

***Colella, 7 OCB2d 13 (BCB 2014)***

(IP) (Docket No. BCB-2630-07)

***Summary of Decision:*** Petitioner filed a verified improper practice petition alleging that Respondents violated NYCCBL § 12-306(a)(1) and (3) by retaliating and discriminating against him because he successfully won reinstatement through the grievance procedure and engaged in other union activity. Respondents allege that Petitioner failed to prove that the majority of the alleged retaliatory acts ever took place. Also, Respondents claim that Petitioner failed to establish a *prima facie* case and that any actions taken by Respondents were supported by legitimate business reasons. The Board found that Respondents violated the NYCCBL by unjustifiably and disparately preventing Petitioner from utilizing department fax machines to file grievances, however the Board dismisses claims related to the deduction of annual leave, the payment or assignment of overtime hours, the holding of supervisor's conferences, and the use of department radios. Therefore, the Board granted the petition, in part, and denied it, in part. (*Official decision follows.*)

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Petition**

*-between-*

**BRIAN COLELLA,**

*Petitioner,*

*-and-*

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

*Respondents.*

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**DECISION AND ORDER**

On July 7, 2007, Brian Colella ("Petitioner") filed a verified improper practice petition against the City of New York ("City") and the New York City Fire Department ("FDNY")

(collectively, “Respondents”).<sup>1</sup> The petition alleges that Respondents violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by retaliating and discriminating against Petitioner because he successfully won reinstatement through the grievance procedure and engaged in other union activity. Respondents allege that Petitioner failed to prove that the majority of the alleged retaliatory acts ever took place. Also, Respondents claim that Petitioner failed to establish a *prima facie* case, and any actions taken by the Respondents were supported by legitimate business reasons. The Board finds that Respondents violated the NYCCBL by unjustifiably and disparately preventing Petitioner from utilizing department fax machines to file grievances, however the Board dismisses claims related to the deduction of annual leave, the payment or assignment of overtime hours, the holding of supervisor’s conferences, and the use of department radios. Therefore, the Board grants the petition, in part, and denies it, in part.

### **BACKGROUND**

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

Petitioner is an electrician for the Building and Maintenance Division (“BMD”) of the FDNY and a member of Local Union No. 3, IBEW (“Union”). Petitioner initially worked for the FDNY from 1989 until being terminated in June 2003. In January 2007, an arbitrator found that the FDNY wrongfully terminated Petitioner and reinstated him with back pay, benefits and

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<sup>1</sup> The Board did not commence proceedings in this matter upon the initial filing of the petition. Instead, the case was held in abeyance during the pendency of related court proceedings. Additionally, following the resolution of that litigation, the parties engaged in extended attempts to settle the matter. Once it was clear that the petition would not be settled, a hearing was scheduled.

seniority.<sup>2</sup> Supervisor of Electricians Ray Manetta (“SE Manetta”), one of Petitioner’s supervisors, testified that he saw an article in *The Chief* newspaper discussing Petitioner’s reinstatement in March 2007. (Tr. 425) He also testified that he is sure others saw the article as well; “things have a tendency of making the circuit ... it’s a small world.” (Tr. 425-426) Petitioner reported for work on March 5, 2007.

Here, Petitioner claims that from March 5, 2007, his first day back after being reinstated, through July 7, 2007, the date this petition was filed, Respondents took an array of actions in retaliation for pursuing and obtaining reinstatement and for Petitioner’s continued and frequent use of the grievance process. Petitioner alleges, as clarified at the hearing, five distinct varieties of retaliatory actions, specifically that: (1) he was not compensated for overtime in a timely manner, (2) he was forced to submit annual leave requests when he arrived late to work while other employees were not, (3) he was subjected to supervisor’s conferences which resulted in written memoranda warning of future discipline, and ordered to modify his time sheets to eliminate overtime, (4) he was excluded from overtime opportunities and earnings by his supervisors’ inequitable assignment of overtime, and (5) he was prevented from utilizing FDNY radios and fax machines in ways other electricians were not.

Petitioner had a contentious relationship with his supervisors when he arrived back at work in March 2007. On March 6, one day after Petitioner returned to work, Petitioner reported to the 58<sup>th</sup> Street Shop and met with Supervisor of Mechanics Dan Wallen (“SM Wallen”), Supervisor of Electricians Dominick Moretti (“SE Moretti”), and SE Manetta. During this meeting, Petitioner asked SM Wallen for a key to the Seaview, Staten Island facility, where

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<sup>2</sup> Subsequently, in June 2007, this Board found that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by denying Petitioner overtime between April 29 and June 24, 2003 and terminating Petitioner’s employment in retaliation for Petitioner’s protected union activity. *See Colella*, 79 OCB 27 (BCB 2007).

Petitioner reported to work prior to being terminated in June 2003. Petitioner told them that he needed a key to the facility to retrieve the work boots and other belongings he left in an assigned locker when he was terminated in June 2003. SM Wallen informed Petitioner that the facility was no longer used by BMD and that the lockers had been cleaned out. At some point after Petitioner's termination and before the closure of the facility, the FDNY distributed a notice to all current employees that the lockers would be cleaned out at the time the facility was scheduled to be repurposed. Petitioner did not receive that notice because he was not an employee at the time the notice was distributed.

Once he learned that his belongings had been thrown away, he contacted the Bureau of Investigations and Trials ("BITs") to report the "theft." (Tr. 153) (*See also* Pet. Ex. 25 (memorializing conversation with BITs)) He also filed a report with the New York City Police Department. (Pet. Ex. 44) According to Petitioner, shortly after he contacted BITs, SE Moretti and SE Manetta confronted him. SE Moretti stated "if you ever go downtown and call BITs again I'll have you written up." (Tr. 40) Neither SM Wallen nor SE Manetta, who were both present at the earlier meeting, recalled this incident. SE Manetta did not remember SE Moretti receiving a call from BITs that day or making that statement.

