Local 376, DC 37, 6 OCB2d 39 (BCB 2013)

(IP) (Docket No. BCB-3076-13).

Summary of Decision: The Union filed an improper practice petition alleging that Respondents violated NYCCBL § 12-306(a)(1) and (3) by terminating certain employees and extending the probationary period of others in retaliation for protected union activity. Respondents argue that Petitioner failed to establish a *prima facie* case because the record does not contain sufficient evidence that Respondents' agents responsible for the employment actions knew of the protected activity, or that the protected activity was a motivating factor in the employment decisions. Furthermore, Respondents assert a legitimate business reason for the employment actions. This Board found that Respondents violated NYCCBL § 12-306(a)(1) and (3) by retaliating against the Union and its members and therefore granted the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

LOCAL 376, DISTRICT COUNCIL 37,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On March 26, 2013, Local 376, District Council 37 ("Union" or "Local 376") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP") (collectively, "Respondents"), alleging that Respondents 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"). The Union claims that Respondents terminated five Apprentice Construction Laborers ("ACLs") and extended the probation of four other ACLs in retaliation for the Union opposing the assignment of work it considered unsafe and outside its members' title. Respondents terminated ACLs Richard Goslin, Rainier Lapompe, Eulalio Neredia, Shamel Tatum, and Anthony Wagner ("Terminated ACLs"). ACLs Philip Bristol, Daniel Coffey, Nicolas DelPonte, and Anthony Shiulaz had their probationary period extended ("PPE ACLs"). Respondents argue that the Union did not demonstrate a *prima facie* case because the agents responsible for the employment decisions at issue were not aware of the Union's protected activity at the time they made the relevant decisions. Respondents also argue that the Union did not prove that the Union's protected activity was the motivating factor for the employment actions. Rather, Respondents assert that the decision to terminate the Terminated ACLs was based on a review of the employees' time and leave records. Furthermore, Respondents decided to extend the PPE ACLs' probation because the employees' performance evaluations indicated the need for further training. Thus, Respondents argue that the decisions were supported by legitimate business reasons. The Board finds that the Union established a *prima facie* case, and that the City did not demonstrate legitimate business reasons for the adverse employment actions. Therefore, the Board finds that Respondents violated NYCCBL §12-306(a)(1) and (3) by retaliating against the Union and its members.

BACKGROUND

The Trial Examiner held three days of hearings, at which eleven witnesses provided testimony, and found that the totality of the record established the following relevant facts.

DEP is a mayoral agency that manages and conserves the City's water supply. It distributes drinking water, and it collects and treats wastewater through a network of underground pipes and pumping stations. DEP's Bureau of Water and Sewer Operations ("BWSO") is responsible for the maintenance and repair of water mains and sewers throughout the City. At BWSO, ACLs and Construction Laborers ("CLs") repair and maintain water supply and sewer lines.

ACLs are employed by DEP as a part of an intensive apprenticeship program. This program provides on-the-job training for the broad range of assignments a CL may encounter. Generally, the apprentice program lasts for two years, but DEP may extend an employee's apprenticeship, and therefore his or her probationary status, for as long as one additional year. ACLs that successfully complete the program are provisionally maturated into the CL title.[1]

On July 27, 2012, Deputy Commissioner James Roberts ("DEP Deputy Commissioner"), Director of Field Operations Anastasios Georgelis ("Field Director"), and Deputy Commissioner Richard Yates ("OLR Deputy Commissioner"), met with Union President Gene DeMartino ("Union President") as well as with other individuals from DEP, the New York City Office of Labor Relations ("OLR"), and the Union. At that meeting, the parties discussed DEP's plan to institute a pilot program in which ACLs and CLs would be trained to operate a hydraulic excavator ("mini-excavator"). (Union Ex. 1) The Union opposed this pilot program at the meeting, asserting that the operation of the mini-excavator did not fall within the duties appropriately assigned to ACLs and CLs, and that it presented safety concerns. The Union also sent a letter dated September 25, 2012, to the OLR Deputy Commissioner restating its opposition

[1] The ACL title is a non-competitive title. The CL title is a competitive title, so provisional employees must successfully complete the applicable Civil Service Exam.

to this proposal, and reiterating its position that the operation of the mini-excavator constituted out-of-title work for ACLs and CLs, and that it would be unsafe. (Union Ex. 1) The Union therefore "demand[ed] that the pilot program not be implemented." *Id.* The Union considered this work within the title of Motor Grader Operators and Tractor Operators. These titles earn "significantly more" than CLs and ACLs, and are represented by Local 15, another District Council 37 local ("Local 15"). (Pet. ¶ 7) The DEP Deputy Commissioner testified that, in the months following this meeting, the Union and representatives of DEP discussed the Union's concerns "*ad nauseam*." (Tr. 290, 317)

On January 29, 2013, the DEP Deputy Commissioner met with Local 15. The DEP Deputy Commissioner testified that Local 15 urged that its members should operate the mini-excavators instead of Local 376 members. However, the DEP Deputy Commissioner and others within DEP preferred Local 376 members operate the mini-excavators over Local 15 members because that would allow crew members from each Local to be used interchangeably and would allow each crew to work more efficiently. Additionally, the DEP Deputy Commissioner testified that public sector unions "across the board" encouraged DEP to in-source work and to have city employees "do more work." (Tr. 292) He thought the pilot program was a "situation that was kind of agreeable" because it in-sourced work. As a result of that meeting, the DEP Deputy Commissioner called the Union President from his car as he traveled to another location. The DEP Deputy Commissioner told the Union President that DEP intended to go forward with the pilot program and begin training ACLs and CLs to operate mini-excavators. The Union President reiterated the Union's position that work involving the mini-excavator was not within the job specifications of ACLs and CLs, and expressed continued concern about Union members' safety operating mini-excavators. According to the Union President, the DEP Deputy

