were aware that he carried the camera. He also stated, "I have been at meetings with Pilecki and showed him the camera and the pictures and it's never been a problem." (Tr. 73-74) Robbins testified that he had never been disciplined or instructed not to carry the camera while on duty.

[4] The Union and the City stipulated to facts concerning a third Level III TEA who was found to be "at fault" for a vehicle accident, including that the TEA was assessed a 45 day penalty. Apparently, this TEA did not serve any additional time on intersection duty beyond these 45 days.

Pilecki testified that he was not aware that Robbins routinely carries a camera with him while on duty. However, he recalled an instance three or four years ago in which Robbins showed him some photos, and he believed that they were in paper format. He could not recall the specific photos, nor could he recall whether he asked Robbins at the time why he took the photos.

Robbins testified that during roll call on July 25, 2011, he was informed that he had been found "partially at fault" for the accident and that he would be performing intersection duty as a penalty. Robbins had the camera in his shirt pocket as he normally would. He stated that did not take it out of his pocket before reporting to the intersection because he went directly there from roll call.

The command's Integrity Control Officer ("ICO"), Sergeant Rohan McKenzie, testified regarding an incident that took place later that day.[5] McKenzie stated that, on this date, he was assigned to sign agents in Manhattan and the Bronx.[6] He came across Robbins and Traffic Supervisor Keith on the corner of Bruckner and Alexander Avenue. McKenzie was surprised to see Robbins assigned to an intersection because he was unaware that Robbins was serving a penalty for a vehicle accident. McKenzie turned on his sirens, as a signal that Robbins and Keith should approach him. He testified that this is when he observed Robbins holding the camera up to his face and taking a photo of him. McKenzie stated that Robbins then began to approach him, and as he got closer to the car he took another photo. McKenzie stated that he was not aware that Robbins routinely carried a camera with him while on duty.

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[5] McKenzie testified that the duties of an ICO include assisting the Commanding Officer with inspecting TEAs, ensuring that the vehicles are operable and monitoring integrity issues such as abuse of time and leave or overtime.

[6] Signing or "scratching" agents means that a supervisor will sign the TEA's Daily Field Patrol log in order to indicate that the TEA was at a particular location at a particular time.

When asked on cross-examination why he took the photos, Robbins responded, "Oh, because he was double[-]parked, taking up a lane of traffic and I took a picture of him blocking traffic." (Tr. 162) When asked whether he is responsible for enforcing parking regulations while on intersection duty, Robbins responded, "If you're messing up my intersection . . . that I'm assigned and you're backing up traffic while you're calling me over, yeah. . . . You're messing up traffic because you want to sign me?" (Tr. 162-163)

Subsequent to July 25, McKenzie handed Robbins a Letter of Instruction dated July 26, 2011 that directed him to "refrain from carrying a camera while on duty." (City Ex. 4) This Letter was authored and signed by McKenzie.

McKenzie testified that it was his understanding that TEAs are not allowed to carry a camera while on-duty. Patrol Guide 206-03 prohibits a TEA from carrying an electronic device, and Pilecki testified that he considers a camera to fall within the description of a prohibited electronic device. Pilecki stated that he found Robbins' actions to be "kind of unheard of and to me a real act of discourtesy and insubordination." (Tr. 361) He further stated that any other agent or police officer who would have done so would have received a command discipline and lost vacation time. However, Pilecki explained that out of deference to Robbins' position with the Union, he directed that Robbins receive only a Letter of Instruction. According to Pilecki, a Letter of Instruction is not considered formal discipline. Its purpose is to inform employees that they have engaged in an inappropriate action. A copy is placed into the recipient's personnel folder.

Use of Ad Hoc Release Time

Union release time is granted in accordance with the Mayor's Executive Order No. 75 ("E.O. 75"). E.O. 75 sets forth definitions and conditions for the performance of full and part-

time union release, as well as "*ad hoc* assignments." (Union Ex. F) E.O. 75 states that all time spent on the conduct of labor relations, including *ad hoc* release time, "must be approved in advance by authorized officials." (*Id.*) According to E.O. 75, *ad hoc* release time to perform union business must be taken without pay or charged to the employee's annual leave or compensatory time credits.

Robbins testified that in addition to his regular authorized union release days, he is often required to obtain additional release time "as things come up." (Tr. 81) He stated that the procedure he has always followed for obtaining *ad hoc* release time is that, if he knows about it in advance, he will fill out a "28 form" requesting the time off.[7] He gives the form to his immediate supervisor who informs him whether it's been approved. Robbins testified that, if something comes up at the last minute, he calls into the command to speak to his supervisor and he is told over the phone whether the time is approved. According to Robbins, if the time is approved, it will be entered into the daily command logbook. Robbins' testimony regarding his normal practice for securing *ad hoc* release was unrebutted.

Lieutenant John Kanganis is employed by the NYPD's OLR and serves as a liaison to the unions by handling grievances, answering questions, and representing the NYPD at Step III hearings and arbitrations. His office also administers E.O. 75 and keeps track of excusals. Kanganis testified regarding the procedure that his office follows for approval of what he termed "*bona fide*" *ad hoc* union release pursuant to E.O. 75. He stated that his office receives requests for *ad hoc* release from the unions specifying the representative who needs the excusal. If the request is granted, his office calls that person's command and leaves a message relaying the grant of release time. The union representative will not be charged for annual or sick leave for

[7] Pilecki testified that the "28 form" is a "leave of absence report." (Tr. 368)

approved *ad hoc* release time. He also stated that, without permission from his office, "it's not really a *bona fide* release" and, therefore, the union representative will not be excused under E.O. 75. (Tr. 444) Kanganis testified that the consequence for being absent without an excusal under E.O. 75 is that the representative could be disciplined, marked as absent without leave ("AWOL"), or he or she could be charged their own annual leave.

Letter of Instruction Regarding *Ad Hoc* Release

Robbins testified that prior to July 27, 2011, he was not aware of the need to cover for a Union representative who was on vacation. Therefore, he called in to the command before the beginning of his tour on July 27 and 28, as well as on August 1, 2011, and reported that he would not be in because he had to attend to Union business. He testified that he was told, "Not a problem, I'll put you in the book." (Tr. p. 85) The telephone log for July 27 and 28 indicates Robbins was on Union leave for those two days. (*See* Union Ex. G)[8]

Pilecki testified that, on August 1, 2011, one of his lieutenants came into his office late in the morning and informed him that Robbins was AWOL that day. The Lieutenant also stated that Robbins had not been on his post on July 27 or 28. When Pilecki asked the lieutenant if he knew where Robbins was, the Lieutenant replied that he might be out on union business. Pilecki testified that he directed the Bronx Tow Pound to review their records to ascertain where Robbins had been on the days in question. Because they did not get back to him immediately, he called the President of the Union to find out if Robbins was there. When he was informed that Robbins was at the Union on release time, Pilecki responded that he didn't believe that Robbins went through OLR to get approval. Therefore, he asked the Union President to "find out what