Once Petitioner was assigned a department vehicle, he began including time he spent commuting to and from work sites outside of his regularly scheduled work day on his time sheet as overtime. The FDNY previously had compensated electricians for this time, but it changed that policy between 2001 and 2003. Now, electricians choose to either report to the shop at 7:30 a.m. or to be assigned a department vehicle and commute to the work site each morning on their own time. (Tr. 240) Respondents provided a document in which Petitioner elected to use a department vehicle to commute to work sites on his own time, and to arrive at the work site at

7:30 a.m. (City Ex. F) The document was dated February 27, 2007, and signed by Petitioner under protest. Petitioner acknowledged that it was the department policy “that you are to get yourself to the worksite on your own time,” but alleged that the policy was never bargained over. (Tr. 175) Petitioner testified that, in his opinion, any work done prior to 7:30 a.m. is considered overtime. Since his “day starts from the moment you get in a fire department vehicle,” he stated that he should receive overtime payment for that time. (Tr. 174)

On a number of occasions during supervisor’s conferences Petitioner was ordered to remove his travel time from his time sheet, and reminded that he should not submit timesheets reflecting unauthorized overtime. Petitioner testified these orders required him to falsify timesheets. He continued to submit timesheets reflecting time spent commuting as overtime worked and he filed grievances regarding his supervisors’ instructions and the fact that he was not paid for this time.

In March 2007, Petitioner was told by various coworkers that his supervisors were upset with him. Petitioner testified that, on March 8, 2007, plumber Phil Crisci told him “they’re pissed off that you are here, I think they’re going to take shots at you, watch your back.” (Tr. 47-48) He stated that roofer Timmy Denesopolis asked “have they come after you yet?” (Tr. 48) Also, on March 9, 2007, electrician Mike Kamierczak told Petitioner “Danny [Wallen] is not giving us overtime because of you.” (Tr. 48) On March 15, 2007, SE Manetta complimented Petitioner’s recent performance, at which point Petitioner asked SE Manetta to relay those comments to Petitioner’s other supervisors. In response, SE Manetta stated “do you really want me to tell [SM Wallen] that, [he] wants to hear you’re down here sleeping.”<sup>3</sup> (Tr. 48)

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<sup>3</sup> SE Manetta did not recall making this specific comment regarding Petitioner’s job performance.

(1) Petitioner claims he was forced to submit annual leave requests when he arrived late to work.

Petitioner testified that he arrived late to work on March 19, 2007 and March 27, 2007, because of unexpected traffic while commuting to work. In each instance he had alerted his supervisor to his late arrival. When Petitioner arrived at the shop he was told to submit an annual leave slip for the time he missed. Petitioner testified that, on each occasion, other tradesmen also arrived late, but were not required to take annual leave for the time they missed. These other employees had different supervisors than Petitioner. Specifically, Petitioner testified that another electrician, Jimmy Brennan, did not arrive at the job site until 8:00 a.m., but Petitioner asserts that Brennan was not required to submit an annual leave slip. Petitioner testified that he is not aware of whether or not the other employees made prior arrangements to arrive late on those days.

Respondents provided evidence of five instances from 2006 through 2007 in which other employees were required to submit a request for annual leave because they arrived to work late. (See City Ex. J-A – J-E) SE Manetta testified that employees must take annual leave when they are late because there is no other way to charge them for the time they missed being late to the worksite.

(2) Petitioner claims he was not compensated for overtime in a timely manner.

On Saturday, April 14, 2007, Petitioner worked approximately eight hours of overtime. (See City G) He submitted his weekly timesheet reflecting these hours in a timely fashion, but he did not submit his overtime sheet until Friday, April 20, 2007. (See City Ex. G) Though Petitioner was eventually paid for these hours, he asserts that he was not paid in a timely manner. Petitioner noticed that his May 3, 2007 paycheck did not include the overtime hours he worked on April 14. Petitioner filed an Inquiry Form regarding the unpaid hours on May 4, 2007, and

then, on May 21, 2007, Petitioner filed a grievance. (City Ex. D, p. 2) He testified that he did not recall receiving a formal written reply to his grievance but, instead, remembers speaking with SE Moretti. SE Moretti told Petitioner that he was unable to submit the paperwork necessary for him to be paid during the proper pay period because Petitioner had not timely filed his overtime sheet. According to SE Manetta, for an employee to receive payment for working overtime hours, he or she must submit both a timesheet and an overtime sheet reflecting those hours. SE Manetta testified that it is best to file this paperwork on the final day of the week the employee worked, but the paperwork may be submitted on the following Monday.

- (3) Petitioner claims he was subjected to supervisor's conferences which resulted in written memoranda warning of future discipline, and was ordered to modify his time sheets to eliminate overtime.

Petitioner testified that he was subject to closer scrutiny than other electricians. Specifically, he claims he was called into the office by SE Moretti and Petitioner's other supervisors for supervisor's conferences, and subsequently written up, more often than other electricians. According to SM Wallen and SE Manetta, a supervisor's conference, and the memorandum which follows, is a corrective measure during which a supervisor can voice concerns about an employee's job performance, reinforce proper department protocol, and develop mechanisms to improve the employee's performance. (Tr. 366, 434) The BMD Policy and Procedure Handbook, also known as the "red book," which includes the Civilian Code of Conduct, establishes rules and guidelines that employees must follow.<sup>4</sup> An employee will be written up at a supervisor's conference if he or she has violated those policies. SM Wallen testified that, in his opinion, a supervisor's conference is not disciplinary in nature. However, Sean Fitzpatrick, a business representative with the Union's City division, stated that it can be

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<sup>4</sup> During Petitioner's first day after reinstatement, he received the red book, but he testified that he has not read it in its entirety.

considered discipline insofar as the meeting can be relied upon to issue discipline at a later date by demonstrating that the employee was notified of the issue.

Fitzpatrick testified that he was not aware of any BMD employees, other than Petitioner, being brought into the office for supervisor's conferences.<sup>5</sup> Shop Steward Joe Berardi also testified that other electricians in BMD were not "called into the shop for supervisor's conferences."<sup>6</sup> (Tr. 221) However, Shop Steward Berardi recalled two other electricians being called in for a supervisor's conference in 2010 or 2011. In contrast, SM Wallen testified that supervisor's conferences are not unusual events, as "they're done quite often." (Tr. 366) Furthermore, SM Wallen testified that the subjects addressed in Petitioner's supervisor's conference memoranda are not unusual subjects to address with an employee. In fact, the record shows that SE Manetta participated in at least five supervisor's conferences with other employees between 2005 and 2009. (*See* City K-A – K-E)

Petitioner alleges that he was brought in for supervisor's conferences because he filed grievances regarding his entitlement to overtime payments for time spent commuting to and from work as well as other issues. In fact, Petitioner testified about several instances in which he was brought in for a supervisor's conference and/or was written up. Respondents aver that the supervisor's conferences were in response to Petitioner's repeated failure to follow direct instructions.