Commissioner "basically said that … if they were going to go forward and give the work back to Local 15 that would impact my membership." (Tr. 27) The DEP Deputy Commissioner testified that he told the Union President "if [DEP uses] Local 15, it will reduce [the Union's] headcount."[2] (Tr. 327-328) Before the call ended, the Union President told the DEP Deputy Commissioner that "the local was still going to go forward and fight them if they decided to go and put our people on the excavator." (Tr. 28) The DEP Deputy Commissioner sounded aggravated during the phone call, according to the Union President.

The DEP Deputy Commissioner testified that he called the Union President because he, as well as others who attended the meeting with Local 15, could not understand why the Union was reluctant to participate in the pilot program. He wanted to know "why [the Union] would be pushing, if they were pushing, to have another Local do the work." (Tr. 288, 290) The DEP Deputy Commissioner stated that this phone call was not meant to convince the Union to support the program. However, when asked on cross-examination if, at the time of the phone call, he would "rather have Local 376 support the excavator program," the DEP Deputy Commissioner stated "…I don't want to say that I'm indifferent, but I think that from a sort of practical standpoint it was a little bit perplexing to me that Mr. DeMartino was moving to a position which would have one less of his membership involved in the crew." (Tr. 322-323)

On January 31, 2013, two days after the DEP Deputy Commissioner called the Union President, the Field Director began the process of considering his initial recommendations as to whether the nine ACLs at issue here would be maturated to CLs. The record shows that the Field Director discussed this review process with the DEP Deputy Commissioner on several

[2] At the hearing, the DEP Deputy Commissioner explained that there were only a certain number of workers required for a given job, and if Local 15 was operating the mini-excavator there would be less work for the Union's members.

occasions. The first of these discussions was at the end of January. (Tr. 198) With regard to these discussions, the DEP Deputy Commissioner stated "our doors are two doors apart and we talk on a fairly regular basis." (Tr. 335) The Field Director testified that he began "looking at it closely" towards the end of February 2013. (Tr. 180)

In late February 2013, DEP extended the probationary period of ACL Shiulaz. The Field Director testified that Shiulaz's probationary period was extended because he allowed his Commercial Driver's License ("CDL") to lapse. Indeed, ACL Shiulaz was given a written warning dated November 28, 2012 for being without the required license for three days. The letter was then included in the employee's personnel file in January 2013. *Id.* The Field Director testified that he spoke with the Union President after Shiulaz's probationary period was extended. The Field Director testified that, during the conversation, he volunteered to call the Union President if they "were going to determine not to maturate any of them." (Tr. 183)

DEP began implementing the pilot program as planned in March of 2013 and assigned the mini-excavator duties to Local 376 members. By March 20, 2013, the Field Director had prepared initial recommendations seeking the termination of four of the members of the ACL class and the extension of probation for three of the remaining four members of the class. The Field Director had not made a final decision regarding the last of the nine ACLs at issue here, ACL Nereida, so he requested ACL Neredia's time and leave records for further review. The Field Director asked a DEP Bureau Administrator to prepare paperwork effectuating his recommendations subject to the approval of the DEP Deputy Commissioner. Despite his prior representation, the Field Director did not notify the Union President that DEP decided not to maturate the other ACLs. The Field Director testified that he did not call him because he was not at work on March 21st when the final decision was made.

The Union filed a grievance on March 21, 2013, regarding the mini-excavator pilot program addressing its out-of-title concerns. (Union Ex. 2) That same day, the DEP Deputy Commissioner reviewed and approved the Field Director's recommendations. The Deputy Commissioner also reviewed Nereida's records and decided to terminate him. Subsequently, the Department of Citywide Administrative Services ("DCAS") authorized DEP's request to extend the probationary period of the four ACLs. On March 22, 2013, the nine ACLs at issue in this case were notified of DEP's employment decisions. The record contains no evidence that the City warned any of the Terminated ACLs that management had concerns related to their time or attendance at any point during this two year period. Both the Field Director and the DEP Deputy Commissioner testified that they did not know the Union filed a grievance concerning the mini-excavator pilot program until March 27, 2013, and that the issues raised in the grievance did not impact the employment actions at issue. (Tr. 191-192, 306-307).

The Union President and the Union's Secretary Treasurer Thomas Kattou ("Secretary Treasurer") testified that they could not recall another instance in which ACLs were terminated for time and leave issues. (Tr. 58, 96) Each testified from at least 25 years of experience. On cross examination, the Union President admitted that multiple ACLs and CLs have been fired on the same day, for example as a result of bribery charges. He also admitted that ACLs and CLs have been terminated for failing to retain a valid CDL or for having issues with drugs. However, no additional evidence was provided to rebut the Union's allegation that DEP has never before failed to maturate an entire class of ACLs.

The Field Director and DEP Deputy Commissioner testified that the employment actions in issue were taken based on the ACLs' performance evaluations, time and leave records, and other relevant conduct. The Field Director testified that he recommended termination if any of

the nine ACLs had poor time and leave records. The Field Director testified that the five terminated ACLs took too many unscheduled days off, often immediately before or after a regularly scheduled day off ("RDO"). He also considered whether ACLs took time off without pay, indicating they took time off without first accumulating sufficient annual leave or sick leave. The Field Director also testified that he decided to extend the probation of four ACLs, in part, because their supervisors indicated that they needed more training.

