

**Local 1757, DC 37, 6 OCB2d 13 (BCB 2013)**

(IP) (Docket No. BCB 2991-11)

**Summary of Decision:** The Union alleged that the City and DOF violated NYCCBL § 12-306(a)(1) and (3) when DOF transferred Local 1757's President in retaliation for her public testimony on behalf of the Union and critical of DOF. The City argued that the transfer was a managerial right, that the Union activity of Local 1757's President was not a factor in DOF's decision to transfer her, and that DOF had legitimate business reasons for the transfer. The Board found that the City did not refute the *prima facie* case of retaliation established by the Union and that the City's proffered legitimate business reasons were not credible. Accordingly, the petition was granted. (*Official decision follows.*)

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**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 1757,**

*Petitioners,*

*-and-*

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

*Respondents.*

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**DECISION AND ORDER**

On October 27, 2011, District Council 37, AFSCME, AFL-CIO ("DC 37"), and its affiliated Local 1757 (collectively, "Union"), filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Finance ("DOF"). The Union alleges that the City and DOF violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

(“NYCCBL”) when DOF transferred Local 1757’s President in retaliation for her public testimony on behalf of the Union and critical of DOF. The City argues that the transfer was a managerial right, that the Union activity of Local 1757’s President was not a factor in DOF’s decision to transfer her, and that DOF had legitimate business reasons for the transfer. This Board finds that the City did not refute the *prima facie* case of retaliation established by the Union and that the City’s proffered legitimate business reasons were not credible. Accordingly, the petition is granted.

### **BACKGROUND**

Two days of hearings were conducted in the instant matter. The Trial Examiner found that the totality of the record established the relevant facts to be as follows:

Fran Schloss has been Local 1757’s President since April 2009. Local 1757 represents City employees in the civil service title of City Assessor at various City agencies, including DOF. Schloss has been employed at DOF since 1978. She is a City Assessor Level 4 with the in-house title of Supervising Assessor in the Property Valuation subgroup of DOF’s Tax Policy and Planning Division.<sup>1</sup> Schloss worked in DOF’s Manhattan office from 1983 until June 27, 2011, when she was transferred to DOF’s Brooklyn office. While the Union alleges that the transfer was made in retaliation for Schloss’ Union activity, DOF claims that the transfer was effectuated to meet its operational needs.

### **DOF’s Restructuring and the Creation of a Supervising Assessor Vacancy in Brooklyn**

DOF’s primary operational goals are to ensure compliance with the City’s tax and revenue laws, to provide up-to-date information to taxpayers, to value real property, to record

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<sup>1</sup> City Assessor Level 4 is the top level of the City Assessor title; above it is the managerial title Administrative Assessor. Levels 4 and 3b City Assessors can supervise lower level assessors.

and maintain property records, and to provide a mechanism for the payment or dispute of parking tickets. The Director of the Property Valuation subgroup, Administrative Assessor Warren Hyman, testified that DOF decided to restructure the Property Valuation subgroup in early 2011.<sup>2</sup> Emails entered into the record establish that the discussions regarding restructuring DOF were underway by mid-April 2011, although the restructuring itself was not implemented until June 27, 2011.<sup>3</sup>

As part of the restructuring, DOF wanted to assign at least one Supervising Assessor to each borough. In early 2011, Staten Island had no Supervising Assessor; instead, two Supervising Assessors assigned to other boroughs would each spend two to three days per week in Staten Island. Sometime prior to April 19, 2011, Leslie Dubois, one of Brooklyn's Supervising Assessors, a City Assessor Level 3b, requested and was granted a transfer to Staten Island to be effective in June 2011.<sup>4</sup> Hyman testified that the transfer was granted because Dubois' "needs met our needs." (Tr. 143) Dubois' transfer created a vacancy for a Supervising Assessor in Brooklyn.

Hyman testified that another goal of the restructuring was for each Supervising Assessor to supervise no more than seven Assessors; that is, a ratio of 1:7 or less. According to Hyman, in early 2011, Manhattan had seven Supervising Assessors but only five with supervision responsibilities, including Schloss, for its 20 Assessors (a ratio of 1:4); Queens had three

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<sup>2</sup> Hyman's current in-house title is Director of Property Field Valuation.

<sup>3</sup> The City identified seven employees, including Schloss, who it claims were transferred due to the restructuring. Schloss was the only supervisor and the only Level 4 City Assessor transferred. (*See* City, Ex. 3) Six of the employees were transferred from Manhattan to other boroughs; one was transferred to Manhattan. The civil service title of the employee transferred to Manhattan is not in the record; of the remaining five, four were Level 2 City Assessors, and one was a Level 3a City Assessor (which is a step below Level 3b).

<sup>4</sup> The exact dates that the transfer was requested and granted are not in the record but an email in the record indicates that the decision to transfer Dubois was made prior to April 19, 2011.