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<sup>5</sup> Fitzpatrick testified that he would only know of these events if other employees filed grievances about them, and he does not know for sure whether or not other conferences occurred. (Tr. 127-128)

<sup>6</sup> Joe Berardi was an electrician with the FDNY. He was the Union Shop Steward from 1985 to 1990 and from 2006 to 2011. Shop Steward Berardi admitted to having strong feelings about SE Moretti; "He's the worst person I ever worked for in my life...He wasn't professional. He was less than honorable." (Tr. 254) SE Moretti terminated Shop Steward Berardi's employment in 2011.



On March 30, 2007, SE Moretti allegedly asked for Petitioner's original time sheet from the prior week. Petitioner had submitted the time sheet by fax and did not have the original with him, so he recreated the time sheet from memory. Petitioner claims that all other employees were permitted to submit timesheets by fax. This was supported by Shop Steward Berardi's testimony. However, SM Wallen testified that employees within BMD were required to submit original documents in accordance with a directive from the FDNY legal division. (Tr. 485) If the employee does not have the document, he may be required to reconstruct the document, but it would be unlikely that an employee could produce all the required information, such as work order numbers, from memory. Instead, an employee would likely need to contact his supervisor for the information. An employee should not leave the information blank or leave comments on the time sheet. (Tr. 312-313) Employees may receive training on how to fill out paperwork if they request such training. SM Wallen testified that Petitioner requested and received training on how to fill out BMD paperwork, but the record does not indicate when this training occurred. (Tr. 367)

On March 30, Petitioner also sent a Step I grievance, again regarding payment of overtime for commuting, to SE Moretti by fax machine. (City Ex. D, p. 9 (described by Shop Steward Berardi as a "grievance about driving")) An hour later, Petitioner received a phone call from Shop Steward Berardi who told him that SE Moretti was "flipping out" because Petitioner submitted a grievance by fax after being ordered to submit original documents. (Tr. 56) Later that day, Petitioner was called into his supervisors' office and was written up by SE Moretti for unacceptable insubordinate behavior. Shop Steward Berardi accompanied Petitioner to the meeting. He testified that SM Wallen, SE Moretti and SE Manetta were present at this meeting. SE Manetta did not recall being present.

During this meeting there was a “shouting match” between Shop Steward Berardi and SE Moretti; Shop Steward Berardi testified that he and Petitioner were told that the BMD unit would be “disbanded” for “causing too many problems” if Petitioner continued the grievance. (Tr. 217) The record indicates that these statements were originally made about a group grievance filed before Petitioner returned to work, but SE Moretti made “specific reference to [Petitioner’s] grievance” when he made the statement on March 30. (Tr. 232) SM Wallen directly denied telling SE Moretti that the unit would be disbanded for filing grievances. (Tr. 378) He also denied knowledge of that statement being made by other supervisors in BMD. He testified that BMD was not susceptible to being shut down because of a grievance. (Tr. 365) Shop Steward Berardi also testified, more generally, that when Petitioner submitted a grievance SE Moretti “blew up,” and he would call “screaming” to see if Shop Steward Berardi could squash the grievance. (Tr. 215) Shop Steward Berardi testified that SE Moretti got upset because he considered the grievances invalid and a waste of time.<sup>7</sup>

On April 4, 2007, Petitioner submitted another grievance to SE Moretti alleging that he was not being paid to drive the department vehicle to his first work site each day. Petitioner was called in for another supervisor’s conference. Shop Steward Berardi testified that during the conference, SE Moretti and SM Wallen again threatened to disband the unit if the Union pursued the grievance Petitioner submitted that day. (Tr. 219) Petitioner was also written up at the supervisor’s conference. The conference memorandum alleges that Petitioner failed to call his supervisor when he arrived at the job site and failed to notify his supervisor of his availability for

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<sup>7</sup> Petitioner believes that the March 30, 2007 meeting was recorded by the use of a cell phone that was open on the table in front of his seat. SM Wallen did not recall noticing a cell phone at this meeting. (Tr. 353) Petitioner requested the transcript of the recording but received no response. Petitioner was unable to produce a copy of the write up he allegedly received at the March 30 meeting.

overtime after being instructed to do so on three separate occasions since returning to work. (Pet. Ex. 1) It also asserts that he worked unauthorized overtime from 07:15 to 07:30 on March 22 and March 23, 2007 and was insubordinate by not answering SE Manetta's question as to why he worked the unauthorized overtime. *Id.* Finally, it alleges that Petitioner failed to submit a proper Weekly Time Report for the week ending March 17, 2007, and instead submitted an incomplete form recreated from memory that included improper notations, such as question marks. *Id.*

On April 11, 2007, Petitioner was called into a meeting with SE Moretti and SE Manetta in which he was instructed to only record seven hours in the "regular hours" portion of his time sheet. Then on April 12, 2007, Petitioner was written up by SE Moretti. SM Wallen, SE Manetta, Shop Steward Berardi and others were present at this meeting. At the meeting, Petitioner was told that, despite receiving prior warnings regarding his timesheet for March 22 and March 23, he continued to request payment for unauthorized overtime. (Pet. Ex. 3) For example, he submitted 30 minutes of unauthorized overtime on April 9, 2007. (Pet. Ex. 3) He was instructed to obtain prior authorization from SE Moretti or SE Manetta before working overtime.

On Saturday April 19, 2007, Petitioner notified SE Manetta of discrepancies with his paycheck and was told to call downtown to correct the situation. He was also told to come into the shop first thing in the morning. The following day, he met with SE Manetta and SE Moretti. SE Moretti instructed Petitioner to resubmit a timesheet for the week of April 8, 2007. Petitioner was instructed to remove all crossed out information, notes indicating Petitioner was not certain the recorded times were correct, and unauthorized overtime. After Petitioner complied with this request, SE Moretti asked him for a detailed description of the work he had done that day.

Petitioner testified that he had “never heard of any other electrician or tradesperson going through this” at the FDNY. (Tr. 75)

(4) Petitioner claims he was excluded from overtime opportunities and earnings by his supervisors’ inequitable assignment of overtime.