Both of Respondents' witnesses emphasized the importance of ACLs' time and leave records in the review process. ACLs and CLs are expected to be dressed, in the yard, and ready to work at the beginning of their shift. Lateness and unscheduled absences cause operational problems and delay work crews. These delays lead to issues managing work load and costs associated with overtime. However, both the Field Director and the DEP Deputy Commissioner testified that the employment decisions were not meant to send a message about time and leave to ACLs and CLs.[3]

ACLs and CLs must clock-in and clock-out each day using the Citytime Data Collection Device, a hand scanner with an accompanying key pad. Employees are expected to record their time immediately upon arrival and before leaving work. The Field Director testified that he closely examines "missed punches" because employees abuse the missed punch system to conceal lateness. An employee is permitted to submit a Payment Request for Undocumented Work or a Temporary Punch Form if the employee is reporting to a new or offsite location, there

[3] In the past, employees in the CL title had significant issues with lateness and abusing the sick leave policy but BWSO's time and leave statistics have recently improved. The DEP Deputy Commissioner testified that time and leave has been a problem since he took his position with DEP, but in 2013 attendance problems decreased 70% compared to the same months in 2012. The DEP Deputy Commissioner credited this improvement, at least in part, to a relatively new absence control policy that is applied to many titles at DEP, including CLs.

is a technical problem with the hand scanner or, on occasion, if the employee forgets to clock-in. Employees must get prior authorization to submit a Temporary Punch form where they are reporting to a new or offsite location. These instances are considered a "missed punch." A supervisor is "required to confirm the reason for an employee's inability to punch" and sign the appropriate form. (City Ex. 6) If a supervisor confirms the employee tried to clock-in properly but was prevented by technical difficulties, the missed punch will be excused. Where there is no record the employee attempted to clock-in, the missed punch may be considered unexcused.

The Field Director testified that he also reviews which days employees use sick leave to determine if an employee is abusing the sick leave policy by using it as a means of extending a weekend or vacation. The Field Director testified that an employee who takes unscheduled sick days immediately before or after an RDO shows a pattern of abusing the sick leave policy.

During the hearing, the Field Director discussed the recommendations he presented to the DEP Deputy Commissioner in detail. With regard to ACL Tatum, the record indicates that the Field Director considered three main factors in recommending his termination. ACL Tatum received a warning letter in December 2012 for allowing his CDL to lapse. The Field director also considered time and leave records, such as the fact that ACL Tatum took time off without pay which indicated that the employee took time off without accrued annual leave available. Finally, he alleged that ACL Tatum had an unusual absence related to a random drug test, but did not provide any details of the event.

With regard to the other Terminated ACLs, the Field Director testified that that several ACLs took too many unscheduled days off, often immediately before or after an RDO. Also, ACL Lapompe took time off without pay, again indicating the employee took time off without accrued annual leave available. The Field Director admitted that he "never told [the ACLs] or

[told] someone else to tell them that their time and leave records were not sufficient for them to be made construction laborers." (Tr. 206) The Field Director also testified that, while conducting the review, he was not aware of how many sick days each employee was allotted or if any of the employees used most or all of their accrued time.

ACLs did receive feedback through quarterly performance evaluations. These evaluations are a two page preprinted form completed by an ACL's supervisor. The performance evaluations allow a supervisor to rank an employee from "Unsatisfactory" to "Outstanding" both overall and in separate "Critical Tasks" such as "engages in the repair of leaking or broken catch basins, sewers, castings, and other appurtenances." The performance evaluations also provided a supervisor with space to mark the number of hours or days an ACL was absent or out sick, "other relevant information (including punctuality, impact on the work of others, etc.)," and "recommendations for employee's development." (Union 3-11)

In contrast to the Field Director's testimony, a review of the ACL's performance evaluations show that none of the ACLs received negative comments regarding time and leave from their supervisors. When supervisors did comment on an ACL's time and leave or punctuality, the comments were positive. The performance evaluations entered into evidence for ACL Lapompe show that he took 11.5 sick days from March 2011 through January 2013.[4] (Union Ex. 5) ACL Lapompe did not receive any comments concerning his attendance or punctuality from his supervisors. The record shows that ACL Tatum took 18 sick days between March 2011 and January 2013. (Union Ex. 11) ACL Goslin took eight and one half sick days from March 2011 to January 2013. (Union Ex. 10) ACL Goslin's performance evaluations do not comment on his time and leave records. Furthermore, ACL Goslin received an overall rating

[4] While the evidence includes seven performance evaluations for most ACLs, Union Exhibits 5 and 7, for ACLs Lapompe and Shiulaz, only provide six performance evaluations.