[8] Robbins referred to Union Ex. G as "a daily diary of people that call in, call out, advance days off . . . ." (Tr. 83)

the bottom line is and get back to me." (Tr. 367) He stated that the Union President never got back to him, but that instead he received a copy of a letter by facsimile from a Union employee, dated August 1, 2011, requesting leave for Robbins for the prior Wednesday and Thursday (July 27 and 28), as well as for that day and the remainder of the week (August 3 and 4). This letter was addressed to Lieutenant Patricia Feeley in OLR. Kanganis received it because Feeley was on vacation at the time and the request for release was ultimately granted.[9]

Letter of Instruction Regarding Union Release Time

McKenzie testified that when he arrived at the command on July 26 and 27, 2011, he asked where Robbins was and was told that Robbins was at the Union. McKenzie testified that on both days, he checked the telephone log and saw that Robbins was marked as being on Union business. When McKenzie asked why Robbins was on Union business on a Wednesday, he was told that Robbins had called in to the command. McKenzie stated that previously he never really paid much attention to the issue of union release because "we're just used to Marvin Robbins being on whatever he calls union." (Tr. 468)

On or about September 7, 2011, Robbins received a Letter of Instruction from McKenzie alleging that he had "absented [himself] without prior authorization in order to transact union business" on July 27 and 28, 2011. (City Ex. 5) McKenzie testified that he does not write Letters of Instruction often, but that he has discretion and authority to do. He normally writes Letters of Instruction on the day that he witnesses a violation of the NYPD's rules, or shortly thereafter. However, he explained that he wrote this Letter more than a month after the alleged violation because he "wanted to do more research." (Tr. 514) McKenzie stated: "Originally [Robbins] went union business then I heard he was sick and then he went E[mergency] day. So I

[9] The record is not clear as to the date that the request was granted.

wasn't sure where he was going at with this." (*Id.*) McKenzie explained that his research included reviewing the telephone log and ensuring that he used the proper wording in his Letter.

Denial of Overtime Opportunities

Several witnesses testified regarding overtime assignments at the Bronx Tow Pound. Robbins testified that as long as overtime is available, a TEA will volunteer and they will be assigned to an overtime shift. He stated that every other weekend he adds his name to the overtime list and he is assigned to work. Robbins testified that prior to his accident in July 2011, he had never been denied overtime.

Traffic Supervisor William Brown also testified regarding overtime. Brown has held the title of Level I Traffic Supervisor for eight years and he is assigned to the Bronx Tow Pound. He stated that he supervises all TEAs, Levels I, II, and III, and that he is responsible for scheduling overtime and assisting with command operations. Brown assigns overtime on a weekly basis, generally on a Wednesday or Thursday, for work that will be performed on Saturdays. There are different types of available overtime. Brown explained that "violation tow" overtime involves driving a truck and towing vehicles. Other overtime opportunities do not involve driving, such as "pound assist," "escort," or "gate security."

Brown testified that when a Level III TEA is assigned to intersection duty, he or she is not permitted to work overtime that involves driving, but is allowed to perform non-enforcement overtime.[10] Brown stated that if a Level III TEA is placed on intersection duty, his supervisor will inform him of this and he will then schedule overtime accordingly. Brown testified that at the time of Robbins' accident, he was on vacation. He stated that when he returned from

[10] The Union presented testimony from two Level III TEAs that is consistent with Brown's. Both TEAs testified that they were given administrative overtime while serving a 45-day penalty for being found "at fault" for a vehicle accident. The parties stipulated to the same facts concerning a third TEA.

vacation on July 27, 2011, he was not informed, nor was he aware, that Robbins had been placed on intersection duty. Indeed, the record reflects that from Tuesday, July 26, 2011, through Friday, August 5, 2011, Robbins did not report to the Bronx Tow Pound on any day, but instead reported to the Union to conduct Union business. Brown explained that, because he was not aware of Robbins' accident or penalty, he scheduled Robbins for violation tow overtime for Saturday, August 6, 2011. Brown stated that if he had been aware of Robbins' reassignment, he would have scheduled him for non-enforcement overtime.

Brown testified that on Monday, August 8, 2011, McKenzie approached him and asked why Robbins was allowed to work violation tow overtime on August 6. Brown responded that, because he was never informed that Robbins had been placed on foot patrol, he wrote him into the overtime rotation as he normally does. Brown testified that McKenzie then told him that he should not have assigned Robbins to the overtime on August 6, and that Pilecki's instructions were that Robbins was not to incur any additional overtime. Brown stated that he understood this directive to mean that he could not assign Robbins overtime of any kind. He also stated that he had never been given this type of directive before.

McKenzie's version of events differed significantly from Brown's. McKenzie implied that Brown approached him regarding Robbins' overtime assignment. He stated that, "when I came in on the 8th, Mr. Adami spoke to me with regards to Marvin got overtime Saturday and he should not be operating a tow truck." (Tr. 471) When McKenzie was asked if he gave any orders regarding overtime relating to Robbins during the time in which he was serving intersection duty, he stated:

> ...I told Supervisor Brown when he brought it to my attention that he forgot that Marvin Robbins was still doing intersection duties[,] because it's been two weeks and he was on vacation for a short time and when he got back he thought Marvin had finished his ten

> days directing traffic[.] [I]t's actually two weeks later, so he said I really thought that he had finished his ten days directing traffic.

(Tr. 474) When asked what instructions he gave Brown, McKenzie stated that his words were, "He's not allowed any overtime while operating a tow truck." (*Id.*) During cross examination, McKenzie clarified that this statement referred to "tow truck operator" overtime. (Tr. 523)

Robbins testified that after August 6, 2011, he was given no overtime during the period of time in which he was serving his penalty. He stated that when he questioned this, "Brown told me that Sergeant McKenzie told him that as per 34th Street, where Pilecki is, the message was sent that I was not to do any overtime." (Tr. 138)

August 8, 2011 Change of Work Location and Meal Time

August 8, 2011, was Robbins' first regular day back at the Bronx Tow Pound after being released to attend to Union business from July 26 to August 5, 2011. McKenzie testified that when he arrived at the command that day, he asked if Robbins was back from his Union leave. When he was informed that Robbins was on his post, McKenzie went out in the field in search of him. On cross examination, McKenzie was asked whether he goes out in the field specifically looking for one individual every day. He answered: "No. No. No. Unless I'm doing an observation on an agent . . . ." [11] (Tr. at 501) However, he acknowledged that he was not assigned to observe Robbins at this time.

Robbins testified that while he was serving intersection duty, McKenzie began to come by his post multiple times a day to check on him and sign him. Both Robbins and McKenzie testified that a TEA working an eight-hour shift would normally be signed by a supervisor only once or twice a day. Robbins also testified that other supervisors informed him that they were

[11] McKenzie testified that he may sometimes be signed to do an "observation" on one particular agent for up to three days.

instructed that it was now their responsibility to incorporate going to his post to sign him as well. Further, he testified that one of the Traffic Supervisors told him: "You know, I just finished talk[ing] to [McKenzie], and he said he's here for you. You should watch out because Pilecki wants you." (Tr. 72) Robbins could not recall the name of this supervisor.