As evidence of retaliation and discrimination, Petitioner avers that he was not offered the same or similar overtime opportunities as other similarly situated tradesmen. Fitzpatrick, the Union’s Business Representative, testified that overtime should be issued in accordance with an Executive Order intended to “equalize the issuance of overtime.” (Tr. 118) He testified that this required a supervisor to assign overtime based on opportunities offered in reverse order of seniority. According to SM Wallen, SE Moretti considered a number of factors when assigning overtime including which employee had the lowest accumulative hours, an employee’s proximity to the assignment, and whether the assignment was an emergency. SE Moretti maintained weekly sheets, also known as grid sheets, which record all overtime opportunities that are offered to an employee, and which hours an employee worked or refused. (*See* Pet. Ex. 43) He used the weekly sheet in deciding how to assign overtime opportunities.

The record shows that Petitioner’s overtime opportunities were limited because he declined to work on weekends.<sup>8</sup> In fact, both Shop Steward Berardi and SM Wallen testified to this effect. Petitioner’s availability may have led SE Moretti to consider Petitioner to have declined overtime opportunities that would have been assigned to him had he been available. SM Wallen stated that it could lead to Petitioner being charged for up to 25 hours of declined

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<sup>8</sup> Petitioner denied that he refused to work overtime on weekends and noted that he worked overtime on Saturday, April 14, 2007. (Pet. Ex. 5) However, other timesheets entered into evidence show that Petitioner did not mark that he was available on Sunday, March 11, Saturday, March 17, Sunday, March 18, or Sunday, March 24, 2007. (Pet. Ex. 4 and 7)

overtime each weekend.<sup>9</sup> (Tr. 374) Furthermore, employees were not always notified when they were charged for declined overtime. Instead, an employee would have to reference his own documents, ask his or her shop steward, or ask to see the weekly sheet in the office. (Tr. 345-346) Importantly, the weekly sheets entered into evidence show that Petitioner's and other electricians' total "refused hours" did not change despite indications they were unavailable to work overtime during the week or during the weekend. (Pet. Ex. 43)

Shop Steward Berardi testified that he didn't work every weekend, but he "wasn't punished like [Petitioner] was during the week." (Tr. 234) He also testified that two other electricians also preferred to not work overtime hours on weekends, but they received overtime opportunities during the week that Petitioner did not. (Tr. 233) When Shop Steward Berardi intervened on Petitioner's behalf, SE Moretti told him that "unless [Petitioner] works Friday, Saturday, and Sunday he will not work [overtime] Monday to Thursday." (Tr. 207)

The record includes three weekly sheets from the weeks of March 4, March 18, and April 8, 2007, which include the year-to-date total overtime hours, worked hours and refused hours for five BMD employees including Petitioner.<sup>10</sup> (Pet. Ex. 43) The documents also include each employee's availability for overtime and notes regarding overtime assignments they worked throughout that week. *Id.* These sheets represent data from three non-consecutive weeks out of the four months at issue in this case. The document shows that, upon reinstatement, Petitioner was treated as having accrued the average number of overtime hours worked and refused by all employees from January 1, 2007 through the date of his reinstatement. *Id.* Therefore, the

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<sup>9</sup> Furthermore, while overtime opportunities on a weeknight may be five to seven hours long, opportunities on the weekend are generally eight to ten hours long.

<sup>10</sup> BMD employed between 16 and 20 electricians at any given time. (Tr. 232) Therefore, the weekly sheets do not provide information for as many as 15 other electricians.

weekly sheet for the week of his reinstatement shows Petitioner to have worked 70.75 hours of overtime and refused 13.5 hours of overtime, for a total of 84.25 hours. *Id.* From March 4, 2007 through Saturday, April 14, 2007, Petitioner worked 8.5 hours of overtime and was not charged for refusing any overtime hours.<sup>11</sup> *Id.* Therefore, as of April 14, 2007, Petitioner had 92.75 total overtime hours. Over this same period of time, Shop Steward Berardi worked 9.5 hours of overtime and ended with 93 total overtime hours. *Id.* Electrician Sergio Bizgu worked 27.75 hours of overtime and ended with 88.75 total overtime hours. *Id.* Electrician Brennan worked 28 hours of overtime and ended with 108 overtime hours. *Id.* Electrician Georgievski worked 15 hours and ended with 93 total overtime hours. *Id.* None of the employees were charged with refused overtime hours.

Petitioner testified to several specific examples of SE Moretti allegedly distributing overtime opportunities in an inequitable manner. On Tuesday, April 24, 2007, Petitioner received a phone call at the worksite from SE Moretti. SE Moretti asked to talk to Petitioner's coworker, Bizgu. Petitioner then overheard SE Moretti offer Bizgu overtime. Petitioner testified that he was "way lower in overtime earnings" than Bizgu. (Tr. 76) Petitioner "viewed that as a deliberate act thrown in my face that I'm giving your coworker overtime, you're not getting overtime and I know he's higher than you in overtime hours." (Tr. 76) A similar event took place on Tuesday, May 8, 2007, when SE Moretti offered overtime to another electrician who supposedly had higher overtime earnings than Petitioner.

On Thursday, May 3, 2007, Petitioner learned that other employees, Jimmy Brennan and Mike Kazmierczak, received one half hour overtime when they arrived back to the shop at 3:30 p.m. Kazmierczak also supposedly mentioned to Petitioner that other employees were working

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<sup>11</sup> These 8.5 hours were worked on Saturday April 14, 2007.

overtime at various locations. Petitioner asserts that he was never offered overtime on that day, despite being the “low guy.” (Tr. 77)

On Wednesday, May 23, 2007, Firemen at Engine 161 notified Petitioner that the apparatus door was not working properly. The record indicated that the pull chain wrapped around the door spring and prevented the door from opening. (City Ex. I) Since Petitioner parked his department vehicle at Engine 161 each day, he felt that he should be assigned to fix the malfunctioning door. In his experience, “you always take care of your own firehouse because they’re like family to you, you could walk there to work, it’s like a second home to you.” (Tr. 79) Even though, in Petitioner’s experience, this was the type of problem an electrician would fix, SE Moretti did not allow Petitioner to work overtime to fix the apparatus door. Petitioner testified that the overtime work was assigned to a different electrician. However, the City provided a work order which proved that this repair was assigned to Atlantic Overhead Door, a contractor BMD hires to repair the overhead doors. (City Ex. I, Tr. 372) SM Wallen testified that overhead doors were repaired by the contractor unless the problem dealt with a high voltage line, such as the electrical feed to the motor. (Tr. 373) According to SM Wallen, this case did not require a department electrician. (Tr. 373)