of "outstanding," the highest rating, in October 2012. The same performance evaluation indicates that ACL Goslin used eight hours of sick leave during the third quarter of 2012. *Id.* ACL Wagner used six sick days from March 2011 through January 2013. (Union Ex. 8) Four of those six sick days were taken in the same three month period, while ACL Wagner took zero sick days in four other quarters. *Id.* ACL Wagner's supervisors commented that he "arrives to work on time" and that he is "always on time and ready to work." One supervisor also wrote that ACL Wagner should "keep up the good work." *Id.* Finally, ACL Nereida used roughly eight work days of sick leave from March 2011 through January 2013. (Union Ex. 9) ACL Nereida used about six days of sick leave in one quarter, ending in July 2012, but did not use any sick leave in five other quarters. However, in the performance evaluation for that quarter, his supervisor stated that "Mr. Nereida is always on time, ready to work on a daily basis. In the same evaluation the supervisor stated that ACL Nereida needed "little to no supervision to carry out daily tasks" and that he was "an asset to [the] department." *Id.* In October 2012, while reviewing the only other quarter in which ACL Nereida used sick leave, his supervisor stated that ACL Nereida is "very punctual," "an outstanding worker," and that he "continues to do all aspects of the job effortlessly, an [is] a very reliable person." *Id.*

The Field Director also discussed the PPE ACLs. He testified that he decided to extend the probation of the three ACLs, in part, because their supervisors indicated that they needed more training; these comments appear in the section of ACLs' performance evaluations entitled "supervisor's recommendations for employee's development."[5]

[5] The Field Director testified that ACLs rotated through four phases: water repairs, sewer repairs, water maintenance, and sewer maintenance. Therefore, each evaluation was important in his decision because they focused on different tasks. An ACL "needs to be adequate in all phases of operation." (Tr. 189)

For example, in reference to ACL Bristol, the Field Director determined he was not prepared to be maturated because supervisors' comments indicated the ACL needed additional training. ACL Bristol received seven performance evaluations throughout his initial probationary period. On January 21, 2012, one supervisor wrote in the same section of the performance evaluation that the ACL should "continue to learn and grow in [his] work skills." (Union Ex. 6) In April 2012 another supervisor wrote "needs supervision to learn job properly." *Id.* The July 2012 performance evaluation states "[t]raining will strengthen employee's performance." *Id.* The January 2013 performance evaluation stated that "Mr. Bristol should keep up his good attitude and continue his learning process… needs to familiarize map." *Id.* In ACL Bristol's final performance evaluation, his supervisor complimented his environmental health and safety ("EH&S") skills and stated that ACL Bristol shows good skills as a potential laborer." *Id.*

With regard to ACL DelPonte, supervisors commented in the section of his performance evaluation entitled "supervisor's recommendations for employee's development" to "keep up the good work and think safety," "keep working to work safely" and "practice safety first." (Union Ex. 4) The Field Director testified that these comments led him to extend ACL DelPonte's probation.[6] (Tr. 213) ACL DelPonte's performance evaluations also state that he is "a very good employee," "an asset to the department" and that he is "on his way to being an outstanding laborer." *Id.* He received four "very good" overall ratings, including his final three performance evaluations, and three "good" overall ratings. *Id.*

[6] The Field Director also indicated that he considered ACL DelPonte's time and leave records. He testified that ACL Delponte was late "five or six times," from twenty minutes to two hours. However, the Field Director testified that ACL DelPonte was not terminated because he did not "demonstrate excessive unscheduled absenses" like some of his coworkers. The Board notes that ACL DelPonte's last performance evaluations stated: "Mr. DelPonte is a very good worker. Comes to work every day and follows supervisor's directions." (Union Ex. 4)

The Field Director stated that ACL Coffey's performance evaluations showed he needed further training, such that he should not be maturated, because one of his evaluations stated "training will improve employee's performance." (Union Ex. 3) However, this ACL's most recent performance evaluation stated that he is "a pleasure to work with" and he is "on his way to become an excellent laborer." *Id.* It does not contain any recommendations for further development. A performance evaluation from April 2012 states that this ACL "is an excellent, self-motivated, hardworking employee with a very good work ethic" and that he "shows definite potential to be a future supervisor." (Union Ex. 3)

The Union filed an improper practice petition on March 26, 2013, alleging that DEP retaliated against the Union for opposing the mini-excavator pilot program by terminating the Terminated ACLs and extending the probation of the PPE ACLs. The Union also claims DEP intended to discourage participation in future union activity and undermine the Union's status as bargaining representative. The Union seeks a make-whole remedy for each of the nine employees, including, but not limited to, reinstatement and back-pay.

POSITIONS OF THE PARTIES

Union Position

The Union asserts that Respondents retaliated against it for protected activity, in violation of NYCCBL §§ 12-306(a)(1) and (3), when it terminated five employees and extended the probation of three others. The Union asserts that it established a *prima facie* case of retaliation. The Union engaged in protected activity when the Union President and other union officials vigorously opposed the mini-excavator pilot program and ultimately filed a grievance challenging the program. The DEP agents responsible for these decisions, the DEP Deputy

Commissioner and the Field Director, had direct knowledge of this protected activity. They both attended a meeting in July 2012 at which the Union President and other Local 376 leadership stated that the Union opposed the program. Furthermore, the Union President communicated the Union's intentions to continue to oppose the program during his call with the DEP Deputy Commissioner in January of 2013.

Additionally, the Union alleges that its protected activity was a motivating factor in the decision making process. The Union argues that the proximity in time of the Union's opposition to the pilot program and the employment actions at issue here, when considered in light of several other facts, shows Respondent's retaliatory motive. The Union President gave unrebutted testimony that DEP has not failed to maturate an entire class of ACLs to CLs after the completion of the standard two year probationary period in the past 25 years. During the January 29, 2013 phone call with the Union President, the DEP Deputy Commissioner threatened that further opposition to the mini-excavator pilot program would negatively affect the Union's members by reducing the number of workers on the mini-excavator work crew. The employment actions were also executed close in time to the beginning of the training for the pilot program. The Union argues that this timing was meant to chill any future Union activity related to the pilot program. Also, the Union asks the Board to consider prior decisions in which it found that DEP retaliated against various unions and employees in violation of the NYCCBL when deciding whether union animus exists in this case.