Robbins testified regarding the events of August 8, 2011. He stated that on this date, McKenzie approached him while he was in an intersection and told him that "[a]s per Pilecki and Lieutenant Dreckman, your assignment is changed, so get up the block. I want you up the block and I want you up the block now, and if you don't hurry up the block, I'm writing you up now." (Tr. 66) Robbins testified that McKenzie then walked him up the block and asked if he went to lunch yet. Robbins stated that he hadn't because his meal was scheduled for 12:00. McKenzie told him that he was changing his lunch to 11:20, that Robbins was not to take his lunch at the pound, and that he was not to report back to the command until one hour prior to the end of his shift, at 1:00. According to Robbins, McKenzie then grabbed his Daily Field Patrol log and wrote these changes down. Robbins stated that at this point McKenzie began putting his fingers in Robbins' face and "screaming at the top of his lung[s]." (Tr. 67) Furthermore, Robbins testified that McKenzie had his hand on his hip, as if he was trying to remind him that he had a gun. Robbins interpreted this as an attempt to intimidate him.

McKenzie testified that on August 8, 2011, he drove around looking for Robbins until he eventually found him at an intersection taking a personal break. He testified that he had told Brown at some point earlier in the day to instruct Robbins that his post was to be changed to an intersection two blocks away where there was heavier traffic. McKenzie stated that he repeatedly asked Robbins why he was not at the other intersection, but that Robbins did not answer him. He testified that he walked Robbins up to the exit ramp off the Willis Bridge, and

that Robbins was behind him the entire time. McKenzie denied that he raised his voice, put his fingers in Robbins' face, or threatened him in any way. According to McKenzie, he did not make any threatening gestures with his gun, which would not have been visible to Robbins. He further stated that he did not rest his arm on his gun, as this is not a feasible standing position for him.

McKenzie was asked to explain why he changed Robbins' post. He conceded that it was his decision to do so and that no one else told him to. McKenzie stated that at the intersection where Robbins was initially assigned, there was little traffic. Therefore, he changed him to an intersection where the bulk of the traffic problems are, and so that there would be two TEAs there.

McKenzie also explained why he changed Robbins' meal time. He stated that on July 25, 2011, subsequent to the incident in which he saw Robbins with the camera, he observed Robbins in the Bronx Tow Pound at about 11:15 or 11:20. He stated that it would have taken Robbins about 25 to 30 minutes to walk there from the intersection that he was assigned to. McKenzie stated that he noticed that Robbins never returned to his post for the rest of the day and he explained that this was why he changed Robbins' meal time.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the NYPD violated NYCCBL § 12-306(a)(1) and (3) by taking a number of adverse employment actions against Robbins in retaliation for his various protected union activities and in order to interfere with the rights of the Union.[12] It contends that it is

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

undisputed that Pilecki and McKenzie have actual knowledge that Robbins is the Vice President of the Union and that he was engaged in protected union activity when he filed grievances. Additionally, the Union argues that it has presented unrebutted evidence that Pilecki made a statement to Robbins in October 2010 which demonstrates his anti-union animus. Robbins was engaged in protected union activity shortly before the adverse employment actions taken against him. Consequently, the Union argues that it has made out a *prima facie* case of retaliation.[13]

The NYPD's Assessment of Robbins as "Partially At Fault" for a Vehicle Accident and Subsequent Penalty

The Union contends that the NYPD wrongfully determined Robbins to be "partially at fault" for the accident. It argues that Robbins credibly testified that Adami told him that, on the date of his accident and prior to the ARP meeting, Pilecki had already determined that Robbins would be placed on intersection duty. Therefore, the Union argues that Pilecki did not follow the proper procedure in making his determination, nor did he consult the available documents. The Union also argued that Pilecki's testimony regarding his directive that Adami should sit down and think about the penalty is not credible because TEAs found to be "partially at fault" are

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> 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[.]

[13] The Union also argued in its Reply and Point VII of its post-hearing brief that the NYPD's conduct here was inherently destructive of protected employee rights and/or an independent violation of NYCCBL § 12-306(a)(1). However, we find that the Union has argued that all of the NYPD's actions alleged herein were motivated by Robbins' union activity. Accordingly, all claimed § 12-306(a)(1) violations are derivative of the discrimination and retaliation claims and, therefore, will not be analyzed separately.

assessed a ten day penalty. The Union contends that, had the proper procedure been followed, Robbins would have been found "not at fault," and, therefore, the NYPD's proffered business reason is not legitimate.

The Union also argues that assuming, *arguendo*, the finding of "partially at fault" was legitimate, Robbins was nevertheless treated disparately. The Union claims that, while other agents have only been required to serve the penalty assessed to them, Robbins served two extra days of intersection duty.

The July 26, 2011 Letter of Instruction

The Union first argues that the Letters of Instruction at issue here are adverse employment actions because they were disciplinary in nature. It is significant that the Letters state that that a copy will be placed in Robbins' personnel folder. Furthermore, they are devoid of any statements indicating that they are only a "reminder" or that they should not be construed as discipline.

The Union argues that the July 26, 2011 Letter was issued to Robbins in direct interference with his efforts to gain hazardous duty pay for Level III TEAs, which is protected union activity. It contends that the NYPD's proffered business reason is not legitimate, because Pilecki has always been aware that Robbins carries the camera, and he admitted to previously viewing pictures taken from it. However, Robbins was never previously directed to refrain from carrying the camera. Furthermore, the Union construes Pilecki's and McKenzie's testimony regarding who made the decision to issue the Letter as contradictory to one another. Therefore, the Union argues that the NYPD's proffered business reason for issuing the Letter is logically inconsistent and pretextual.

The September 7, 2011 Letter of Instruction

The Union argues that the issuance of the September 7, 2011 Letter of Instruction was done in direct retaliation for Robbins' filing of the instant improper practice petition on August 12, 2011. Furthermore, the Letter seeks to discipline Robbins for conducting union business. The Union claims that prior to the issuance of the Letter, Pilecki called the Union and informed the President that Robbins would be marked AWOL for being there. Therefore, the Union argues that there is a clear causal connection between Robbins' protected union activity and the Letter of Instruction.

The Union argues that Robbins' testimony, as well as the documentary evidence, demonstrate that Robbins followed proper NYPD protocol when he used his own time to conduct union business on July 27 and 28, 2011.[14] It also argues that Pilecki's explanations for telephoning the Union on August 1, 2011 and for the September 7, 2011 Letter of Instruction are unsupported by the record and, thus, cannot be considered credible. Furthermore, the Union contends that the delay in the issuance of the Letter cannot be explained by McKenzie's testimony that he was doing "research." Therefore, the Union argues that it is clear that the September 7, 2011 Letter of Instruction was issued in retaliation for Robbins' protected Union activity, and that the NYPD's proffered business reason is merely pretext.