On Friday, June 1, 2007, SE Moretti visited Petitioner at a work site and asked Petitioner to walk through the work he had done. Petitioner asked if there was any overtime available that night, and SE Moretti said no. However, Shop Steward Berardi and other electricians were assigned overtime hours that night, even though Petitioner was “low in hours earned.” (Tr. 80)

On Wednesday, June 13, 2007, SE Moretti instructed Petitioner and two other electricians to work overtime at the test site. While working that assignment, SE Moretti called one of the other electricians working there and asked to speak with Petitioner. SE Moretti asked

what Petitioner was doing working overtime, and told Petitioner to leave. The other electricians continued working at that site. Petitioner asserts that the other electricians had higher overtime earnings than he did at that time.

On Thursday, June 14, 2007, SE Moretti offered Petitioner overtime hours in the coming days. However, Petitioner asserts that SE Moretti knew he had already requested annual leave for those days. Petitioner offered to work overtime that day instead, but SE Moretti said he already assigned any overtime for that day to other workers. On Monday, July 9, 2007, Shop Steward Berardi informed Petitioner that there was a “ton of overtime” available while Petitioner was on vacation. On Tuesday, July 10, 2007, SE Moretti told Petitioner over the phone that he had 233 hours of overtime. Petitioner claims, at that point, he had only worked 89.25 hours of overtime.

(5) Petitioner claims he was prevented from utilizing FDNY radios and fax machines in ways other electricians were not.

Petitioner testified that his supervisors prevented him, but not other employees, from utilizing department resources. Specifically, SE Moretti instructed petitioner to refrain from using the radio in his department vehicle to notify his supervisors he was stuck in traffic, and, on a separate occasion, SE Moretti insisted that Petitioner not use a department fax machine to submit grievances to his supervisors.

On March 19, 2007, and March 21, 2007, Petitioner was late reporting to his worksite because of morning traffic. In each instance he alerted his supervisor he would be late by contacting an FDNY dispatcher on the radio in his department issued vehicle who then relayed the message to his supervisor. When he arrived at his worksite on March 21, he was told by SE Moretti to not use the department radio to report that he would be late. Instead, SE Moretti told Petitioner that he should contact his supervisor by phone once he reaches his work site.



The record contains conflicting testimony with regard to whether it was customary for employees to use the radio to notify their supervisor when they were delayed because of traffic. Petitioner testified that the “purpose” of the radio includes “report[ing] that you’re delayed in responding due to heavy traffic,” but, even in Petitioner’s experience, he did not “customarily use the radio to report to [his] supervisor that [he was] going to be late.” (Tr. 160) SE Manetta and Shop Steward Berardi also testified that using the department radio in this situation was not a regular occurrence. Shop Steward Berardi testified that “maybe half a dozen guys” chose to use the department radio, instead of a cell phone, to notify supervisors that they would be late. (Tr. 250) But generally, an employee could wait to notify their supervisor of the traffic once they arrived at the work site. SE Manetta testified that the radios were used for “emergency use;” to report a fire, a car accident, or an injury. (Tr. 449-450) The radio also did not connect a tradesperson directly to BMD. Any radio transmission was handled by a fire dispatcher.

On April 9, 2007, Shop Steward Berardi informed Petitioner that SE Moretti said that Petitioner could no longer use a department fax machine to submit grievances.<sup>12</sup> Petitioner does not know whether this rule was applied to other electricians, or only him. However, testimony from Shop Steward Berardi and Fitzpatrick indicates that other employees were not similarly limited. According to Fitzpatrick, Petitioner was “the only individual that I’m aware of that was told not to use the fire department fax machine ... to send a grievance to the union,” though similar issues had arisen with other employees at other agencies. (Tr. 116) Shop Steward Berardi confirmed that grievances were generally filed from fax machines which were located in

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<sup>12</sup> That day, Petitioner filed a grievance from a Staples fax machine. He entered on his timesheet the time he spent filing that grievance as overtime. Later, he was ordered to change his time sheet to remove the unauthorized overtime. He testified that this is an instance in which he was required to falsify his time sheet.

every firehouse and in the electrician shop office. (Tr. 222) Furthermore, he believes this was the first time an employee was prevented from using a department fax machine to submit a grievance.<sup>13</sup> Additionally, both SM Wallen and SE Manetta testified that an employee could file a grievance by fax or by hand to a shop steward or supervisor. (Tr. 311, 456)

SM Wallen clarified his testimony regarding the use of department fax machines when recalled by the City's counsel. He stated that employees are able to submit all job related paperwork, such as timesheets or other official documents, with department fax machines. However, "there's a standing policy, phones, fax machines, copy machines are only to be used for official business or documents." (Tr. 479) The City also provided Chapter 10 of the red book, revised in March 2007, which states that fax machines are not for "personal use." (City Ex. L) SM Wallen testified that personal use included filing a grievance. (Tr. 483)

Petitioner seeks a number of remedies: a cease and desist order, a notice posting, to be made whole, including back pay, benefits, payment of out of pocket expenses related to this action dating back to 2000, and the reversal of the retaliatory personnel actions. In addition, he asks the Board to retroactively promote him to FDNY BMD Supervisor of Electricians from 1997 to present. Finally, Petitioner asks that this Board remove and replace the supervisors at issue because they conspired to adopt a culture of "managerial terrorism," selective discipline, discrimination, harassment, retaliation, exploitation, hostile work environments, misconduct and mismanagement.