The Union states that the record does not support Respondents proffered legitimate business reasons. The testimony concerning the decision making process is limited to baseless justifications that do not conform to any documentary evidence. The performance evaluations do not indicate a need for further training or any time and leave problems. No other time and leave

records were provided to support Respondents' assertions. Moreover, the Union alleges that ACLs did not receive any negative feedback regarding time and leave policies during their two year probationary period and were not provided with any justification when they were informed of Respondents' decision. The Union further asserts that the Field Director's testimony regarding ACL Tatum's alleged absence surrounding a drug test shows Respondents' justifications to be pretext. The Field Director testified that he considered this incident in his decision to terminate ACL Tatum, but he admitted he did not know the details of what happened. The Union also notes that the Field Director did not phrase his allegation the same way each time he spoke of it. The Field Director claimed ACL Tatum "excused himself without authorization from the jobsite, from the yard," then "he unauthorized left the building," and finally "he unauthorized excused himself from the urine." The Union argues this uncertainty is not compatible with the Field Director's assertion that this incident was important in his decision. Furthermore, the Union states that drug testing is heavily regulated and, as such, a great deal of paperwork would be required to document an incident like this. However, the City did not provide any such documentation in support of the Field Directors allegation.

Similarly, the Union states that the testimony regarding the decision to terminate ACL Nereida also shows pretext. The Field Director testified that he did not make a recommendation regarding ACL Nereida and requested additional time and leave records for the DEP Deputy Commissioner to review when making the final decision. The Union argues that the DEP Deputy Commissioner allocated insufficient time to review these records because there was less than a day between the request for the records and the final determination. It argues that this indicates the decision was not truly based on these records, but rather a retaliatory act. The

Union seeks a make-whole remedy for each of the nine employees, including, but not limited to, reinstatement and back-pay.

Respondents' Position

First, Respondent's argue that the employment actions DEP took concerning the nine ACLs at issue in this case were within DEP's managerial rights pursuant to NYCCBL § 12-307(b) and the Personnel Rules. NYCCBL § 12-307(b) provides that a public employer has the right to relieve employees for legitimate reasons and otherwise "exercise complete control and discretion over its organization." Furthermore, the Personnel Rule § 5.2.1(b) expressly provides a public employer the power to terminate a probationary employee prior to the end of the employee's probationary period. In this case, Respondents considered relevant documents in determining whether to maturate an employee, extend the employee's probationary period or terminate the employee. Respondents determined that it was appropriate to terminate five employees and extend the probationary period of four others based, in large part, on the employees' time and leave records and performance evaluations. Therefore, Respondents acted within their managerial rights.

Respondents also contend that the Union did not demonstrate a *prima facie* case of retaliation. First, while Respondents acknowledge that the Union engaged in protected activity by filing a Step III grievance on March 21, 2013, they assert that the agents responsible for the employment actions were not aware of the Union's protected activity. No one within DEP knew of the grievance until several days after it was filed. Furthermore, both the Field Director and the DEP Deputy Commissioner testified that they did not learn of the grievance until March 27, 2013. Second, Respondents argue that the Union failed to show a causal connection between the alleged improper practice and the protected activity. The Union mistakenly relies on the

temporal proximity of the protected activity and employment actions. Respondents argue that the decisions at issue were antecedent to the Union's protected activity. Regardless, temporal proximity alone does not establish a causal link and the Union did not provide any additional evidence to allow the Board to infer causation.

Further, Respondent's assert that the January 2013 phone call between the Union President and the DEP Deputy Commissioner did not include a threat of retaliation. The record shows that the DEP Deputy Commissioner did not use the words "grievance" or "complaint" during that call. Furthermore, it is illogical to assert that DEP retaliated against a group of ACLs because of protected activity related to CLs, a different title. Respondents also argue that causation cannot be inferred because the high cost of training an ACL requires that the decision to terminate ACLs or extend their probationary period to be made carefully. Finally, the Union President's testimony regarding the unusual nature of this employment decision is merely conjecture and speculation and therefore cannot support a claim of retaliation. Respondents' argue that the Union President "conveniently forgot," when questioned, about alleged instances of ACLs being discharged for issues related to time and leave policies.

Whether or not the Union proved a *prima facie* case of retaliation, Respondents assert it had a legitimate business reason for its actions. In reviewing the employees' records, Respondents determined that five employees exhibited a pattern of suspicious absences and other evidence of abuse of DEP's time and leave policies. Respondents therefore decided to terminate those employees. Furthermore, Respondents discovered evidence that three employees required further training in at least one area prior to maturating into the CL title. Accordingly Respondents decided to extend their probationary periods. The fourth PPE ACL's probationary period was extended because he allowed his CDL, the only requirement for the ACL and CL job,

to lapse for several days. Therefore, Respondents would have taken the same employment actions at issue here regardless of the Unions protected activity.