Supervising Assessors for its 20 Assessors (a ratio of 1:6.66); and the Bronx had two Supervisor Assessor positions for its ten Assessors. However, one of the two Bronx Supervising Assessor positions was vacant (an effective ratio of 1:10). With Dubois' pending transfer taken into consideration, Staten Island had one Supervising Assessor for its six Assessors and Brooklyn had three Supervising Assessors for its 22 Assessors (a ratio of 1:7.33). Thus, both the Bronx and Brooklyn exceeded DOF's target maximum ratio of 1:7. Hyman testified that DOF believed Brooklyn to be an easier post to fill than the Bronx.

In an April 21, 2011 email, Jeffrey Ray, a Manhattan Administrative Assessor who worked with Hyman on the restructuring, recommended that DOF transfer one of the three Manhattan Supervising Assessors who lived in Brooklyn to DOF's Brooklyn office. Ray explained that the basis of his recommendation was that it would be less of a hardship for an employee who lived in Brooklyn to be transferred to Brooklyn. Schloss lives in Brooklyn. No immediate action was taken on Ray's recommendation.

**Schloss' Union Activity**

Schloss testified that working in Manhattan facilitated her Union activity as Local 1757's President. When she worked at DOF's Manhattan office, Schloss would often discuss issues that concerned the Union with senior DOF management, such as Assistant Commissioner Maurice Kellman. The Union's headquarters and DOF's Manhattan office were within walking distance of each other, and this proximity allowed Schloss to spend her lunch hour at the Union headquarters working on Union business. DOF's Manhattan office also has the largest number of Local 1757 members.

Prior to any decision being made as to how the Brooklyn Supervising Assessor position would be filled, Schloss twice testified critically of DOF in public hearings in her capacity as

Local 1757's President. On April 28, 2011, Schloss testified at a public hearing organized by DC 37 and attended by City Council members. Her testimony was critical of DOF regarding uncollected revenue, the lack of lower level assessors, the lack of scrutiny of tax exempt properties, and the failure to tax cell towers and billboards. On May 2, 2011, Schloss testified at a City Council hearing. Again, Schloss' testimony was critical of DOF, specifically about the Computer Assisted Mass Appraisal ("CAMA") system. Hyman testified that Schloss had discussed the Union's concerns regarding the CAMA System with him and that he was aware that the Union had filed a grievance regarding it. Schloss also testified that DOF needed to hire more assistant assessors. DOF Commissioner David Frankel attended part of the May 2 City Council hearing and members of his staff attended the entire hearing.

Schloss testified that on May 2, after she testified before the City Council, Hyman approached her and informed her that his superiors wanted to know if certain statements attributed to her at the hearing were accurate. Specifically, Hyman asked Schloss if she said "that all of the co-ops and condo comparables were inaccurate." (Tr. 47) Schloss responded that "[w]hoever is saying that is misquoting me" and explained that she testified that some, but not all, of the comparables were inaccurate. (*Id.*) Hyman denied that he questioned Schloss about the content of her testimony and specifically denied asking her if she testified that the comparables were inaccurate. Hyman testified that he did not recall if any senior DOF managers complained about Schloss' testimony.

However, Hyman testified that one of his superiors asked him to determine if Schloss was testifying as a City employee or as a Union representative. Hyman could not recall which superior had instructed him to make this determination, when he was asked to do so, or even if

his superior was referring to the April 28 or the May 2 hearing.<sup>5</sup> Indeed, Hyman testified that he could not even recall if the superior who contacted him was a man or a woman. Hyman further testified that this was the only time in his career that a superior contacted him about the testimony of one of his subordinates. He also testified that he discussed Schloss' testimony with other DOF managers but could not recall with whom.

**The Decision to Transfer Schloss**

Hyman testified that the decision to transfer Schloss was made by the Deputy Commissioner based upon his recommendation. While Hyman testified that any Level 3b City Assessor could have filled the Supervisor Assessor post in Brooklyn, he also testified that he decided in late May or early June 2011 that the "Manhattan [S]upervising [A]ssessor [who would] cause the least disruption needed to move to the Brooklyn office." (Tr. 232) Regarding the vacant Supervising Assessor position in the Bronx, Ray testified that DOF considered promoting an assessor to fill that position. Hyman testified that although DOF had the time to seek an individual who wanted to transfer to Brooklyn it chose not to. (See Tr. 187) Further, Hyman testified that DOF had posted the vacant Supervising Assessor position in the Bronx but did not explain why DOF did not post the vacant Brooklyn Supervising Assessor position. The vacant Brooklyn Supervising Assessor position would be filled immediately (that is, Dubois' transfer and Schloss' transfer were both scheduled for the end of June 2011). Hyman testified that for budgetary reasons, the Bronx position has not yet been filled.

Hyman testified that he only considered five of Manhattan's seven Supervising Assessors for the transfer. Hyman explained that he did not consider for the transfer the two Manhattan Supervising Assessors who "had other specific responsibilities separate and distinct from district

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<sup>5</sup> Hyman testified that he reports directly to DOF's Assistant Commissioner.

supervision.”<sup>6</sup> (Tr. 149-150) The five Manhattan Supervising Assessors considered for the transfer by Hyman were Schloss, Edward Escobio, Robert Rolandi, George King, and Alozie Okwu. Schloss was the only Level 4 City Assessor; the other four Supervising Assessors were all Level 3b City Assessors. Schloss reported to Administrative Assessor Jeffrey Ray; the other four reported to Senior Supervising Assessor John Stebner.<sup>7</sup> Hyman emphasized that all five Supervising Assessors “were capable of continuing to work in Manhattan.” (Tr. 232).

Hyman testified that his first step in deciding which Manhattan Supervising Assessor should be transferred to Brooklyn was to ask Stebner “of the five . . . who was his most critical person.”<sup>8</sup> (Tr. 151) Stebner did not testify. According to Hyman, Stebner opined that that Escobio, Rolandi, and King were his most critical people. Hyman testified that he concurred with Stebner that these three Supervising Assessors were critical to the Manhattan office. However, Hyman acknowledged that Schloss possessed the same skills as Escobio, Rolandi, and King. Schloss’ un rebutted testimony established her expertise in the income and valuation method. Schloss had been the supervisor of DOF’s income and expense unit and was the first City Assessor certified to teach the income and expense valuation process by the International Association of Assessing Officers. Hyman also acknowledged that Schloss was qualified for the position of Senior Supervising Assessor since she was a City Assessor Level 4. All of the other Manhattan Supervising Assessors were City Assessors Level 3b and, thus, not qualified to be a

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<sup>6</sup> Hyman testified that one of the two Supervising Assessors not considered for the transfer dealt with the assessment of the administration mainframe system remissions and CAMA while the other handled the review process in the assessment review unit.

<sup>7</sup> All Senior Supervising Assessors are City Assessors Level 4.

<sup>8</sup> Hyman testified that he was aware that Ray recommended in mid-April that one of the Manhattan Supervising Assessors who lived in Brooklyn should be transferred to Brooklyn but did not testify that Ray’s April recommendation was a factor in his decision to transfer Schloss.

Senior Supervising Assessor. Hyman testified that, having reduced the options to Schloss or Okwu, he then asked Rose Horton, the Senior Supervising Assessor for Brooklyn, whom she preferred.

Horton testified that she informed Hyman that she “needed another [S]upervising [A]ssessor and he said he was thinking about transferring Ms. Schloss.” (Tr. 263). Horton had worked with Schloss and had a good working relationship with her. Horton testified that she also discussed Okwu with Hyman, that Hyman was aware that Okwu had problems working with her, and that Hyman was aware that Okwu was perceived as having a problem working with women.

Hyman testified that when Horton “indicated a preference for [] Schloss, that [] sealed the deal.” (Tr. 232) Hyman further testified that DOF “expected [Schloss] actually to be pleased [to be transferred to Brooklyn] since she lived in Brooklyn.” (Tr. 208) However, Hyman was aware that Schloss often would work at the Union’s Manhattan headquarters during her lunch hour.

Hyman and Ray testified that an additional reason for Schloss’ transfer to Brooklyn was because of her “excellent history in training new people.” (Tr. 215) Hyman testified that DOF intended that Schloss “would be the primary person in the Brooklyn office” training new hires. (Tr. 216) However, Hyman acknowledged that all Supervising Assessors have training responsibilities and that he never told Schloss that she was being transferred because of her superior training skills.

Horton testified that the Brooklyn office does not have a formal training program and that, while Schloss did help train three new assessors, there have been newly hired assessors who were not trained by Schloss. Further, Schloss’ un rebutted testimony was that she was not



assigned any greater training responsibilities than any other Supervising Assessor and that, to the extent she provided additional training to new hires, it has been on her own initiative.

**Notification of Transfer**

The decision to transfer Schloss was made in June 2011. Schloss' un rebutted testimony was that in the past when she had been transferred she had been consulted before the decision to transfer was made. Schloss was not consulted before the decision to transfer her to Brooklyn. Instead, after the decision had been made, at around 3:00 p.m. on June 10, 2011, Ray called Schloss, who was out on emergency leave, to inform her that Hyman would be calling her. A few minutes later, Hyman called Schloss and informed her that she would be transferred from Manhattan to Brooklyn on June 27. Hyman testified that he called Schloss as a courtesy because an email notification of the transfer was going to be sent to the entire Property Valuation subgroup and he did not want Schloss to learn of her transfer in an email.

Schloss testified that in June 10 phone call Hyman said to her: "This may impede upon your union activity, but you will be closer to home, you're being transferred to Brooklyn." (Tr. 50) Hyman testified that in the June 10 phone call he stated to Schloss: "I know it's a little longer don't, you know, be concerned." (Tr. 209-10) Hyman denied that the statement referred to the time it would take for Schloss to travel from DOF's Brooklyn office to the Union's Manhattan headquarters, stating that it referred to the distance between the two. Hyman testified that DOF's Brooklyn office was only ten minutes from the Union's Manhattan headquarters.

Schloss objected to the transfer, viewing it as a demotion. Schloss testified that the Union considers DOF's Manhattan office to be a more prestigious placement for assessors. DOF's Commissioner, Assistant Commissioners, and other senior officials are located in

Manhattan. Schloss also testified that she believes that the majority of promotions within the assessor title come from those assessors working in the Manhattan office.

On June 15, Schloss emailed Hyman requesting a transfer back to Manhattan. On June 18, the Union, by letter to DOF's Director of Labor Relations, requested that Schloss be transferred back to Manhattan, noting that "it is clear that Ms. Schloss' transfer was related to [U]nion activity." (Rep., Ex. B) On June 21, Hyman denied Schloss' request to be transferred back to Manhattan. On June 28, DOF responded to the Union's June 18 letter. Without identifying any specific operational needs, DOF asserted that Schloss' "transfer was based on the operational needs and was in no way related to her [U]nion activities." (Union, Ex. C)

On October 27, 2012, the Union filed the instant petition. The Union requests that the Board order Respondents to rescind Schloss' transfer, assign Schloss to a position in Manhattan, post appropriate notices, and grant any other relief the Board deems just and proper.

### **POSITIONS OF THE PARTIES**

#### **Union's Position**

The Union argues that DOF retaliated against Schloss for her Union activity. DOF knew that Schloss was Local 1757's President, knew that she represented members in grievance proceedings, and knew that she often voiced employee concerns to DOF's senior management, including objections to DOF policies. Indeed, DOF senior management attended the City Council hearing at which Schloss testified critically of DOF and sent Hyman to question her about her testimony. The decision to involuntarily transfer Schloss was made approximately one month after her testimony critical of DOF. It is clear that her Union activity motivated senior

management to transfer her. Thus, the Union argues it has established a *prima facie* case of retaliation in violation of NYCCBL § 12-306(a)(1) and (3).<sup>9</sup>

The Union argues that the City’s stated legitimate business reasons are clearly pretextual. The City abandoned all of the purported legitimate business reasons stated in its answer. The answer includes several paragraphs that falsely state that Schloss lacked necessary experience because “only twenty five percent of her work consisted of income and expense analysis.” (Ans. ¶ 64; *see also* Ans. ¶¶ 63-67, 97) The Union believes this criticism to be “spurious” because Schloss was the first City Assessor to be certified by the International Association of Assessing Officers to teach the income and expense valuation process.

The Union argues that the alleged legitimate business reasons put forth at the hearing are *post-hoc* rationalizations. The City contends that Schloss was transferred because of her superior training skills; however, no mention of Schloss’ training skills exists in the City’s answer. Hyman admitted that he never told Schloss that she was being transferred because of her superior training skills. Further, Hyman admitted that all Supervising Assessors have the responsibility of training new assessors. The claim that Schloss was transferred for her training skills also

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<sup>9</sup> NYCCBL § 12-306(a) provides, in pertinent part, that:

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 [§] 12-305 of this chapter;  
\* \* \*
- (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

NYCCBL § 12-305 provides, in pertinent part, that: “Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.”

contradicts her actual job duties, as Horton testified that there have been new hires in Brooklyn that were not trained by Schloss. Schloss' training responsibilities are no greater than any other supervisor.

The Union argues that Hyman selectively narrowed the field of candidates in such a way as to ensure Schloss' transfer. Hyman, the Union argues, could not have reasonably believed that Stebner would opine that Schloss was needed in Manhattan because Schloss did not work for Stebner. Hyman admitted that Schloss also possessed the same skills that allegedly made Escobio, Rolandi, and King critical to Manhattan. Hyman, the Union argues, could not have reasonably believed that Horton would choose Okwu over Schloss because of Okwu's perceived difficulties working with women. Although Hyman admitted that any Level 3b City Assessor could fill the position, no explanation has been provided as to why only five Manhattan Supervising Assessors were considered. At least 13 other Level 3b City Assessors, and possibly as many as 20, worked in Manhattan. No explanation is provided as to why DOF did not post the position or otherwise look for an employee who wanted to transfer to Brooklyn.

The Union argues that Schloss' involuntary transfer is inherently destructive of Union rights. Schloss is not any Union member; she is the Local 1757's President. Her transfer not only has a chilling effect on Union participation but also directly impacts her ability to represent her members. When she was based in Manhattan, Schloss had regular access to DOF's most senior management. DOF's Manhattan office also has the largest number of Local 1757 members. The proximity of the Union headquarters and DOF's Manhattan offices facilitated Schloss' ability to work on Union matters. Now, she must take more leave and work at night to engage in the Union activity that she was able to perform on her lunch hour. In the phone call informing Schloss of the transfer, Hyman noted that it would impact her Union work, stating "I

know it's a little longer don't [] be concerned." (Tr. 209-10) The transfer also impacts Schloss' career, as more promotions are made out of the Manhattan office. Thus, the Union argues, Schloss' transfer was designed to punish her and discourage participation in Union activity.

### **City's Position**

The City argues that the Board has long recognized that it is a management right to assign, reassign, and transfer employees. Thus, DOF's decision to transfer Schloss was consistent with DOF's managerial prerogatives under NYCCBL § 12-307(b).<sup>10</sup> DOF transferred Schloss to better meet its operational needs. The City was not obligated to transfer a less senior employee. In seeking to return Schloss to Manhattan, the Union is attempting to controvert DOF's managerial discretion and limit its management right to determine assignments and reassignments.

The City argues that the Union has failed to establish a *prima facie* claim of retaliation in violation of NYCCBL § 12-306(a)(3). The City acknowledges that DOF was aware of Schloss' Union activity but argues that the Union has not established a causal link between that activity and Schloss' transfer, which was not a demotion. Schloss' status as a Union official does not confer immunity from being transferred. The Union has not established anti-union animus on the part of Hyman. There is no evidence in the record that anyone at DOF opposed or disapproved of Schloss' testifying. Indeed, the Union has not established that Hyman knew the contents of Schloss' testimony. The City argues that an inquiry as to whether a City employee is testifying as a City employee or as a union president is not evidence of anti-union animus.

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<sup>10</sup> NYCCBL § 12-307(b) provides, in pertinent part, that: "It is the right of the city . . . acting through its agencies, to . . . direct its employees; . . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . ."

Assuming, *arguendo*, that the Board finds that the Union has established a *prima facie* case, the City argues that DOF had legitimate business reasons to transfer Schloss. The undisputed evidence is that the restructuring of the Property Valuation subgroup resulted in several employees being reassigned. An additional Supervisory Assessor was needed in Brooklyn, whose ratio of Supervising Assessors to Assessors was over 1:7 when Manhattan's was 1:4. Hyman concluded that Schloss was the best person to be transferred after consulting with other managers. Before Schloss testified at DC 37's hearing, Ray had already recommended Schloss as one of three possible candidates for transfer. Stebner opined that three of his Supervisory Assessors were more critical to DOF's Manhattan operations than Schloss. Hyman asked Horton whom she preferred of the remaining two, and she preferred Schloss. In addition, Schloss has extensive training experience that is needed in Brooklyn.

The City argues that there is no independent NYBCCL § 12-306(a)(1) violation because the Union has not established that DOF's conduct was inherently destructive of the Union's NYCCBL § 12-305 rights. Schloss' transfer did not deny any Union member's participation in the grievance process, prohibit attendance at Union meetings, or hinder future bargaining. Nobody at DOF stated or suggested that Schloss should cease her duties as Local 1757's President or be less vocal in her criticisms of DOF. The change in location has not significantly impacted Schloss' ability to work on behalf of the Union, nor is there any legislative, statutory, or contractual right to be assigned a work location near the Union's headquarters. Schloss testified that it is more difficult to check her Union mailbox now that she is in Brooklyn.

Inconvenience in getting the mail does not rise to the far reaching effects that would hinder bargaining as to be inherently destructive.<sup>11</sup>

### **DISCUSSION**

The Union claims that DOF violated NYCCBL § 12-306(a)(1) and (3) by transferring Schloss in retaliation for her public testimony on behalf of her Union that was critical of DOF. Upon reviewing all of the evidence adduced in this case, we find that the Union established a *prima facie* case of retaliatory action, that the City has not refuted that *prima facie* case, and that the City has not provided a credible legitimate business reason supporting its defense that Schloss would have been transferred without regard to any protected activity. We therefore find that the City violated NYCCBL § 12-306(a)(1) and (3).

At the outset, we address the City's claim that DOF has a managerial right under NYCCBL § 12-307(b) to transfer its employees. NYCCBL § 12-307(b) authorizes the City to direct its employees, to maintain efficient operations, and to exercise control and discretion over its organization. It "does not provide [the City] unlimited protection from claims that its decisions violate the NYCCBL." *CSTG, L. 375*, 4 OCB2d 61, at 24 (BCB 2011); *see also DC 37*, 61 OCB 13, at 16 (BCB 1998) ("the right to manage is not a delegation of unlimited power, nor does it insulate the City from an examination of actions claimed to have been taken within its limits"); *DC 37*, 27 OCB 8, at 10 (BCB 1981) ("the management rights clause is intended as a means to enable management to do that which it should do but not as a license to do that which it should not"). Actions taken within an employer's "managerial prerogative . . . may not be taken for a retaliatory purpose." *SBA*, 4 OCB2d 50, at 25 (BCB 2011). Thus, the managerial right to

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<sup>11</sup> In its answer, the City argues that Schloss' transfer did not amount to a unilateral change in violation of NYCCBL § 12-306(a)(4). The Union notes that it never made any such argument.

transfer employees does not immunize an employer from a finding of a violation of NYCCBL § 12-306(a)(1) and (3) if it is established that the transfer was motivated by retaliation for engaging in protected union activity and the employer fails to establish a legitimate business reason. *See CEU, L. 237, 77 OCB 3, at 14 (BCB 2006)* (transfer motivated by retaliation for protected activity found to be a violation of NYCCBL § 12-306(a)(1) and (3)); *SBA, 75 OCB 22, at 23 (BCB 2005)* (same).

This Board, in *Bowman, 39 OCB 51 (BCB 1987)*, 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; see also Local 376, DC 37, 5 OCB2d 31, at 17-18 (BCB 2012)*. A violation of NYCCBL § 12-306(a)(3) is also a violation of NYCCBL § 12-306(a)(1). *See SSEU, L. 371, 77 OCB 35, at 14 (BCB 2006)*. If a petitioner is able to establish a *prima facie* violation of NYCCBL § 12-306(a)(3), "the burden shifts to the employer who may refute a petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *CSTG, L. 375, 4 OCB2d 61, at 25 (citations omitted); see also SBA, 75 OCB 22, at 24*.