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<sup>13</sup> When asked if other electricians could file a grievance from a department fax machine, Shop Steward Berardi testified that Petitioner may have been the only electrician that filed a grievance during the relevant time period. (Tr. 247) But, when questioned as to whether SE Moretti was specific that the policy applied to Petitioner, Shop Steward Berardi testified that SE Moretti said "This is what Brian's doing, this is how we are going to stop him." (Tr. 248)

## **POSITIONS OF THE PARTIES**

### **Petitioner's Position**

Petitioner argues that his supervisors retaliated and discriminated against him because he was reinstated by an arbitrator's award after he was wrongfully terminated, and because he filed numerous grievances once he was reinstated. He also claims that his supervisors knew of his reinstatement, the circumstances surrounding it, and of his participation in the grievance process. Furthermore, Petitioner notes that the supervisors at issue in this case are the same individuals found to have discriminated against him based on union activity in the past. According to Petitioner, a number of coworkers told him that his supervisors were upset he had been reinstated. They told him his supervisors were looking for ways to discipline Petitioner, and eventually terminate his employment. Petitioner also claims that he and Shop Steward Berardi witnessed various actions and statements indicative of anti-union animus. Petitioner's supervisors blew up when Petitioner or another employee filed a grievance and his supervisors threatened to disband the unit if Petitioner pursued a grievance.

Petitioner claims that he suffered disparate treatment because of his union activity. In the months following his reinstatement, Petitioner was brought in for several supervisor's conferences and written up. He was denied equal overtime opportunities and taunted by his supervisors when they distributed overtime hours to other employees. Petitioner also argues, with relation to overtime hours, that he and other electricians were entitled to overtime pay for operating a department vehicle before and after their regularly scheduled work day. Petitioner often submitted time sheets which included his commuting time and filed grievances when he was instructed to remove this time from his timesheet and was not paid for the time he spent in a department vehicle. Petitioner alleges that these grievances motivated Respondents' behavior.

Petitioner was ordered to submit annual leave requests when arriving at work late even though other employees were not required to submit leave slips when they arrived late on the same day. He was repeatedly required to modify his timesheets to eliminate overtime he rightly earned. On several occasions his paycheck was incorrect, and overtime payments were unnecessarily delayed. Furthermore, Petitioner was the only electrician prevented from using department fax machines to file grievances. He claims that restricting his use of the fax machine was part of an effort to stop him from filing grievances.

### **Respondents' Position**

Respondents argue that Petitioner did not establish sufficient facts to show a violation of the NYCCBL and therefore, the petition should be dismissed. Petitioner failed to establish that many of the alleged discriminatory or retaliatory actions occurred at all. Additionally, many actions at the heart of Petitioner's claim were taken in the legitimate exercise of Respondents' management right to conduct operations. In fact, Petitioner's complaints that enforcement of FDNY rules regarding overtime authorization, vehicle usage and other paperwork requirements actually reflect that Petitioner merely disagreed with FDNY rules and policies. Respondents claim that Petitioner had a "vendetta" against the supervisors responsible for his prior discipline when he returned to work in March 2007 and that he instigated conflicts with his supervisors and exaggerated claims against them. Respondents also argue that Petitioner has failed to present sufficient evidence to support a claim of retaliation because no discipline was imposed, no adverse action was taken, and he was not treated differently than other employees during the time in question.

Respondents also argue that the actions underlying the allegations are supported by legitimate business reasons. With regard to deductions from annual leave when Petitioner

arrived late to work, Respondents argue that Petitioner was not treated differently than other employees. Respondents point to documents which show other employees also submitted leave slips for lateness. Similarly, the record shows that the supervisor's conferences that Petitioner complained of were held for the legitimate reasons outlined in the conference memoranda entered into evidence. Also, other employees were called in for supervisory conferences to address similar issues

Furthermore, if Petitioner did not record comparable overtime earnings, it was likely a result of his personal decision to decline weekend overtime opportunities which are approximately half of all available overtime hours. Petitioner's preferred schedule provides a non-retaliatory explanation for his assertion that he worked fewer hours than other employees. Respondents also argue that Shop Steward Berardi's testimony regarding the distribution of overtime is unreliable. Shop Steward Berardi admitted to disliking SE Moretti and acknowledged that SE Moretti terminated his employment with the FDNY. Furthermore, his testimony about FDNY overtime policies was not in accordance with the testimony of SM Wallen.

Respondents also assert that Petitioner introduced several additional claims of retaliatory conduct at the hearing, Respondents argue that these claims should be rejected as outside the scope of the proceeding. Even if the Board chooses to rule on these claims, Respondents argue that the evidence does not support Petitioner's allegations. Respondents presented evidence that the decision to prevent Petitioner from using a department fax machine to file grievances was based on a department wide policy reflected in the red book and equally applied to all BMD employees. In addition, Respondents argue that Petitioner did not make out a violation under NYCCBL § 12-306(a)(1). Petitioner's claim that SE Moretti threatened to shut down the unit if

a grievance was pursued is untenable. The threat, if made, was made to Shop Steward Berardi and not Petitioner. Furthermore, in its first iteration, the threat dealt with a grievance that predated Petitioner's reinstatement. Respondents also dispute that the threat was made a second time in Petitioner's presence and referenced one of Petitioner's grievances. Finally, any claims related to FDNY vehicle policies have been previously addressed by the Board in *Colella*, 79 OCB 27 (BCB 2007). There, the Board found these claims to be outside its jurisdiction.

### **DISCUSSION**

To establish a claim of retaliation 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 39, at 19 (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 39, at 19; *DC 37 L. 376*, 6 OCB2d 18, at 14 (BCB 2013); *CEU, L. 237*, 67 OCB 13, at 9 (BCB 2001). The Board will consider whether 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 39, at 19; *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). Temporal proximity alone is not sufficient. *Id.* Moreover, a petitioner may not rely on merely “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).

Here, this Board finds that Petitioner established a *prima facie* case of retaliation. First, it is clear that Petitioner’s supervisors, SM Wallen, SE Moretti, and SE Manetta, knew that Petitioner engaged in protected union activity. Petitioner was reinstated in March 2007 pursuant to an arbitrator’s award that resulted from a grievance over his termination in 2003. SE Manetta testified that he saw an article in *The Chief* newspaper discussing Petitioner’s reinstatement in March 2007. (Tr. 425) He also testified that he is sure others saw the article as well; “things have a tendency of making the circuit ... it’s a small world.” (Tr. 425-426) In addition, Petitioner filed an improper practice petition, which this Board granted, regarding his supervisors’ inequitable distribution of overtime in 2003 and his subsequent termination. Furthermore, Petitioner advocated aggressively for his rights when he returned in March 2007 and filed numerous grievances. (*See City Ex. D*) Both SM Wallen and SE Manetta remembered Petitioner filing various grievances.