Respondents also state that the Union did not prove an independent claim under NYCCBL § 12-306(a)(2). Respondents' actions were not inherently destructive, as they did not create an obstacle to future bargaining or have a chilling effect on future protected activity. Also, Respondents did not dominate the Union, or interfere with its administration. Neither Respondent involved itself in internal union matters. Therefore, Respondents argue that the petition should be dismissed in its entirety.[7]

DICUSSION

It is well settled that an employer's actions may constitute an improper practice, notwithstanding management's statutory rights, if the actions are taken for coercive or discriminatory reasons. *See Bowman*, 39 OCB 51, at 16 (BCB 1987). A public employer has the right to "determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; … [and] determine the methods, means and personnel by which government operations are to be conducted." NYCCBL **§** 12-307(b). Nevertheless, this Board may find a violation of NYCCBL § 12-306(a)(1) and (3) if the employment actions were taken in retaliation for protected union activity.

[7] Although Respondents' address an independent NYCCBL § 12-306(a)(1) claim in their Answer and Brief, the Board does not find that the Union pled this claim and therefore does not consider it here.

To establish discrimination under the NYCCBL, we apply the test enunciated in *City of Salamanca,* 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman,* 39 OCB 51 (BCB 1987). Pursuant to the test, 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 DC* 37 *L. 376*, 6 OCB2d 18, at 13 (BCB 2013). As to the motivation behind the employer's actions, "typically, [motivation] is proven through the use of circumstantial evidence, absent an outright admission." *Burton*, 77 OCB 15, at 26 (BCB 2006**)**; *see also DC 37 L. 376*, 6 OCB2d 18, at 14, *CEU, L. 237*, 67 OCB 13, at 9 (BCB 2001). However, to establish motive, "a petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22 (BCB 2005). Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001); *see Kaplin,* 3 OCB2d 28 (BCB 2010). In ruling on the causation prong of the *Bowman* test, the Board will consider the temporal proximity between the protected union activity and the retaliatory action, in conjunction with other facts supports a finding of improper motivation. *See DC 37 L. 376*, 6 OCB2d 18, at 15. *See also Colella,* 79 OCB 27, at 54 (BCB 2007) (finding causation where the timing of relevant events was suspicious and repeated, and Petitioner also credibly testified about comments made by his supervisors which tended to prove union-animus). However, temporal proximity alone is not sufficient; Petitioner must provide more than mere assertions of union animus. *Id*.

Where the Board finds Petitioner has proven these facts, Petitioner has established a *prima facie* case of retaliation. The employer may attempt to refute the showing on one or both

elements underlying the *prima facie* case or demonstrate that legitimate business motives would have caused the employer to take the same actions even in the absence of Petitioner's union activity. *DC 37 L. 376*, 6 OCB2d 18, at 15. *See also Local 621, SEIU*, 5 OCB2d 38 (BCB 2012).

Here, the Board finds that the Union successfully established a *prima facie* case of retaliation. The DEP Deputy Commissioner and the Field Director, both of whom were integrally involved in the employment decisions at issue, knew of the Union's protected activity. Although the Union did not file a formal grievance until March 21, 2013, the Board finds that the Union engaged in union activity protected by the NYCCBL prior to the filing of the grievance. Under the NYCCBL, any activity that relates, directly or indirectly, to the employment relationship and is in furtherance of employees' collective welfare is protected. *Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004). For example, participating in labor-management meetings on behalf of other employees is protected activity. *Id.* Here, the Union engaged in protected activity when the Union President and other elected union officials, acting on behalf of ACLs and CLs, strongly opposed the mini-excavator pilot program. Since July 2012, the Union President has met with officials at DEP and OLR to prevent the Union's members from being assigned what it considered unsafe and out-of-title work.

The record also clearly indicates that both the Field Director and the DEP Deputy Commissioner knew of the Union's protected activity. They first learned of the Union's opposition to the pilot program as early as the July 27, 2012 meeting where the parties first discussed DEP's plan to institute the mini-excavator pilot program and the Union clearly voiced its opposition. Furthermore, the DEP Deputy Commissioner, who was responsible for the final decision regarding these employees, was again reminded of the continued union activity during

the January 29, 2013 phone call where the Union President stated that "the local was still going to go forward and fight them if they decided to go and put our people on the excavator." (Tr. 28)

Turning to the second prong of the *Bowman* test, the Board finds that the Union's opposition to the mini-excavator pilot program was a motivating factor in DEP's decision to terminate five ACLs and extend the probation of four others. The close temporal proximity of the Union President's affirmation that the Union would continue to oppose the pilot program and the initial conversations between the DEP Deputy Commissioner and the Field Director regarding the adverse employment actions raises suspicion of a retaliatory motive. As mentioned above, the Union President made the Union's opposition to the pilot program clear on January 29, 2013. By his own testimony, the Field Director began considering the employment decisions at issue on January 31, 2013, just two days after that phone call, even though the final decision was not required until April 2013 when the probationary period ended. This suspicious timing does not stand alone. It is apparent from the record that failing to maturate an entire class of ACLs at the end of the two year probationary period is an unprecedented action. The Union President and Secretary Treasurer testified that they could not remember and instance in which an ACL was terminated for time and leave issues. Moreover, Respondents did not provide any evidence of an instance in which an entire class of ACLs did not maturate at the end of the standard two year probationary period. Also, the fact that after extending the probationary period of ACL Shiulaz, the Field Director offered to call the Union President if there were any other issues that would affect the maturation of the other eight ACLs suggests that it would be unusual or otherwise unexpected for the other ACLs to not be maturated. These facts, when considered in light of the temporal proximity of the union activity and the employment actions,

lead the Board to find that the protected Union activity was a motivating factor in the decisions at issue.