The record clearly establishes Schloss' Union activity. Schloss, at all times relevant here, was Local 1757's President and participated in numerous matters that constituted protected Union activity. DOF was aware that Schloss attended the public hearings on behalf of her Union



at which she gave testimony critical of DOF. *See UFA*, 1 OCB2d 10, at 20-21 (BCB 2008) (public criticism of working conditions is protected activity); *DC 37*, 1 OCB2d 6, at 29 (BCB 2008) (testifying at an arbitration is protected activity); *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007) (testifying at an improper practice proceeding is protected activity). We also find that Hyman's admitted June 10 statement that "I know it's a little longer don't [] be concerned" indicates that he was aware that Schloss' transfer would impact her Union activity. (Tr. 209-10) We do not find credible Hyman's denial that the statement did not refer to Schloss' Union activity. The only thing in the record that was a little longer as a result of Schloss' transfer to Brooklyn was the distance between her work location and the Union's headquarters. Thus, we find that Petitioner has satisfied the first prong of the *Bowman/Salamanca* standard.

Establishing the second prong of the *Bowman/Salamanca* standard, the motive component, is "typically . . . proven through the use of circumstantial evidence, absent an outright admission." *Benjamin*, 4 OCB2d 6, at 16 (BCB 2011) (citations omitted); *see also CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). A "petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22. 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, [may be] sufficient to satisfy the second element of the *Bowman/Salamanca* test." *Feder*, 4 OCB2d 46, at 44 (BCB 2011).

Temporal proximity is clearly present in the instant case. Hyman testified that the decision to transfer Schloss was made in early June 2011. Schloss' public testimony on behalf of her Union that was critical of DOF occurred on April 28 and May 2. Thus, the alleged retaliatory act occurred slightly more than one month after Schloss' protected Union activity.

The Union argues that the fact that Hyman's superiors instructed him to inquire about Schloss' testimony is evidence of improper motivation. We agree. Schloss and Hyman disagree over what DOF's specific concerns were but both testified that DOF's senior management raised concerns regarding Schloss' public testimony. Schloss testified that Hyman inquired about the accuracy of statements attributed to her at the May 2 City Council hearing; Hyman denied doing so, testifying that he only inquired if Schloss was testifying as a City employee or as a Union representative. Either version, combined with the temporal proximity of the transfer to Schloss' Union activity, would suffice to establish the *prima facie* case.

In any event, we find Schloss' testimony credible and Hyman's less so. Schloss' testimony was specific and consistent. *See SBA*, 4 OCB2d 50, at 23 (detailed and consistent testimony supports finding that a witness is credible). Hyman's memory was selective and incomplete on important facts. *See DC 37, L. 375*, 2 OCB2d 26, at 18 (BCB 2009) (credibility undermined by claiming not to know certain facts that witness should reasonably be expected to know); *DC 37*, 1 OCB2d 5, at 67 (BCB 2008) (same). Hyman acknowledged that never before in his career had a superior asked him to inquire about the testimony of a subordinate. Yet, Hyman was unable to remember which superior had so instructed him; he could not even recall if the superior was a man or a woman. Hyman also could not recall when he was asked to inquire or when he inquired; that is, Hyman could not recall whether he was inquiring about the April 28 hearing or the May 2 hearing, nor could he recall if he inquired before or after Schloss testified at these hearings. Further, Hyman admitted discussing the contents of Schloss' testimony with other DOF managers; albeit he could not remember specifically with whom. Thus, we find that

the record establishes that DOF management was concerned by Schloss' testimony. Accordingly, we find that the Union has established a *prima facie* case of retaliation.<sup>12</sup>

We reject the City's argument that the Union has not established a *prima facie* case. Respondents acknowledge Schloss' Union activity. It is undisputed that senior DOF management asked Hyman about Schloss' testimony, that Hyman asked Schloss about her testimony, and that Hyman discussed Schloss' testimony with other DOF managers. The City did not put forth an alternative explanation for DOF's senior management sending a Director to ask a Union President about her Union activity.

We next turn to the three reasons proffered by the City in its brief for Schloss' transfer: (i) that it was due to the restructuring; (ii) that, based upon the opinions of Senior Supervising Assessors, Hyman determined that transferring Schloss would cause the least disruption to DOF; and (iii) that Brooklyn needed Schloss' training skills. We note that two of the proffered reasons ultimately relied upon by the City (the input of the Senior Supervising Assessors and Schloss' training skills) were not pled by the City. This concerns the Board as it expects that an agency that takes an action for a legitimate business reason would present that reason at the earliest available opportunity. *See Colella*, 79 OCB 27, at 61 (BCB 2007) (citing *Reeves*, 530 U.S. at

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<sup>12</sup> We note that our rejection, discussed *infra*, of the City's proffered reasons bolsters our finding of a causal link between Schloss' Union activity and her transfer. *See Local 376, DC 37*, 5 OCB2d 31, at 19-20 (citations omitted); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination") (emphasis in original); *Stockbridge Valley Central School District*, 26 PERB ¶ 3007 (1993) ("the pretextual nature of the employer's articulated reasons for its conduct not only rebuts a claim of legitimate business reasons, but may support the charging party's *prima facie* case").

147) (other citations omitted); *SSEU, L. 371, 77 OCB 35*, at 19-20 (citations omitted).<sup>13</sup> The Board also notes that when assessing the validity of the proffered reasons, we must consider the unexplained differences between DOF's approaches to filling the vacancies in Brooklyn and the Bronx. *See DC 37, 1 OCB2d 6*, at 30-31 ("party's prior inconsistent conduct may be used to impeach that party's explanation of events") (citing *State of New York v. Dawson*, 50 N.Y.2d 311, 318 (1980); *Coinmach Corp. v. Fordham Hill Owners Corp.*, 3 A.D.3d 312, 314-315 (1<sup>st</sup> Dept. 2004)).

Regarding the first proffered reason, the record established that the decision to restructure DOF's Property Valuation sub-group was made before Schloss' public testimony on behalf of her Union critical of DOF. DOF had a target ratio of Supervising Assessors to Assessors of 1:7; after Dubois' transfer, Brooklyn's ratio would be 1:7.33. The decision to transfer Dubois was made before Schloss' public testimony. Thus, the record establishes that the restructuring resulted in a vacant Supervising Assessor position in Brooklyn. However, the restructuring itself does not explain why Schloss was chosen to be transferred to Brooklyn. Hyman testified that DOF posted the vacant Supervising Assessor position in the Bronx, that the DOF had time to post the Brooklyn vacancy, but did not do so. Schloss' un rebutted testimony is that the last time she was transferred, DOF solicited her opinion prior to deciding to transfer her. DOF did not do so regarding her transfer to Brooklyn. No explanation was presented for why DOF did not look for an employee who wanted to transfer to Brooklyn. Hyman acknowledged that any Level 3b City Assessor could fill the vacant Supervising Assessor position in Brooklyn and Ray testified that DOF considered using promotion to fill the Bronx vacancy. Yet Hyman did not consider

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<sup>13</sup> We further note that Union established that Schloss possessed the requisite expertise in income and expense valuation. Thus, we find that the record does not support this rationale proffered by the City in its pleadings. *See DC 37, L. 376, 77 OCB 12*, at 18 (BCB 2006) (failure to substantiate grounds for one proffered reason weakens other proffered reasons).

using promotion to fill the Brooklyn vacancy. Thus, we do not find that the restructuring establishes that Schloss would have been transferred regardless of her Union activity.

The City's second proffered reason is that, based upon the opinions of Senior Supervising Assessors, Hyman determined that transferring Schloss would cause the least disruption to DOF. We are not persuaded that Schloss was transferred due to the belief that it would cause the least disruption to DOF.<sup>14</sup> This proffered reason is reliant upon Hyman's testimony, and, as discussed herein, we do not find his testimony credible.<sup>15</sup> See *DC 37, L. 376, 77 OCB 12*, at 16 (where a proffered legitimate business reasons relies upon the credibility of a witness, and that witness is found not to be credible, proffered rationale will be found to be pretextual).

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<sup>14</sup> In its brief, the City argues that Ray's April 2011 recommendation that one of the three Manhattan Supervising Assessors who lived in Brooklyn (Schloss, Rolandi, or Okwu) be transferred to Brooklyn was a factor in Hyman's decision to transfer Schloss to Brooklyn. We find that the record does not support such a finding. Hyman testified that he talked to Ray regarding Schloss' training skills and that Ray's April 2011 recommendation was a factor in the decision to transfer a Supervising Assessor to Brooklyn. However, Hyman did not testify that Ray's April recommendation was a factor in his decision to transfer Schloss to Brooklyn. Hyman testified that his first step in choosing who to transfer to Brooklyn was made in late May or early June; Ray's recommendation was made at least a month earlier. Hyman also testified that he considered five Manhattan Supervising Assessors, not just the three who lived in Brooklyn as recommended by Ray. If Hyman was following Ray's April recommendation, he would not have considered the two Manhattan Supervising Assessors who did not live in Brooklyn (Escobio and King). Further, Ray's recommendation was based on the hardship faced by an employee who did not live in Brooklyn being transferred to Brooklyn. Hyman did not testify that the amount of hardship to be suffered by the employee chosen for the involuntary transfer was a factor in his decision making process. Thus, the record does not support finding that Ray's April recommendation was a factor in the decision to transfer Schloss to Brooklyn.

<sup>15</sup> We have already expressed some of our concerns regarding Hyman's credibility. We did not credit Hyman's testimony that he does not recall which superior instructed him to question Schloss about her public testimony or which managers he discussed her testimony with. Further, we do not credit Hyman's testimony that he believed Schloss would look favorably upon a transfer to Brooklyn since she lived in Brooklyn. Hyman knew that Schloss often worked at Union headquarters in Manhattan during her lunch hour. His admitted June 10 statement that Schloss should not worry about her transfer and Schloss' credible testimony that Hyman stated that he was aware that the transfer "may impede upon [her] union activity" indicates that Hyman understood that Schloss would not be happy to be transferred to Brooklyn. (Tr. 50)

We find it is suspect for Hyman ask Stebner to opine as to whether Schloss was critical to Manhattan since Schloss did not work for Stebner and nothing in the record indicates that Stebner was otherwise in a position to assess Schloss' contribution to DOF's Manhattan office.<sup>16</sup> *See SSEU, L. 371*, 3 OCB2d 22, at 13, n.3 (BCB 2010) (inherently illogical testimony weakens credibility) (citing *James-Reid*, 1 OCB2d 26, at 29 (BCB 2008)) (other citations omitted) We also find suspect Hyman's testimony that the "deal" to transfer Schloss was not "sealed" until after he asked Horton to choose between Schloss and Okwu because the record establishes that Hyman knew that Horton did not have a positive working relationship with Okwu, who was perceived as having difficulties working with women. (Tr. 232) Rather, we are persuaded that Hyman was well aware of who Horton would choose for the transfer before he posed the question to her.

We also find that the City has not established its third proffered reason, that Schloss' training skills were a factor in the decision to transfer her. *See SSEU, L. 371*, 77 OCB 35, at 20. Schloss' training skills were not mentioned as a factor in her transfer prior to the hearings. Hyman testified that he never told Schloss that her training skills were a factor in her transfer. It is undisputed that no formal training program exists in Brooklyn. Schloss' un rebutted testimony was that to the extent that she has done any more training than any other Supervising Assessor it

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<sup>16</sup> Regarding Stebner, the record is limited to Hyman's recollections. *See DC 37, L. 375*, 2 OCB2d 26 (failure of employer to call witness that could corroborate testimony undermines credibility); *DC 37, L. 376*, 77 OCB 12, at 19 (alleged legitimate business reasons rejected in part because City failed to call witness who could allegedly corroborate it). Thus, only hearsay is presented. *See DC 37*, 1 OCB2d 5, at 67 (hearsay "testimony must be carefully scrutinized in determining its reliability"); *Colella*, 79 OCB 27, at 55 (hearsay "lacks the indicia of reliability"). We find Hyman's detailed recollection of his discussions with Stebner suspect in light of his inability to recall other salient details, such as the superior who instructed him to inquire into Schloss' testimony. There is also no corroborating evidence of Stebner's opinions or even of Hyman asking Stebner for his opinion. *See CSTG, L. 375*, 4 OCB2d 61, at 29 (lack of corroborating evidence a factor in rejecting proffered reason); *Local 376, DC 37*, 5 OCB2d 31, at 21 (lack of documentation undercuts credibility); *SBA*, 4 OCB2d 50, at 23 (same).

was because she volunteered to do so. Horton's unrebutted testimony is that there have been new Assessors in Brooklyn who have not been trained by Schloss.

Thus, as we find that the City has not refuted the Union's *prima facie* case and has not established a legitimate business reason for the transfer of Schloss to Brooklyn, we find that Respondents violated NYCCBL § 12-306(a)(1) and (3) by retaliating against Schloss for her protected Union activity. *See SSEU, L. 371, 77 OCB 35, at 20* ("Where, 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.") (citing *SBA, 75 OCB 22, at 25; Reeves, 530 U.S. at 147*). Thus, we order DOF to rescind Schloss' transfer and order a posting.

**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 verified improper practice petition filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1757, docketed as BCB-2991-11, be, and the same hereby is, granted to the extent that it involves claims that the City of New York and the New York City Department of Finance violated NYCCBL § 12-306(a)(3) and derivatively violated NYCCBL § 12-306(a)(1) by retaliating against Local 1757's President Fran Schloss for engaging in protected Union activity; and it is further

ORDERED, that the New York City Department of Finance rescind the transfer of Local 1757's President Fran Schloss; and it is further

ORDERED, that the City of New York and the New York City Department of Finance post appropriate notices detailing the above violations of the New York City Collective Bargaining Law.

Dated: New York, New York  
May 29, 2013

MARLENE A. GOLD  
CHAIR

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GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

GWYNNE A. WILCOX  
MEMBER

PETER PEPPER  
MEMBER

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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

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**We hereby notify:**

**That the Board of Collective Bargaining has issued 6 OCB2d 13 (BCB 2013), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1757, and the City of New York and the New York City Department of Finance.**

**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 verified improper practice petition filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1757, docketed as BCB-2991-11, be, and the same hereby is, granted to the extent that it involves claims that the City of New York and the New York City Department of Finance violated NYCCBL § 12-306(a)(3) and derivatively violated NYCCBL § 12-306(a)(1) by retaliating against Local 1757's President Fran Schloss for engaging in protected Union activity; and it is further**

**ORDERED, that the New York City Department of Finance rescind the transfer of Local 1757's President Fran Schloss; and it is further**

**ORDERED, that the City of New York and the New York City Department of Finance post appropriate notices detailing the above violations of the New York City Collective Bargaining Law.**

**The New York City Department of Finance**  
**(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.*