Second, Petitioner has proven facts that establish that his union activity was a motivating factor behind some of Respondents’ actions.<sup>14</sup> The Board notes here that the facts presented in this case must be viewed in light of its previous finding that SE Moretti harbored anti-union

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<sup>14</sup> Similar to this Board’s previous rulings, we do not find Petitioner’s self-serving recollection of third-party statements probative in determining whether anti-union animus was a motivating factor in the actions at issue as “such comments lack indicia of reliability.” *See Colella*, 79 OCB 27, at 55 (BCB 2007) (“We recognize that the testimony provided by Colella is filtered through the lens of his strongly held conviction that he is a target and victim and, though heartfelt, may be exaggerated and is not particularly probative.”)

animus that was a motivating factor in withholding overtime opportunities from Petitioner and eventually terminating him. *See Colella*, 79 OCB 27 (BCB 2007). In addition, the timing in this case raises suspicion. The series of events Petitioner complains of began almost as soon as Petitioner returned to work after being reinstated by an arbitrator. Additionally, a number of specific incidents, such as the March 30 supervisor's conference and memorandum, occurred the same day Petitioner filed a grievance. The record also contains specific testimony that Petitioner's supervisors harbored anti-union animus. For example, Shop Steward Berardi testified that SE Moretti "blew up" whenever Petitioner filed a grievance and that SE Moretti would call him "screaming" in an attempt to squash the grievance. (Tr. 215) Finally, Respondents' interference with Petitioner's attempts to file grievances using department fax machines, along with Shop Steward Berardi's testimony that Moretti said "this is what Brian's doing, this is how we are going to stop him" is evidence that Petitioner's protected union activity was a motivating factor in Respondents' actions.<sup>15</sup> (Tr. 248)

Where the Board finds that a petitioner 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 the employer may demonstrate that legitimate business motives would have caused the employer to take the same actions even in the absence of the petitioner's union activity. *DC 37 L. 376*, 6 OCB2d 39, at 20; *see also DC 37 L. 376*, 6 OCB2d 8, at 15; *Local 621, SEIU*, 5 OCB2d 38 (BCB 2012).

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<sup>15</sup> In finding that Petitioner established a *prima facie* case, we do not rely on Shop Steward Berardi's general testimony that SE Moretti often threatened that the BMD unit would be "disbanded" for "causing too many problems" unless various grievances were withdrawn. (Tr. 217) The record at hand does not confirm that SE Moretti made these statements. SM Wallen denied making the statements and, to the best of his knowledge, also denied that other supervisors made the statements. Furthermore, even Shop Steward Berardi acknowledged that it was not feasible for SE Moretti or the other supervisors to disband the unit.



As to Petitioner's claims that he was forced to submit annual leave requests when he arrived late to work while other employees were not, and that he was not compensated for overtime in a timely manner, we find that Respondents rebutted Petitioner's *prima facie* case with respect to this claim. In response to Petitioner's equivocal testimony that other employees were not required to submit annual leave requests, Respondents offered evidence of five instances in which other BMD employees were required to submit requests for annual leave because they arrived to work late. (*See* City Ex. J-A – J-E) These documents supported SE Manetta's testimony that employees must take annual leave when they are late because there is no other way to charge them for being late to the worksite. Therefore, given that Petitioner testified that he did not know if other employees had made prior arrangements to arrive late on the days in question, we cannot find that Petitioner was treated differently than other employees in regards to this claim. Second, Respondents offered Petitioner's overtime sheet which was dated April 20, 2007, four days after the paperwork was due to be submitted. This document, along with SE Manetta's testimony, shows that even absent Petitioner's union activity, payment for overtime worked on April 14, 2007 would have been delayed because Petitioner did not file his paperwork by the close of the work week, Monday, April 16. Thus, Respondents have established a legitimate business reason for any delay in the payment of overtime.

Turning to Petitioner's allegation that he was subjected to supervisor's conferences that resulted in written memoranda warning of future discipline and was ordered to modify his time sheets to eliminate overtime, this Board finds that Respondents provided sufficient evidence to rebut Petitioner's *prima facie* case. The record shows that supervisor's conferences are fairly common means of addressing problems with employees outside of the formal disciplinary process. SM Wallen testified that supervisor's conferences are not unusual events, as "they're

done quite often.” (Tr. 366) On numerous occasions between 2005 and 2009, SE Manetta has participated in conferences with other employees as well. (See City K-A – K-E) Furthermore, SM Wallen testified that the subjects addressed in Petitioner’s supervisor’s conference memoranda are not unusual subjects to address with an employee.

Further, Petitioner acknowledged that it was the department’s policy “that you are to get yourself to the worksite on your own time,” and he chose to use a department vehicle to commute to work sites on his own time instead of reporting to the BMD office by 7:30 a.m. (Tr. 175) (City Ex. F) The record indicates that all tradespeople were expected to follow this policy. Notwithstanding FDNY’s policy, Petitioner submitted numerous timesheets that included commute time as overtime hours worked. This repeated inclusion of unauthorized overtime precipitated the supervisor’s conferences. Therefore, in this context, a similarly situated employee is not simply another tradesperson within BMD, but rather it is a tradesperson who routinely disregarded instructions to submit timesheets without travel time. There was no evidence that other employees included travel time on their timesheets and were not spoken to by their supervisor. Thus, the record before us does not show that SE Moretti and Petitioner’s other supervisors were motivated by Petitioner’s union activity when holding supervisor’s conferences with Petitioner about what they considered insubordinate behavior, namely including his commute time on his timesheet despite repeated instruction not to do so.<sup>16</sup>

As to Petitioner’s claim that he was excluded from overtime earnings by his supervisors’ inequitable assignment of opportunities, this Board finds that, considering the record as a whole, Respondents’ agents acted in accordance with internal policy and therefore Respondents rebutted

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<sup>16</sup> Petitioner also testified that he received closer scrutiny than other employees. While this was not specifically pled and there was little evidence presented on this claim, it seems reasonable that a supervisor may inquire more closely into the work of an employee who repeatedly submits incorrect timesheets.