Additionally, the Board does not find all of the adverse employment decisions at issue supported by legitimate business reasons. ACLs are probationary employees who may be fired at any time before the end of their probationary period. They do not have disciplinary rights under the Civil Service Law. Respondents assert justifications for terminating the five Terminated ACLs and extending the probation of the four PPE ACLs. First, the Field Director and DEP Deputy Commissioner determined that the time and leave records for each of the Terminated ACLs contained questionable absences, excessive missed punches and other evidence of possible abuse of DEP's time and leave procedure. (City Brief 20) Secondly, the quarterly evaluations of the PPE ACLs revealed the need for further training. (City Brief 22) Furthermore, Respondent's provide additional legitimate business reasons for their decision with regard to ACL Shiulaz and ACL Tatum. Respondents claim that ACL Shiulaz had his probationary period extended because he allowed his CDL to lapse. ACL Tatum was terminated because, in addition to allegedly poor time and leave records, Respondents claim that ACL Tatum allowed his CDL to lapse and had a suspicious absence related to a mandatory drug test. Respondents argue that this evidence of time and leave abuse and inexperience indicate that DEP would have made the same decisions in the absence of protected union activity.

This Board finds that Respondents' decision to extend ACL Shiulaz's probationary period is supported by a legitimate business reason. However, after considering the full record, the Board finds Respondents' justifications with regard to the other eight ACLs unpersuasive. *See DC 37 L. 376*, 6 OCB2d 18, at 15; *DEA*, 79 OCB 40, at 29 (BCB 2007) (noting that "unconvincing justifications offered by the City's witnesses support a finding of pretext"). *See*

also District Council 37, AFSCME, 77 OCB 33, at 35 (BCB 2006) (noting that "when a public employer offers, as a legitimate business defense, a reason that is unsupported by or inconsistent with the record, the defense will not be credited by this Board.")

With regard to ACL Shiulaz, the Field Director testified that retaining a CDL is the only job requirement for ACLs and CLs and that ACL Shiulaz needed to understand the importance of keeping the license active. This testimony is supported by the fact that the decision was made to extend ACL Shiulaz's probationary period within several weeks of a warning letter regarding this incident being placed in ACL Shiulaz's personnel file. Therefore, this Board finds that Respondents' would have extended ACL Shiulaz's probationary period regardless of the Union's protected activity. Having established a legitimate business reason, the Board does not find that Respondents violated NYCCBL § 12-306(a)(1) and (3) by extending ACL Shiulaz's probationary period.

With regard to the Terminated ACLs, both the DEP Deputy Commissioner and the Field Director emphasized the importance of time and attendance when evaluating whether the Terminated ACLs would be maturated. However, none of the Terminated ACLs received a formal or informal warning regarding DEP's time and leave policies at any time during their two year probationary period. In contrast, DEP chose to provide each ACL with seven quarterly evaluations, and these quarterly evaluations were presumably intended to aid ACLs in learning and conforming to DEP policies during their training. Further, each supervisor was well aware of the importance of time and leave. Thus, it is appropriate to consider the lack of any formal or informal indication that the five terminated ACLs were in violation of DEP policies when evaluating Respondents legitimate business reasons. Here, the Field Director never told the ACLs, or instructed supervisors to tell them, that they may be taking too much leave time.

Additionally, the ACL's performance evaluations show that none of the ACLs received negative comments regarding time and leave from their supervisors. The performance evaluation requests that a supervisor comment on "other relevant information (including punctuality, impact on the work of others, etc.)." The supervisors comments on an ACL's time and leave were positive: comments included that ACL Nereida was "very punctual," and that ACL Wagner "arrives to work on time" and was "always on time and ready to work."

Moreover, the evidence demonstrates that DEP recognized the importance of issuing warning letters as evidenced in its action issuing warning letters to ACLs who allowed their CDL to lapse. However, its failure to issue formal warning letters regarding time and leave issues undermines Respondents' assertion that the time and leave issues were the reason ACLs were terminated.

The Field Director testified in each case that he reviewed the ACLs' time and leave records and determined that the records warranted termination. However, these records are not in the record before us. The performance evaluations indicate the amount of sick leave taken by each ACL but there is little within the record to place these numbers in context. In contrast to the Field Director's testimony, ACLs received high marks and compliments in their evaluations even in quarters where they utilized sick leave. For example, ACL Neireda, who was terminated for time and leave abuses, took sick leave in only two of the seven quarters in which he was evaluated. (Union Ex. 9) He took 40 hours of sick leave in one quarter, and fifteen hours in another, for a total of 55 hours over almost two years. *Id.* Nothing in the record indicates that the Field Director or the DEP Deputy Commissioner investigated ACL Nereida's use of sick leave. Furthermore, his supervisor stated he was "always on time, ready to work" and that he needs little to no supervision" in the quarter in which he took 40 hours of sick leave. *Id.* His

supervisor stated that he was an "outstanding worker" and a "very reliable person" in the quarter in which he took 15 hours of sick leave. In both quarters in which ACL Nereida used sick leave he received an overall rating of "very good." *Id.*

In addition to allegedly poor time and leave records, Respondents argue that their decision to terminate ACL Tatum was also based on ACL Tatum allowing his CDL to lapse and a supposedly suspicious absence related to a random drug test. Here, the Board is not persuaded that the reasons offered were legitimate. A significant amount of time passed between when ACL Tatum had a warning letter placed in his personnel file for allowing his CDL to lapse and Respondents deciding to terminate ACL Tatum. Furthermore, the record does not contain any information with which the Board could evaluate the supposed absence surrounding a random drug test. The Board is not convinced that the Field Director fully considered this event as he testified: "I wasn't there physically. He was asked to go submit for a test and he unauthorized excused himself from the urine. Whether he ended up taking the test, what transpired, I'm not sure of the facts." (Tr. 200) Further, there is no other evidence related to this incident within the record to prove there were legitimate grounds for termination. As a result, this Board does not find legitimate business reasons for the termination of which relate to ACL Tatum.