Denial of Overtime

The Union argues that Brown testified credibly that he was directed by McKenzie not to give Robbins any overtime while he was serving his penalty. This constitutes disparate treatment because other similarly-situated TEAs were allowed to serve administrative overtime

[14] The Union cites to the command logbook and the roll call sheet for July 27, 2011 to demonstrate that Robbins called into the command to report that he would be conducting union business. (*See* Union Ex. G; City Ex. 8)

while serving penalties for vehicle accidents. The Union argues that McKenzie's contradictory testimony regarding his directive to Brown is not credible because it is inconsistent with the facts.

August 8, 2011 Change of Work Location and Meal Time

The Union argues that, although a change of location and meal time are part of management's rights under the NYCCBL, in this case the evidence and testimony demonstrate that these actions were actually taken to harass Robbins. The Union states that a traffic supervisor warned Robbins that he should watch out because "[McKenzie] is here for you. Pilecki wants you." (Tr. 72) The Union argues that this statement is evidence of the improper motivation behind the change in location and meal time. Additionally, McKenzie testified that he went out in the field that day to look for Robbins, but that he normally does not look for a specific agent unless he is assigned to do an observation on that person. Finally, the Union argues that McKenzie's testimony regarding the reasons for the change in location and meal time cannot be credited because it is inconsistent with the record.

City's Position

The City argues that the Union has failed to establish a *prima facie* claim of retaliation with respect to each of its claims. Specifically, it argues that there is no causal link between Robbins' periodic filing of grievances and any of the actions taken against him. The City also contends that none of the actions taken against Robbins constitute adverse employment actions. Furthermore, certain actions taken by the NYPD stemmed from Robbins' violations of the NYPD patrol guide and other rules and regulations, which are not "protected activities" within the meaning of the NYCCBL.

The City argues that, assuming, *arguendo*, the Union has established a *prima facie* claim,

the actions taken against Robbins were for legitimate business reasons and, thus, would have been taken even in the absence of any union activity

The NYPD's Assessment of Robbins as "Partially At Fault" for a Vehicle Accident and Subsequent Penalty

The City argues that the NYPD acted in accordance with its rights under NYCCBL § 12-307(b) when it found Robbins to be "partially at fault" for a vehicle accident and reassigned him to foot patrol as a penalty.[15] The record demonstrates that the penalty was imposed according to the usual and customary procedure that the Department has developed to deal with traffic accidents. The City argues that the Union's attempt to create an inference of impropriety in the conduct of the ARP meeting is unfounded and lacks factual support in the record. It argues that Pilecki testified credibly that he was unaware of the details of the accident until the ARP meeting and never formulated an opinion about Robbins' level of fault prior to that. Furthermore, the committee reviewed the available documentation, which supported the finding that Robbins was "partially at fault" for the accident. The Union's reliance on the PD 301-153 report is irrelevant, since it was not available for consultation at the ARP meeting. The City argues that although Robbins testified to statements that Adami allegedly made regarding the predetermined nature of

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[15] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the city, or any other public employer, acting through its agencies, to . . . determine the methods, means and personnel by which government operations are to be conducted; . . . ; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

the meeting, it is significant that the Union did not produce Adami as a witness to the proceeding.

The City further argues that the ten-day penalty assessed to Robbins was consistent with the penalties assessed to other drivers who have been found to be "partially at fault" for an accident. It argues that the record does not support the Union's assertion that Robbins served 12 days of intersection duty. Rather, the record suggests that he may have performed 11 days, but that this was inadvertent and based on administrative error. Due to the extensive number of days in which Robbins was not on-duty, there was confusion at the command level as to when his penalty should have been completed.

The July 26, 2011 Letter of Instruction

The City argues that the Letter of Instruction regarding Robbins' use of a camera while on-duty is not disciplinary in nature but merely advisory. Therefore, it does not constitute an adverse employment action. Additionally, Robbins' actions violated the NYPD Patrol Guide and, thus, the issuance of the Letter of Instruction was well within the NYPD's management rights.

The City also argues that the record does not establish that "everyone knew" that Robbins carried the camera. Furthermore, Robbins does not have a special privilege or exemption from the Department's rules due to his position in the Union. The City contends that Robbins had no legitimate use for the camera when he used it to photograph a supervisor while on-duty.

The September 7, 2011 Letter of Instruction

The City argues that this Letter of Instruction was also not disciplinary in nature and cannot be considered an adverse employment action. It contends that the Union's claim that Robbins followed the proper protocol when requesting release time for July 27 and 28, 2011, is

belied by the fact that the Union sent a letter to the Office of Labor Relations requesting retroactive release for these dates on August 1, 2011. Kanganis credibly testified regarding the proper procedure which must be followed in order to request release time under E.O. 75. The City argues that it was Robbins' failure to follow the proper procedure which prompted the phone call from Pilecki to the Union President to attempt to establish Robbins' whereabouts. Additionally, the City argues that the NYPD had an absolute right to issue the Letter of Instruction in this situation. Furthermore, the absence of anti-union animus is demonstrated by the fact that the Union's August 1, 2011 request for *ad hoc* release was ultimately granted for all five dates.

Denial of Overtime

The City argues that, consistent with established policy, McKenzie only ordered Brown not to assign Robbins *driving* overtime for the duration of his reassignment to foot patrol. It contends that the fact that Robbins may have received less overtime than usual is merely a reflection of the lack of available *non-driving* overtime. Furthermore, the City argues that Brown's testimony is unreliable because he would have been aware of Robbins' reassignment due to his daily review of roll call and vehicle allocation logs.

DISCUSSION

The Union contends that a number of actions taken by two individuals, Pilecki and McKenzie, demonstrate that the NYPD retaliated against Robbins for his union activity. In particular, the Union alleges that the NYPD was improperly motivated when it assessed Robbins to be "partially at fault" for a vehicle accident, required him to serve additional days on foot patrol beyond the penalty assessed, denied him overtime opportunities, issued him two Letters of

Instruction, and changed his work location and meal time. After a careful review of the evidence, this Board finds that the Union has articulated a *prima facie* claim of retaliation for protected activity under the NYCCBL. The Board also finds that while some of the alleged retaliatory acts were taken for legitimate business purposes, others were taken for reasons that violate NYCCBL § 12-306(a)(1) and (3).

In determining if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, 39 OCB 51 (BCB 1987), and its progeny. This test states that, in order to establish a *prima facie* claim of retaliation, a petitioner must demonstrate that:

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

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

Bowman, 39 OCB 51, at 18-19; *see also Feder*, 4 OCB2d 46, at 42 (BCB 2011).

Here, it is undisputed that Robbins is a Grievance Representative and the Vice President of the Union. Furthermore, both Pilecki and McKenzie testified that, during the relevant time period, they were aware of Robbins' positions within the Union and the fact that he regularly conducts union activity. Specifically, Pilecki recalled participating in the resolution of a grievance that Robbins filed in or around June 2011. Additionally, McKenzie testified to being aware of, and monitoring, Robbins' use of release time to conduct union business during the weeks following his vehicle accident. Thus, we find that the Union has established the first element of its *prima facie* case.

In order to establish the second prong of the *Bowman-Salamanca* test, "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind

management's actions which are the subject of the complaint." *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007) (citing *Local 376, D.C. 37*, 73 OCB 15, at 14 (BCB 2004)). Absent an outright admission, proof of improper motivation must necessarily be circumstantial. *Id.* (citing *City Employees Union, L. 237*, 67 OCB 13, at 9 (BCB 2001)); *see also Feder*, 4 OCB2d 46, at 44. However, a petitioner must offer more than speculative or conclusory allegations, as claims of improper motivation must be based on statements of probative facts. *Morris*, 3 OCB2d 19, at 15 (BCB 2010) (citing *DEA*, 79 OCB 40, at 22 (BCB 2007); *Edwards*, 1 OCB2d 22, at 17 (BCB 2008)). Additionally, "while 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, is sufficient to satisfy the second element of the Bowman/Salamanca test." *Feder*, 4 OCB2d 46, at 44 (citing *Colella*, 79 OCB 27, at 55 (BCB 2008)).

Here, we find that the record establishes that the alleged retaliatory actions were improperly motivated by Robbins' union activity. Robbins' unrebutted testimony established that Pilecki made a statement to him in October 2010, which demonstrated that he harbored animosity towards Robbins for his union activity. A fair inference can be drawn from Pilecki's statement that he believed that Robbins' filing of grievances led to newspaper stories that reflected poorly upon his administration of the TED. Robbins filed a grievance approximately in or around June 2011. The NYPD's alleged retaliatory actions took place in July and August 2011. Given this temporal proximity and the fact that Pilecki had previously expressed animosity towards Robbins for filing grievances, we find that the Union has made out the second prong of its *prima facie* case.[16]

[16] The Union's contention that Pilecki directed that Robbins perform intersection duties on the

We also find that McKenzie's actions were improperly motivated by Robbins' union activity. First, McKenzie is Pilecki's subordinate, and the record reflects that some of the complained-of acts were undertaken by McKenzie at Pilecki's direct command. For example, Pilecki testified that he gave the directive for the July 26, 2011 Letter of Instruction to be composed and McKenzie testified that he authored it. Additionally, Brown credibly testified that McKenzie stated that the directive that Robbins could not receive overtime was being given "as per Inspector [Pilecki]."[17] (Tr. 280-281) Because the evidence demonstrates that McKenzie was acting at the command of a supervisor who harbored anti-union animus, we therefore conclude that McKezie's actions were tainted by this animus. *See Town of Gates*, 15 PERB ¶ 3079 (1982) (citing *Elmira City School District*, 14 PERB §3015 (1981)); *Ellenville City School District*, 9 PERB ¶4527, *affd.* 9 PERB ¶3067 (1976)) (Town Supervisor's termination of employee tainted by anti-union animus of Town Supervisor of Highways who recommended termination).

Moreover, McKenzie's own testimony suggested an unusual degree of preoccupation with Robbins' use of release time to conduct union business. McKenzie acknowledged that, prior to July 2011, he never really paid much attention to Robbins' release time because "we're just used to Marvin Robbins being on whatever he calls union." (Tr. 468) However, the record reflects that, after McKenzie became aware that Robbins had called in to the command to request *ad hoc* union release time, he began closely monitoring Robbins' whereabouts. Specifically,

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date of the accident and that this demonstrates that the outcome of the subsequent ARP meeting was predetermined is conclusory, as no testimony directly links the decision to Pilecki. However, it is sufficient to buttress the Union's *prima facie* case that management so assigned Robbins in advance of the ARP meeting at which his fault or lack thereof would be determined.

[17] As discussed below, we do not credit McKenzie's testimony regarding his conversation with Brown.

McKenzie stated that he inquired where Robbins was when he arrived at the command in the mornings and he would double check that Robbins was marked in the telephone log as being on union release. Further, the record reflects that immediately following Robbins' return from *ad hoc* union release, McKenzie engaged in an unusual level of surveillance of Robbins while he was directing traffic in the intersection. [18]

The September 7, 2011 Letter of Instruction regarding Robbins' use of union release time is further evidence that McKenzie disapproved of Robbins' union activity. We find that the timing of this Letter, which was issued a month after the alleged violation of procedure and three and a half weeks after the filing of the instant improper practice petition, is suspect. Furthermore, McKenzie's explanation for his delay in issuing this Letter is simply not credible. All of these factors contribute to our finding that the majority of McKenzie's actions were at least partially motivated by Robbins' union activity.

Consequently, we find that the Union has established a *prima facie* case of retaliation with respect to all of its claims except for one. Regarding the August 8, 2011 change of Robbins' post and meal time, we find that, under these particular circumstances, these changes do not constitute adverse consequences. Because a "petitioner must establish adverse consequence to prove a NYCCBL § 12-306(a)(3) claim[,]" the Union cannot meet its *prima facie* case with respect to this particular claim. *CSTG, Local 375,* 3 OCB2d 14, at 16 (BCB 2010)

[18] McKenzie himself testified that normally a TEA would only be signed once or twice per eight-hour shift. On Robbins' first day in the intersection, July 25, 2011, his Daily Field Patrol log indicates that he was signed once by McKenzie and once by another supervisor. (*See* Union Ex. B) However, on August 8, his first day back from union release, the Daily Field Patrol log indicates that he was signed by McKenzie and two other supervisors at 7:35, 8:33, and 9:11 a.m. McKenzie then returned to Robbins' intersection at 10:48 to check on him and consequently assigned him to a new post and changed his meal time and location. (*See* Union Ex. J)

(absent an adverse consequence, Petitioner could not establish the second prong of his *prima facie* case); *see also Local 1181, CWA*, 3 OCB2d 23, at 18 (BCB 2010).

Although employee assignments are within the scope of an employer's managerial discretion, nevertheless, this Board has recognized that this discretion can constitute a violation of the NYCCBL. *See CSTG, L. 375*, 4 OCB2d 61, at 23 (employer's managerial rights do not shield it from discrimination and/or retaliation claims); *see also Feder*, 4 OCB2d 46, at 41 (BCB 2011). However, here we find that even if McKenzie's directive that Robbins' move to a post further up the block was relayed in a loud or intimidating manner, there is nothing in the record to indicate that this post constituted a less desirable or more onerous assignment. *Cf. Detectives Endowment Assn*, 79 OCB 40, at 25 (reassignment of petitioner to foot post that had previously been used for punitive purposes and was normally unmanned characterized as an adverse employment action). Rather, it appears as though Robbins was merely moved from a post where he was not needed, to one two blocks away where McKenzie felt that his presence would be more useful. Consequently, we cannot find that this minor change in post constituted an adverse action that was taken outside the scope of the NYPD's legitimate exercise of its managerial rights.

The same is true of the change in Robbins' meal time. Although we can foresee how a change in meal period could, in some circumstances, adversely affect an employee, here there is simply no testimony concerning how this change in any way harmed Robbins. First, there is nothing in the record to indicate that this meal change was permanent. Second, it is not apparent how a 40-minute earlier lunch period (at 11:20 a.m.) would be less desirable than a 12:00 p.m. lunch. Finally, there is nothing in the record to indicate that it was any way unusual for an

employee's meal time to be shifted based on the needs of the Department.[19] Consequently, we cannot find here that the Union has established an adverse employment action as to the change in Robbins' post and meal time in violation of NYCCBL § 12-306(a)(3).

Once a petitioner has alleged sufficient facts to establish a *prima facie* case, "the burden shifts to the City to refute this showing or to demonstrate legitimate business reasons for [its] actions." *City Employees Union, L. 237*, 77 OCB 3, at 14 (BCB 2006) (citing *Grennock*, 73 OCB 19, at 16 (BCB 2004)). In the case of a dual or mixed motive, "even if it is established that a desire to frustrate union activity is a motivating factor, 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 and for valid reasons.'" *Local 768*, 63 OCB 15, at 18 (BCB 1999) (quoting *Communications Workers of America, L. 1180,* 43 OCB 17, at 19 (BCB 1989). Here, the City argues that all of the NYPD's actions were motivated by legitimate business reasons. We will now discuss each allegedly retaliatory action individually and the asserted business reason for each action.

The NYPD's Assessment of Robbins as "Partially At Fault" for a Vehicle Accident and Subsequent Penalty

The Union claims that Robbins was wrongfully determined to be "partially at fault" for a vehicle accident that occurred on July 20, 2011. The City argues that, regardless of Robbins' protected activity, it acted consistent with its established accident reduction policies in determining him to be "partially at fault" for his vehicle accident. The Board finds that the City has established a legitimate business reason for finding that Robbins was "partially at fault" for his vehicle accident and assessing a penalty of ten days of intersection duties. Furthermore, we

[19] The Roll Call from July 25, 2011 indicates that on that date at least eight TEAs had their meal times changed. (*See* City Ex. 7)

find that the NYPD followed its standard ARP procedures when Robbins' accident was discussed, and that the penalty assessed was consistent with those for similar accidents.

Pilecki testified at length regarding a number of policies that have resulted from the ARP. In particular, he stated that it is a violation of policy for a TEA to attempt to squeeze his or her vehicle past a double-parked vehicle. A review of all of the "partially at fault" accidents for 2011 establishes that the NYPD strictly enforces its accident reduction policies. There were multiple occasions where the TEA may not have proactively caused the accident but was nevertheless found to be "partially at-fault." For example, in one instance a TEA was double-parked while issuing a summons when a civilian motorist tried to maneuver from behind the department vehicle, misjudged the space, and struck the vehicle's left rear bumper.[20] In this case, it is not clear whether Robbins attempted to pass the double-parked vehicle prior to the accident or whether he came to a stop and merely waited. Even assuming that Robbins waited, the circumstances that led to the accident were similar to those of others in which the TEA was found to be "partially at fault." Consequently, we find that Robbins was not treated differently or more harshly than any other TEA in his assessment of fault.[21]

The Union makes a number of arguments as to why it believes that the assessment of Robbins' penalty was not done for legitimate business reasons but was instead pretextual. First, the Union takes issue with the fact that the PD 301-153 report was not considered by the

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[20] This accident took place on July 21, 2011, the day after Robbins' accident. A poll of the committee was also taken in this instance and the majority voted that the TEA was "partially at fault." (*See* City Ex. 11)

[21] Our dissenting colleague challenges the reasonableness of the committee's assessment of Robbins' fault and the resulting penalty. We emphasize, as discussed supra, that the Accident Reduction Program was designed to prevent vehicle accidents. Although Robbins may have been "standing still" in his vehicle at the time of the accident, he received the same penalty as other TEAs who were doing so as well when a civilian motorist collided with their vehicle.

committee. In this report, Sergeant Gonzalez states his opinion that "Robbins acted properly by coming to a stop to allow the double parked vehicles to move out of the lane of traffic." (Union Ex. A) However, Pilecki credibly testified that, not only was this report not available at the time of the ARP meeting, but also that these reports are never given consideration because the officers who prepare them are not familiar with the TED's accident reduction policies. The Union did not present evidence to contest Pilecki's testimony in this regard. Consequently, we credit Pilecki's testimony and find that the opinions of Sergeant Gonzalez and the DOT worker regarding Robbins' level of fault are not relevant as they relate to the committee's determination of fault.

The Union contends that Pilecki's statement to Adami that he should "sit down and think about it" demonstrates an improper attempt to coerce the committee into finding Robbins at fault for the accident. Pilecki testified that he made this statement in relation to the penalty to be assessed after the committee voted that Robbins was "partially at fault," because Adami was not sure what this penalty should be. The Union asserts that this is not a credible explanation because the penalty for "partially at fault" accidents is ten days. However, while the record demonstrates that this ten day penalty has now become customary, at the time of Robbins' accident the category of "partially at fault" was relatively new. In fact, the first "partially at fault" accident occurred less than a month prior to Robbins' accident. Therefore, it is reasonable to believe that, at the time of Robbins' accident, it was not fully established that all "partially at fault" accidents would be assessed a ten day penalty. Furthermore, the Union did not present Adami as a witness to rebut Pilecki's testimony. Consequently, we do not find Pilecki's explanation of his statement or his conduct at the meeting to be suspect.

The Union also claims that Pilecki gave an order for Robbins to work in the intersection

immediately following the accident. It argues that this demonstrates that Pilecki had pre-determined that Robbins would be found "at fault" for the accident. However, Robbins' testimony as to what Adami told him does not directly link Pilecki to the decision, nor provide a motivation as to why "they" wanted Robbins to do intersection duty. Although it may not have been typical for a TEA to serve time in the intersection prior to his official determination of fault, the unexplained aberration is not enough in itself to rebut the weight of the evidence that the normal procedures were followed at the ARP meeting with the usual penalty being assessed. Consequently, we find that the fact that Robbins spent time performing intersection duties on the date of the accident does not persuasively rebut the strong evidence of the NYPD's legitimate business reason for finding him "partially at fault" for his vehicle accident.

As to the Union's allegation that Robbins was treated disparately because he was actually required to serve 12 days of intersection duty instead of ten, we find insufficient evidence to support this claim. Robbins himself was not clear as to how many days he served on intersection duty or when his penalty ended. Consequently, we cannot find that there is a factual basis to conclude that Robbins was treated disparately for intentional, retaliatory reasons.

Letters of Instruction as Adverse Employment Actions

As an initial matter, the Board finds that the Letters of Instruction at issue here constitute adverse employment actions. The July 26, 2011 Letter states that Robbins was observed with a camera and it cites to an Interim Order entitled "Revision to Patrol Guide 206-03, *Violations Subject to Command Discipline*." (City Ex. 4) (emphasis in original). The Letter states, "[e]ffective immediately, you are directed to refrain from carrying a camera while on duty." *Id.* It also states that a copy of the Letter will be placed in Robbins' personnel folder. The September 7, 2011 Letter of Instruction addresses Robbins' use of union release time and

informs him of the proper procedure through which he is to request future release. It states that any unauthorized absence from Robbins' assigned duty, even if for the purpose of conducting union business, may subject him to disciplinary action. This Letter was also placed in Robbins' personnel folder.

Here, as in *Local 375, DC 37*, 5 OCB2d 27 (BCB 2012), we find that the fact that the employer must take additional steps to pursue *formal* disciplinary action through a separate process, "does not negate the disciplinary intent behind the issuance" of the Letter of Instruction. *Id.* at 16; *see also DC 37, L. 1113*, 77 OCB 33 (BCB 2006) (finding that the City retaliated against employees for protected union activity when it issued them "reprimand memos"). The Letters at issue do not contain any statement that they should be regarded as "informational" or a "reminder," nor do they state that they should not be construed as discipline. *See Local 375, DC 37*, 5 OCB2d 27, at 16. Rather, the Letters are clearly intended to put Robbins on notice that if he continues his behavior, formal discipline will follow.

The July 26, 2011 Letter of Instruction

The Union contends that the NYPD's proffered business reason for issuing the July 26, 2011 Letter of Instruction is not legitimate, because Pilecki was aware that Robbins regularly carries a camera with him while on-duty and never previously disciplined him for it. However, we find that the evidence adduced at the hearing does not support this contention. Robbins testified that "everyone knew" that he carried the camera, and that Pilecki was aware as well because Robbins had shown him pictures of dangerous objects found inside towed vehicles that he had photographed. While Pielcki acknowledged that Robbins did show him some pictures on one occasion approximately three or four years earlier, this does not establish that Pilecki was aware that Robbins had taken those photographs while on-duty or that Pilecki expressed his approval of Robbins doing so. Even assuming, *arguendo*, that Pilecki or other supervisors had

consented to Robbins using the camera to document dangerous items, this is not what Robbins was doing when he used the camera to photograph McKenzie. Rather, Robbins admitted that he took the picture to demonstrate that McKenzie was blocking an intersection.

Pilecki testified that not only is carrying a camera while on-duty a violation of the Patrol Guide, but also he found Robbins' actions to be discourteous and insubordinate. He stated that if anyone else had acted similarly, they would have been given a command discipline, but that he directed that Robbins receive only a Letter of Instruction in deference to his position with the Union.[22] We find Pilecki's explanation for the issuance of the Letter to be credible. Consequently, we find that the NYPD has met its burden of establishing a legitimate business reason for disciplining Robbins for his actions.[23]

The September 7, 2011 Letter of Instruction

The City argues that the NYPD had a legitimate business reason for issuing Robbins this Letter of Instruction because he did not follow the proper procedure for obtaining authorization for union release time on July 27 and 28, 2011. It presented the testimony of Lieutenant Kanganis, who credibly testified that under E.O. 75, Robbins was required to obtain advance authorization for release time from OLR. On the other hand, Robbins testified that he is often required to obtain *ad hoc* release time and that, prior to the events at issue here, he had always requested authorization for this time by calling into his command. The City did not rebut Robbins' assertion that he has been following this procedure for years without being disciplined

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[22] The "Revision to Patrol Guide, 20-03, 'Violations Subject to Command Discipline'" lists the use of "any electronic/digital device" as a Schedule "A" Violation which may result in command discipline. (City Ex. 12)

[23] We find that, contrary to what the dissent implies, Robbins was not engaged in protected activity when he took McKenzie's picture, nor was the issuance of the Letter of Instruction related to protected activity.

for it. Further, the Union presented evidence that Robbins did in fact call into the command on July 27 and 28, and that he was marked in the telephone log as being on Union business without being directed to take any further action.

It is not necessary for this Board to determine whether Robbins followed the proper procedure for obtaining union release time on July 27 and 28, 2011. Rather we find that, while the NYPD generally has a legitimate business reason for disciplining an employee who does not properly follow written procedures, under these particular circumstances its proffered business reason for issuing Robbins the Letter of Instruction was pretextual. *See DC 37, L. 376*, 1 OCB2d 40 (BCB 2008) (although employer arguably had a legitimate business reason for disciplining employees who failed to adhere to written sick leave policy, the Board found the asserted business reason was pretextual where it was selectively applied to employees engaged in protected union activity).

The Board finds that McKenzie's explanation for the one month delay in the issuance of the September 7, 2011 Letter of Instruction is not credible. McKenzie testified that he rarely issues Letters of Instruction but that, when he does, he normally issues the Letter within close proximity to the date of the perceived violation. Indeed, McKenzie issued the July 26, 2011 Letter of Instruction to Robbins on the day following the incident with the camera. However, McKenzie explained that in this case it took him a month to issue the Letter because he had to conduct "research" on how to handle the situation. The Letter was issued three and a half weeks after the filing of the instant improper practice petition, despite the fact that Robbins' request for release time was ultimately granted. The suspicious timing of the Letter, combined with McKenzie's inability to credibly explain the delay in its issuance and the fact that Robbins' release time request was ultimately granted, lead us to the conclusion that the Letter of

Instruction was not issued for legitimate business reasons, but was instead pretextual.

Denial of Overtime

It is undisputed that during the time in which Robbins was serving a penalty for his vehicle accident, he was not assigned any overtime. It is also undisputed that TEAs who are serving such penalties are permitted to perform overtime duties that do not require them to operate a vehicle. Since it is clear that Robbins was treated disparately, we must determine whether this disparate treatment was intentional and in retaliation for Robbins' union activity. In order to properly make this determination, the Board must first assess the credibility of the key witnesses involved, Brown and McKenzie.

Here we find that Brown's testimony is credible. He is a disinterested witness who neither stands to gain nor lose anything from the outcome of this proceeding. Brown testified repeatedly, on both direct and cross examination, that when he assigned Robbins to violation tow overtime, he was not aware that Robbins was serving a penalty for a vehicle accident because he was on vacation when the accident occurred and no one had informed him of it. This explanation is consistent with the record. Consequently, it is entirely reasonable to believe that Brown was truly unaware of Robbins' accident when he assigned him overtime.

On the other hand, we find that McKenzie's testimony is not credible, as it is directly at odds with the weight of the established evidence. McKenzie testified that Brown said he scheduled Robbins for overtime because he believed that Robbins had completed his ten-day penalty by the time he returned from vacation. However, the evidence demonstrates that Robbins' accident occurred on July 20, 2011 and his penalty did not begin until July 25. Since the accident occurred while Brown was on vacation, he would not have been aware of the penalty assessed prior to this vacation, nor would it be possible for Robbins' penalty to have

been completed by the time Brown assigned him to perform overtime, sometime around August 3 or 4, 2011.

In the light of the above determination, we credit Brown's account of his conversation with McKenzie on August 8, 2011, rather than McKenzie's self-serving explanation that Brown simply misunderstood him. "When, as here, '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.'" *Colella*, 79 OCB 27, at 61 (quoting *Soc. Servs. Employees Union, L. 371*, 77 OCB 35, at 20); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-148 (2000) ("[A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."). Consequently, we credit Brown's testimony that McKenzie instructed him that Robbins was not to be given overtime, without limitation. Because the City has failed to offer a legitimate business reason for this directive, we find that the NYPD violated NYCCBL §12-306(a)(1) and (3) by denying Robbins the opportunity to perform overtime in retaliation for his union activity.[24]

Conclusion

Based upon the foregoing, we find that the Union carried its burden of persuasion by demonstrating that the NYPD violated NYCCBL § 12-306(a)(1) and (3) by denying Robbins overtime opportunities and issuing him a Letter of Instruction regarding his use of union release time in retaliation for his protected union activity. In this regard, we grant the improper practice petition, in part, and order the NYPD to cease and desist denying Robbins overtime opportunities and to rescind the September 7, 2011 Letter of Instruction. We dismiss the Union's claims that

[24] The City's argument that there was a shortage of available administrative overtime is not supported by the record.

the NYPD discriminated against Robbins by determining him to be "partially at fault" for a vehicle accident and assessing him a penalty of ten days of intersection duty; disciplining him for carrying a camera on-duty; and changing his work location and meal time.

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-2975-11, be, and the same hereby is, granted as to claims that the City violated NYCCBL § 12-306(a)(1) and (3) by denying Marvin Robbins overtime opportunities and issuing him a Letter of Instruction regarding his use of union release time, and dismissed to all other claims; and it is further

ORDERED, that the NYPD cease and desist from denying Robbins overtime opportunities and rescind the September 7, 2011 Letter of Instruction from his personnel file.

Dated: April 15, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

Concurrence and Partial Dissent (see attached)

CHARLES G. MOERDLER
MEMBER

Joins in Concurrence and Partial Dissent
of Member C.G. Moerdler

GWYNNE A. WILCOX
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY
COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 6 OCB2d 10 (BCB 2013), determining an improper practice petition between DC 37, L. 983 and the New York City Police Department.

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-2975-11, be, and the same hereby is, granted as to claims that the City violated NYCCBL § 12-306(a)(1) and (3) by denying Marvin Robbins overtime opportunities and issuing him a Letter of Instruction regarding his use of union release time, and dismissed as to all other claims; and it is further

ORDERED, that the NYPD cease and desist from denying Robbins overtime opportunities and rescind the September 7, 2011 Letter of Instruction from his personnel file.

The New York City Police Department
(Department)

Dated: _____ **(Posted By)**
(Title)

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

DC 37, L. 983, 6 OCB 2d—(BCB 2013); IP Dkt. No. BCB 2975-11

Concurrence and Partial Dissent of Charles G. Moerdler

This proceeding aptly illustrates what foolishness and waste of precious taxpayer resources bureaucracy breeds.

A Department of Transportation truck *backed into a car* driven by an employee of the Traffic Enforcement Division ("TED") of the New York City Police Department ("NYPD") *that was at a standstill.* The driver was a longtime TED employee and Vice President of the Petitioner Union, Marvin Robbins. *The damage consisted of a broken side view mirror.*

As detailed in the Majority Opinion (e.g., pp.4-10) that damaged side view mirror has now consumed countless hours of the time of law enforcement officers in the City of New York (including a NYPD Police Inspector, a committee of some 25 employees of either the NYPD or its Traffic Enforcement Division, a Traffic Supervisor, a TED Traffic Manager, a TED Integrity Control Officer and likely other City employees paid to provide law and traffic enforcement, not to mention the City lawyers and support staff who brought these proceedings and who staffed a five day hearing before a Trial Examiner of this Board). And this vast array of talent, paid from taxpayer funds, have all been deployed to heap vengeance upon Marvin Robbins in consequence of damage to a rear view mirror of a TED vehicle that he was "driving", but which then was standing still, when hit by another City vehicle that was backing up.

If the absurdity recounted above were not enough, there is more. Mr. Robbins as the penalty for having someone else damage his rear view mirror, was sent to the TED's equivalence of purgatory: "intersection duty"—directing traffic. Robbins then had the temerity to carry a camera, which he stated he carried to,

among other things, document dangerous objects found in towed vehicles. Mr. Robbins testified that the commanding officer of TED knew he was carrying a camera, indeed that full Inspector in the NYPD acknowledged he had seen photographs taken by Robbins and could not recall whether he asked why Robbins took the pictures. Reaching into the bowels of TED's Patrol Guide the "Integrity Control Officer" of the relevant command issued a "Letter of Instruction," a copy of which then was placed in Robbins personnel file. And the regulatory basis for that disciplinary act gleaned from the TED Patrol Guide by its Integrity Control Officer was a direction that officers refrain from carrying "electronic devices," the Integrity Control Officer and the Police Inspector testifying that they considered a camera a proscribed electronic device. Indeed, the NYPD Inspector testified that he considered Robbins carrying a camera "a real act of discourtesy and insubordination." (Majority Opinion at p. 12).

There is still more and this time involving an institution that lies at the very heart of collective bargaining and sound labor relations. See, *PBA v. City of New York*, Index No. 113039/2011 (Lobis, J.). While on assertedly Union Business –the premise of released time under Mayor's Executive Order No.75 –the NYPD Inspector was notified of Robbins' absence; the Inspector directed an investigation. The Inspector testified that when the President of the Union confirmed that Robbins was on Union business, the Inspector responded that "he didn't believe" prior approval had been obtained and he asked the Union President to inquire and report. The Inspector stated that the Union President "never got back to him." Again, the Integrity Control Officer was moved to issue a Letter of Instruction. Significantly, the Integrity Control Officer testified that, while he had the authority to do so, " he does not write Letters of Instruction often," much less more than one month after event. (Majority Opinion at p. 15).

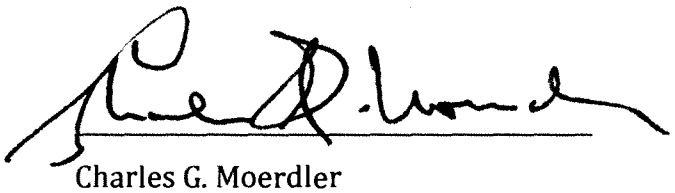
The sorry saga continues. It impacts on overtime, change of work location and meal time. Suffice to say, the testimony reflects and the majority correctly concludes that the NYPD Inspector, who commanded TED, harbored personal

animus toward Robbins and it arose out of Robbins' performance of his duties as a Union representative.

The Majority quite correctly finds that on this Record the Inspector harbored animus toward Robbins and expressed it. The Majority quite correctly concludes that the Union carried its burden of persuasion by demonstrating that the NYPD violated NYCCBL § 12-306(a)(1) by denying Robbins overtime opportunities and issuing him a Letter of Instruction.

Where I part company with my colleagues is with respect to their dismissal of the Union's claims that the NYPD discriminated against Robbins by determining him to be "partially at fault" for a vehicle accident caused by a DOT truck backing into Robbins' vehicle while Robbins vehicle was standing still and, for that heinous act, accessing him a penalty of ten days of intersection duty, disciplining him for carrying a camera and changing his work location and meal time. Frankly, I am appalled that any action taken by the NYPD and TED in connection with its sorry performance here can receive any sanction, much less credibility. I would grant the Union's Petition in its entirety and would publicly chastise the senior NYPD and TED employees who leant themselves to the disgraceful conduct detailed in the Majority Opinion.

March 6, 2013



Charles G. Moerdler