Petitioner's *prima facie* case with respect to this claim. Both SM Wallen and SE Manetta testified that, to their knowledge, overtime opportunities were distributed in accordance with department policy. Furthermore, the weekly sheets entered into the record show that several employees had fewer accumulative hours than Petitioner throughout March because Petitioner was assigned the unit's average total overtime hours upon reinstatement. Nothing in the record supports Petitioner's allegation that SE Moretti, or Petitioner's other supervisors, offered overtime opportunities to other employees when, in normal practice, the opportunities should have been offered to Petitioner. At most, Petitioner testified to seven instances after April 14 in which other employees received overtime assignments to which he believed he was entitled. But, the record shows that at least two of those instances are contradicted by the evidence. While Petitioner alleges that Sergio Bizgu received an overtime opportunity that Petitioner deserved on Tuesday, April 24, the record shows that Bizgu had four fewer overtime hours than Petitioner as of Saturday, April 14. Therefore, on this record, it is very likely that Bizgu still had fewer accumulative hours than Petitioner, or was substantially similar such that other factors may have been legitimately considered, on April 24. Additionally, as to the claim that Petitioner should have been offered an overtime opportunity to repair a firehouse apparatus door on May 23, the record indicates that Petitioner was not entitled to be offered that overtime opportunity. Rather, it was assigned to an outside contractor in accordance with BMD policy. Therefore, given Petitioner's mistaken beliefs regarding these opportunities, we are unable to conclude that Petitioner's unsupported testimony as to the other alleged occasions is sufficient to meet his burden of proof that he was impermissibly denied overtime for retaliatory or discriminatory reasons.

The evidence also does not support Shop Steward Berardi's testimony that Petitioner was "punished" more than other employees for being unavailable on weekends. First, the weekly sheets show that employees were not charged with refused overtime hours merely for being unavailable for overtime. Furthermore, during the six weeks between March 4 and April 14, 2007, Shop Steward Berardi, who was also unavailable to work overtime hours on many weekends, and Petitioner worked very similar overtime hours. Shop Steward Berardi worked 9.5 hours on a Sunday, Petitioner worked 8.5 hours on a Saturday, and neither employee worked overtime on a weekday. Shop Steward Berardi testified that Electrician Jimmy Brennan was an employee who did not work weekends but received more overtime during the week than Petitioner. However, this is also not supported by the record. Brennan received more overtime hours than Petitioner over the six weeks included in the weekly sheets (28 hours versus 8.5 hours), but Brennan worked overtime on at least five days, including at least one Sunday and one Saturday. Therefore, contrary to Shop Steward Berardi's testimony, Brennan was not similarly situated to Petitioner because he was available to work overtime on weekends.

With regard to Petitioner's claim that he was prevented from utilizing FDNY resources in ways other electricians were not the Board finds that SE Moretti's direction that Petitioner not use the department radio for non-emergency purposes is supported by a legitimate business reason. While Petitioner testified that the department radio could be used to notify a supervisor that you were delayed because of traffic, the record as a whole suggests that a department radio was only meant to be used in emergencies. SE Manetta testified that the radios were used for "emergency use" to report a fire, a car accident, or an injury. (Tr. 450) Additionally, even Petitioner acknowledged that it was not common to use the radio for a non-emergency purpose. Finally, SE Moretti provided Petitioner with a seemingly fair alternative, that he call his

supervisor from the work site once he arrived instead of disrupting an FDNY emergency dispatcher.

However, we find that SE Moretti's instruction that Petitioner not use the fax machine to submit grievances is a violation of § 12-306(a)(1) and (3). We reiterate that SE Moretti knew that Petitioner engaged in union activity by winning his reinstatement, successfully filing an improper practice petition, and continuing to file contract grievances. *See Fabbicante*, 71 OCB 30, at 32 (BCB 2003) ("There is no dispute that Petitioner engaged in extensive grievance and improper practice filing and that supervisors and division directors knew about this activity. Thus, Petitioner has established the first element of the *Salamanca* standard."). Furthermore, in addition to the more general evidence of anti-union animus discussed above, the record includes specific evidence with regard to this claim. Both Fitzpatrick and Shop Steward Berardi testified that Petitioner was the only individual they were aware of who was told not to use the fire department fax machine to submit a grievance. Petitioner submitted a number of grievances upon his return to work, generally from a fax machine at whichever worksite he happened to be that day. While the record is unclear as to whether other employees tried to file grievances during the relevant time period, Shop Steward Berardi provided testimony indicating that SE Moretti specifically intended to curtail Petitioner's activity. Shop Steward Berardi testified that SE Moretti stated that preventing Petitioner from using the fax machine was meant to prevent him from filing grievances: "This is what Brian's doing, this is how we are going to stop him." (Tr. 248)

Furthermore, we do not credit Respondents alleged legitimate business reason for this action. SM Wallen testified that the department has a standing policy that fax machines and other telecommunications equipment are to be used only for "official business or documents."

(Tr. 479) Additionally, Chapter 10 of the red book states that fax machines are not for “personal use.” (City Ex. L) SM Wallen testified that filing a grievance is considered personal use. (Tr. 483) However, SM Wallen’s testimony did not align with his own prior statements and those of SE Manetta. Both SM Wallen and SE Manetta testified that employees could file grievances by fax or by hand to a shop steward or supervisor.<sup>17</sup> (Tr. 311, 456) Shop Steward Berardi confirmed that grievances were generally filed from fax machines which were located in every firehouse and in the electrician shop office. (Tr. 222) Therefore, this Board finds that Petitioner’s union activity was a motivating factor in preventing Petitioner from using department fax machines to file union grievances in violation of the NYCCBL.

In conclusion, this Board finds that Respondents violated NYCCBL § 12-306(a)(1) and (3) by unjustifiably and disparately preventing Petitioner from utilizing department fax machines to file grievances, however the Board dismisses claims related to the deduction of annual leave, the payment or assignment of overtime hours, the holding of supervisor’s conferences, and the use of department radios.

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<sup>17</sup> SM Wallen later testified that he meant a personal fax machine, but nothing about the earlier testimony indicates he did not mean to include department fax machines.

**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 Petitioner Brian Colella, docketed as BCB-2630-07 be, and the same hereby is, granted in part, to the extent that the claim that Respondent's prevented Petitioner from using a department fax machine because of Petitioner's union activity is granted, and is in all other respects denied; and it is further

ORDERED, that Respondents cease and desist from implementing or enforcing any policies related to the use of department fax machines in discrimination or retaliation for Petitioner's union activity.

Dated: April 3, 2014  
New York, New York

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

PAMELA S. SILVERBLATT  
MEMBER

CHARLES G. MOERDLER  
MEMBER