Turning to the other three PPE ACLs, Respondent's allege that the ACLs' performance evaluations indicated they needed further training before maturation. The Board does not find that the record supports that justification. First, the section of the performance evaluation relied upon by the Field Director requires the supervisor to provide constructive criticism, asking for the "supervisor's recommendations for employee's development." Therefore, it should not have been surprising that supervisors provided general comments regarding potential areas of improvement. Furthermore, while the Field Director testified that each evaluation was

significant because ACLs rotate through assignments, Respondents did not explain why other aspects of the performance evaluation such as the ACLs' "overall rating" was apparently not considered. For example, the Field Director testified that ACL DelPonte was not maturated because his supervisors stated in his performance evaluations: "keep up the good work and think safety," "keep working to work safely," and "practice safety first." But, ACL DelPonte received four "very good" overall ratings and comments that he is "a very good employee," "an asset to the department" and "on his way to being an outstanding laborer." In reference to ACL Bristol, the Field Director determined he was not prepared to be maturated because a supervisor commented "continue to learn and grow in [your] work skills" in a January 2012 performance evaluation and "needs supervision to learn job properly" in an April 2012 performance evaluation. But, ACL Bristol's final performance evaluation compliments his EH & S skills and stated that ACL Bristol "shows good skills as a potential laborer." One of ACL Coffey's performance evaluations stated "training will improve employee's performance." The Field Director testified that this one comment led him to believe that ACL Coffey could not be maturated. In addition, this ACL's most recent performance evaluation stated that he is "a pleasure to work with" and he is "on his way to become an excellent laborer" and a performance evaluations from April 2012 states that this ACL "is an excellent, self-motivated, hardworking employee with a very good work ethic" and that he "shows definite potential to be a future supervisor." When considered as a whole, the performance evaluations do not support Respondent's assertion that there was a legitimate business reason for extending the probationary period of these ACLs.[8]

[8] In view of the lack of any evidence in the record to support a finding that the Union was dominated or interfered with, we dismiss the charge pursuant to § 12-306(a)(2) which, in any

Having found that Respondents retaliated against the Union in violation of §12-306(a)(1) and (3) by terminating five members and extending three members' probationary period, the Board is empowered to devise a make-whole remedy that remains firmly grounded in the violation at hand. NYCCBL § 12-309(a). The make whole remedies, however, must be drawn to be consistent with Respondents' right to make appointments based on merit and their statutory powers of selection. *See Levy v. The City Commission on Human Rights*, 196 A.D.2d 214, 217 (1st Dept. 1994) (*citing Matter of Green v. Commissioner*, 105 A.D.2d 1037, (3d Dept. 1984)). Therefore, we will not appoint the remaining ACLs at issue here to the permanent title of Construction Laborer even though, on this record, we find no legitimate basis for not maturating these employees. Rather, this Board orders that Respondents reinstate Richard Goslin, Rainier Lapompe, Eulalio Neredia, Shamel Tatum, and Anthony Wagner to the title Apprentice Construction Laborer for a period of time equal to that remaining on their original probationary period and reevaluate each employee for maturation into the title Construction Laborer within that time. Further, we order Respondents' to reevaluate Philip Bristol, Daniel Coffey, and Nicolas DelPonte for maturation into the title Construction Laborer without any consideration of DC 37, Local 376 or its members' protected activity within 30 days of this Order.

Finally, the Board orders that Respondents remit any back pay and lost benefits resulting from Respondents' retaliatory actions to Apprentice Construction Laborers Philip Bristol, Daniel Coffey, Nicolas DelPonte, Richard Goslin, Rainier Lapompe, Eulalio Nereida, Shamel Tatum, and Anthony Wagner.

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event, the Union has not pressed at the hearing or in its brief, and thus may be deemed abandoned.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by DC 37, Local 376, docketed as BCB-3076-13 be, and the same hereby is, granted; and it is further

ORDERED, that Respondents and their agents cease and desist from retaliation against DC 37, Local 376 and its members in exercise of rights protected by the NYCCBL; and it is further

ORDERED, that Respondents reinstate Richard Goslin, Rainier Lapompe, Eulalio Neredia, Shamel Tatum, and Anthony Wagner to the title Apprentice Construction Laborer for a period of time equal to that remaining on their original probationary period and reevaluate each employee for maturation into the title Construction Laborer within that time; and it is further

ORDERED, that Respondents reevaluate Philip Bristol, Daniel Coffey, and Nicolas DelPonte for maturation into the title Construction Laborer without any consideration of DC 37, Local 376 or its members' protected activity within 30 days of this Order; and it is further

ORDERED, that Respondents remit back pay and any lost benefits resulting from Respondents' retaliatory actions to Apprentice Construction Laborers Philip Bristol, Daniel Coffey, Nicolas DelPonte, Richard Goslin, Rainier Lapompe, Eulalio Nereida, Shamel Tatum, and Anthony Wagner.

Dated: December 19, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER