CSTG, L. 375, 7 OCB2d 18 (BCB 2014)

(IP) (Docket No. BCB-3086-13 & BCB-4004-13)

Summary of Decision: Petitioners alleged that DEP violated NYCCBL § 12-306(a)(1) and (3) when it retaliated against a Union official by awarding a "conditional" rating on a portion of his evaluation, issuing the evaluation for a shortened time period, and issuing a warning memorandum for misconduct towards a DEP employee and his intern. Respondents argued that Petitioners failed to state a *prima facie* case because they have not demonstrated a causal link between the official's participation in a Union meeting during work hours and his encounter with the employee and his intern, and the alleged retaliatory action. Respondents also asserted that Respondents' actions were taken for legitimate business reasons. The Board held that although Petitioners established a *prima facie* case, Respondents rebutted the evidence presented by Petitioners regarding the issuance of both the evaluation and the Warning Memorandum. Accordingly, the petitions were dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, AFSCME and TODD ECHELMAN,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

Civil Service Technical Guild, Local 375, AFSCME ("Union") and Union official Todd Echelman filed verified improper practice petitions on June 25, 2013, and August 26, 2013, against the City of New York ("City") and the New York City Department of Environmental

Protection ("DEP").[1] Petitioners allege that DEP violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it retaliated against a Union official by awarding a "conditional" rating on a portion of his evaluation, issuing the evaluation for a shortened time period, and issuing a warning memorandum for misconduct towards a DEP employee and his intern. Respondents argue that Petitioners failed to state a *prima facie* case because they have not demonstrated a causal link between the official's participation in a Union meeting during work hours and his encounter with the employee and the intern, and the alleged retaliatory action. Respondents also assert that Respondents' actions were taken for legitimate business reasons. The Board holds that although Petitioners established a *prima facie* case, Respondents rebutted the evidence presented by Petitioners regarding the issuance of both the evaluation and the Warning Memorandum. Accordingly, the petitions are dismissed.

BACKGROUND

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

DEP is the City agency that manages and conserves the City's water supply, delivers drinking water to City residents, collects and treats wastewater, and regulates air quality, among other responsibilities. It maintains facilities, offices, and employees within the City and outside City limits. The Union is the certified collective bargaining representative for employees in various engineering and technical titles throughout the City, including DEP.

Echelman has worked at DEP since 1995. He is employed as a Research Scientist II in the

[1] The petitions were consolidated for purposes of the hearing and this Decision and Order.

Division of Distribution Water Quality Science and Research ("DWQSR"), which is within the Early Warning Remote Monitoring Section ("EWRM") of the Bureau of Water Supply ("BWS"). Echelman works in DEP's Valhalla office in Westchester County, New York. Echelman was one of the founding members of Chapter 40, the Union's upstate chapter, and has played an active role in it, serving as its Vice President from 2003-2004, its President from 2005-2007 and 2008-2010, and its Second Vice President since 2011. He is also a grievance representative and a shop steward and, in those capacities, counsels employees on grievances, benefits, and time and leave issues, and is involved with disciplinary matters on employees' behalf.[2]

Echelman's work shift begins at 7:00 a.m. Shortly after arriving at work on February 14, 2013, Echelman went to the office of Steve Awad, a fellow DEP employee in the Valhalla office and the Chapter 40 Treasurer. Richard Kowalczyk, another DEP employee and the Chapter 40 President, was also in Awad's office. According to Echelman, the three held a brief meeting to plan for an upcoming Chapter meeting. Echelman testified that, while he was in Awad's office, John Canning, his direct supervisor, called him out of the office, berated him in a loud tone, and gave him a verbal warning in front of his cubicle, which is in a public area.

Canning, the EWRM's Acting Section Chief, has been Echelman's supervisor since 2010. He is also a member of the Union and Chapter 40 and attends monthly Union meetings. Canning testified that when he arrived at the office at around 7:08 a.m. on February 14, 2013, Echelman was not at his desk. Canning again passed by Echelman's desk at 7:22 a.m., and testified that he still was not there. He subsequently found Echelman in Awad's office having coffee and asked

[2] Echelman also filed three out-of-title grievances on his own behalf. He testified that, during the period when he was Chapter president, he complained to Supervisor Steve Schindler about allegedly being passed over for a promotion and that Schindler responded that "grievances are a problem, you know, my bureau can't promote the people they want because the money's already spent on out-of-title grievances." (Tr. 19)

Echelman to come with him. Canning testified that he was unaware of the nature of the conversation taking place in Awad's office. He stated that he and Echelman discussed his whereabouts and what he was doing. Canning testified that he asked Echelman how long he had been on break and that Echelman responded that it had been a minute or so, to which Canning replied that it had been longer than that since he had been away from his desk since the last time Canning walked by at 7:22 a.m. Canning testified that he informed Echelman that breaks are not permitted, particularly extended breaks at the beginning of the day, and gave him a verbal warning that his conduct was unacceptable.

Canning further testified that this was not the first incident involving Echelman's abuse of breaks. In November 2012, Canning attempted to have a written warning issued to Echelman addressing his extended coffee breaks and absences without leave.[3] In addition, in 2010, Canning was advised by senior management that Echelman had been observed taking extended breaks and was instructed to discuss the matter with Echelman. DWQSR Division Chief David Lipsky corroborated Canning's testimony that he and Canning discussed the matter in 2010, and testified that he also discussed the matter with Echelman.

Various witnesses testified about the policy on taking breaks. Echelman testified that there is no rule about when you can or cannot leave your cubicle. He stated that when people are hired they are told that they get an hour for lunch and two coffee breaks during the work day. Groppe, the BWS Director of Management Services and Budget, testified that the Citywide Agreement provides that employees in Echelman's title are entitled to a one-hour meal break per

[3] Canning submitted the warning to his supervisor, but it was not ultimately issued. Bob Groppe, the BWS Director of Management Services and Budget, is responsible for the Bureau's personnel matters. He advised Canning that the warning was under review but did not elaborate on why it was not issued. Groppe testified that Canning's memo stated that Echelman habitually arrived late to his shift and then sat in the break room for 30 to 45 minutes.

day but does not provide for coffee breaks. While he acknowledged that employees are entitled to take breaks during the work day, he stated that he advises supervisors that "when you think it's crossed the line, tell the employee you're spending too much time away from your desk."[4] (Tr. 115)

Alleged Retaliatory Acts

I. Performance Evaluation for First Quarter of 2013

DEP employees typically receive annual performance evaluations covering the period from January through December. However, on or about April 15, 2013, Echelman received a written performance evaluation covering the period from January 1, 2013, through April 7, 2013 ("2013 Evaluation"). The 2013 Evaluation states that "[t]he period of this evaluation is from January-April because [Echelman's] Task and Standards have changed." (Resp. Ex. 9) Echelman testified that when he inquired as to the reason for the abbreviated evaluation period, he was informed that DEP has the right to evaluate him on any time period it selects. In contrast, Canning testified that Echelman received a performance evaluation covering only the first quarter of 2013 because Canning "needed to move the evaluation and tasks and standards process from paper to the e-performance system."[5] (Tr. 69)

Performance evaluations consist of a list of tasks and accompanying standards for the satisfactory performance of that task. The 2013 Evaluation lists five tasks and corresponding standards. Echelman received an overall rating of "Good," with a rating of "Good" on Tasks 1-3

[4] Kowalczyk testified that he has never been told that he has to ask for release time in order to hold brief Union meetings and that release time was not requested for the February 14, 2013 meeting. He stated that "we try to do the best we can to [hold brief Union meetings] on our time when we can . . . and sometimes it is over coffee." (Tr. 177)

[5] There is no evidence in the record explaining the implementation of the e-performance system or its impact on the pre-existing performance evaluation process.

and 5 and "Conditional" on Task 4.[6] Task 4 provides:

> Promotes a workplace free from safety hazards, and ensures that employees adhere to, and comply with environmental health and safety (EH&S) laws, rules and regulations, and the policies, standards and procedures outlined in the DEP Employee Environmental, Health and Safety Handbook.

(Resp. Ex. 9) Under the heading "Justification for overall rating," the 2013 Evaluation states:

> [Echelman] earned an overall rating of Good because of his own efforts he basically attained all of the standards. An exception was Task [4][7] where [Echelman] earned a Conditional rating because his performance did not meet Standard 2; acknowledge Chemical Hygiene Plan.

(*Id.*) The signature page of the 2013 Evaluation states, "I have seen and understand the above list of critical tasks and standards at the beginning of my evaluation period and fully understand my responsibilities." (*Id.*) Echelman signed the page "Under Protest" and requested an appeal. (*Id.*) He maintained that Task 4 is not applicable to him because he is not a chemist and that signing the 2013 Evaluation, which indicates that he understands his responsibilities, would be akin to falsifying a record.[8] However, Echelman acknowledged that Task 4 is a standard, agency-wide task and that he was evaluated for the identical task in prior years.[9] Echelman

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[6] The rating categories are: outstanding, very good, good, conditional, unsatisfactory, and not ratable.

[7] The original incorrectly reads "Task 3," but from context clearly refers to "Task 4."

[8] The Chemical Hygiene Plan is a written safety document that instructs and guides employees on how to work safely in a lab with chemicals and other processes. It is undisputed that Echelman has maintained his position that the Chemical Hygiene Plan has nothing to do with his job for a number of years.

[9] Echelman also received a "Conditional" rating for the task in 2010 and a "Good" rating for the task in 2012. He testified that he attempted to resolve the matter in 2012 by speaking with a DEP labor relations representative in lieu of filing an out-of-title grievance. The record does not reflect the outcome, if any, of Echelman's discussion with the labor relations representative.

further testified that he was not presented with the tasks and standards listed in the 2013 Evaluation until after the quarterly evaluation period ended and that he informed Canning that agency policy is that an employee must be presented with their tasks at the beginning of the period, prior to being evaluated on them.

Canning, who is responsible for evaluating Echelman, testified that the tasks and standards listed in the 2013 Evaluation are the same as those that were in the 2012 performance evaluation and that Task 4 is standard language that is in everyone's tasks and standards. He stated that all employees are expected to read, understand, and follow the Chemical Hygiene Plan, and that Echelman received a conditional rating on Task 4 because he did not acknowledge that he had reviewed it within the allotted time period, which ran from January 3 through January 25, 2013.

Echelman subsequently appealed the 2013 Evaluation. In a May 3, 2013 Memorandum, Lipsky rejected the appeal, stating that "[t]he tasks and standards identified for the above period are identical to those of 2012, and in my opinion, are appropriate for a Research Scientist II." (Resp. Ex. 10) Echelman appealed Lipsky's ruling, and Groppe convened a Board of Managers to review the appeal. Groppe testified that the Board's standard of review for evaluations on appeal is whether the evaluation was reasonable. Groppe recollected that Echelman objected to the task addressing his budgetary and procurement obligations, which he believed were inappropriate for someone in his job title.[10] However, the Board concluded that the supervisor's estimation of Echelman's efforts with regard to the task at issue met the reasonableness standard because Echelman never produced evidence to show that he had performed a different job.

[10] The task to which Groppe refers is Task 3 in the 2013 Evaluation. Groppe's recollection did not extend to a discussion of Task 4 and he testified that he did not recall the Board discussing any of Echelman's tasks and standards related to health and safety.

II. Disciplinary Action Following Conversation With DEP Employee and Intern

On June 18, 2013, Echelman saw a coworker who is usually not in the Valhalla office and testified that he "stopped by to say hi, find out if they had any issues" at his work site. (Tr. 49) Echelman testified that, because Chapter 40 spans a large geographic area and covers multiple work sites, it is his practice to ask this question to any Union member from another work site who he doesn't usually see in the Valhalla office. The co-worker, Matthew Sudol, was accompanied by a summer intern. According to Echelman, Sudol and the intern responded that they had been at Hillview Reservoir. Echelman testified that he then said "something like," "I trust you guys are following the safety procedures for going to that site," and that this was the end of the conversation. (Tr. 51)

Sudol has worked in DEP's Wildlife Studies Division for slightly over two years and is a Union member. He and his intern had returned from their work site towards the end of their shift to debrief a supervisor and perform other tasks. Sudol's recollection of the incident diverges from that of Echelman. According to Sudol, Echelman stopped by and asked his intern "who are you and what are you working on" while the intern was on his cell phone and checking his DEP email. (Tr. 100) Sudol interjected and explained what they had been doing at Hillview Reservoir. He testified that Echelman then:

> asked me if I was utilizing all my PPE and at that time I also said that, you know, we had steel toe boots, safety vests and I labeled all the PPE that was pertinent to the day. And then he told me that he doubted it and I asked him that you doubted it and he just – he asked me if I had sunscreen at that time because it was part of the PPE apparently and that I looked a little red.[11]

(Tr. 100-01) Sudol further testified that he complained to his supervisor about the encounter

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[11] PPE stands for Personal Protective Equipment.

because it felt like the conversation had a "meaningless, demeaning, harassing quality to it."[12] (Tr. 101) Sudol stated that he had a prior unpleasant encounter with Echelman that occurred when Echelman asked what his title was and how long he had worked for the department and then said, "we're going to have to find something to fire you for." (Tr. 103) On cross-examination, Sudol conceded the possibility that Echelman was advising him as a probationary employee that he should be careful because it would be easy to get fired.

On June 27, 2013, Lipsky personally delivered a Warning Memorandum to Echelman regarding the incident with Sudol. Lipsky testified that he was informed by Schindler, his supervisor, that this was the "second such incident" involving Echelman and an intern. (Tr. 157) Groppe corroborated the testimony that Echelman had previously received a verbal warning in response to a prior incident involving an intern. Both he and Lipsky confirmed that no one in management spoke with Echelman about Sudol's allegations prior to issuing the Warning Memorandum.[13] The Warning Memorandum provides, in pertinent part, as follows:

> Recent discussions you have had with other DEP employees have made it necessary to issue you this **WARNING MEMORANDUM**. Specifically, I've been apprised by our directorate management that on June 18, 2013, you were reported to have made inappropriate comments, and acted in an unprofessional manner, towards a summer intern and his supervisor. . . . I have spoken to Mr. Sudol who characterized your behavior as 'abrasive, condescending and harassing.' As reported by him, at the end of a long day in the field, a day that began at 4:30 in the morning, you asked challenging questions as to: what the intern was working on;

[12] On rebuttal, Petitioners called Thomas M. Boland, Jr., a Project Manager in the Valhalla office who witnessed the encounter. Boland testified that nothing about the conversation stood out to him, such as loud voices. He stated that he subsequently had a conversation with Sudol in which Sudol told him that Echelman said something like "get back to work" to his intern. (Tr. 165)

[13] Lipsky testified that this is the only written warning that he's issued as DWSQR Chief. He also testified that the Warning Memorandum is not disciplinary and for this reason he did not feel it was necessary to speak to Echelman prior to issuing it.

> whether he or his supervisor knew what PPE is; and whether in fact they were using all required PPE on site at Hillview Reservoir. Rather than being interpreted as a helpful or collegial comment on safety or duties, the tone and content of the conversation was described by Mr. Sudol as having 'a harassing demeanor' that 'negatively impacted office time set aside for administrative tasks following Hillview shift end.' Additionally, when Mr. Sudol indicated that they had all required PPE, you indicated that 'you doubted it.' In my conversation with Mr. Sudol, he characterized your behavior as 'unprofessional,' and the tone and tenor of the conversation was judged by Mr. Sudol to be sufficiently disturbing that it was reported up the chain of command and to me.
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> Todd, I was not there, but these allegations, if true, are unacceptable, particularly when involving behavior that reflects poorly on the Department, and particularly when it involves the most vulnerable of employees, namely our interns. Consequently, I've been asked by management to issue this warning letter and to **order you not to interact with any of the summer interns being employed by DEP unless authorized to do so.** You are also directed to approach all DEP staff in a respectful and professional manner, particularly if they are in positions subordinate to your own. If you have concerns about staff safety, whether the safety of the summer interns or any other staff, you should report those concerns through the appropriate venues that you've been apprised of through your own EHS training.
>
> **FURTHER ACTION**
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> The most important function of this **WARNING MEMORANDUM** is to advise you that your misconduct, as described above, will no longer be tolerated. You are advised one last time to improve. Another important function of this **WARNING MEMORANDUM** however, is to advise you that should your conduct not improve, the Agency will have little choice but to address the situation through formal disciplinary charges. I am confident, though that this **WARNING MEMORANDUM** will resolve the matter.
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> A copy of this **WARNING MEMORANDUM** will be placed in your personnel folder, and it will be considered in determining future disciplinary penalties, if it becomes necessary to do so.

(Pet. Ex. B) (emphasis in original)

In a July 3, 2013 Rebuttal Memorandum to Lipsky, Echelman responded to the Warning

Memorandum, stating, in part:

> I am a union chapter officer and delegate, and I have represented union issues at joint Labor-Management monthly meetings (QWL, H&S, etc.), so I do not perceive it inappropriate for me to speak with members, or to discuss PPE with them. In addition, I do not believe that I said anything even remotely offensive to my accuser, Mr. Sudol, and none of us have control over how another interprets our words, particularly when the other does not give any indication of a problem. And, Mr. Sudol gave me no such indications at the time.

(Pet. Ex. C) In the Rebuttal Memorandum, Echelman then stated that it is DEP policy that progressive discipline must be applied and due process must be followed, and that the policy was not followed in his case, as it has been with others. He further stated that "if DEP . . . policies had been followed, at the barest minimum, you should have discussed Mr. Sudol's allegations with me, prior to issuing any notice or verbal warning." (*Id.*) He noted that, without exercising progressive discipline, issuing a written warning to be placed in his personnel folder is inconsistent with DEP policies and strips him of his due process rights.

POSITIONS OF THE PARTIES

Union's Position

Petitioners contend that DEP violated NYCCBL § 12-306(a)(1) and (3) when it retaliated against Echelman based on his Union status and activity.[14] They assert that, in his capacity as a

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

> It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> ***
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in

Union official, Echelman interacted with DEP supervisors Schindler, Lipsky, and Canning. Petitioners argue that Canning had given Echelman a verbal warning for attending the February 14, 2013 Union meeting with Awad and Kowalczyk only weeks before issuing the 2013 Evaluation, and that such a warning does not reflect the "common practice" of employees taking breaks. (Pet. Br. at 6) Further, Petitioners contend that Canning's explanation that he issued the 2013 Evaluation because he needed to move over to an online performance system "was really a non-reason." (Pet. Br. at 6) They conclude that, in the absence of a plausible explanation for the 2013 Evaluation and in light of the verbal warning given to Echelman on February 14, 2013, they have established that an improper practice took place.

As to Echelman's conversation with Sudol and his intern, Petitioners assert that Echelman was engaging in protected union activity when he questioned them about their use of PPE. They point out that Lipsky testified that Echelman was the only employee with whose discipline he had ever been involved and that Schindler asked him to issue the Warning Memorandum. Petitioners contend that the record reflects a history of animosity by Schindler towards Echelman relating back to his Chapter 40 leadership. They further argue that the remedy issued in the Warning Memorandum is "wholly unrelated" to the alleged offense, and that the threat of "one last time to improve" is inappropriate for a long term employee with only one verbal warning on his record. (Pet. Br. at 7) In short, according to Petitioners, since no other explanation was provided, the Board must conclude that "the *prima facie* case proved must stand as the reason." (Pet. Br. at 8)

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the activities of, any public employee organization[.]

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

City's Position

Respondents argue that Petitioners have failed to demonstrate a *prima facie* case of retaliation. While they acknowledge that Echelman's actions on the Union's behalf are protected activity, they assert that Petitioners have not shown the requisite causal link between that activity and any retaliatory action by DEP. They contend that even if Petitioners successfully establish both elements of a *prima facie* case, DEP's actions were the result of legitimate business reasons that would have been taken even in the absence of any protected employee conduct. Respondents note that the mere fact that a petitioner is a union officer does not confer upon him immunity from otherwise appropriate and proper disciplinary procedures nor diminish the employer's right to take such action.

In the case of the verbal warning pertaining to the coffee break, Respondents assert that they have demonstrated that Echelman has a history of spending excessive amounts of time away from his work station and was previously warned not to do so. With regard to the written warning pertaining to Sudol and the intern, Petitioners cannot establish that Echelman was engaged in protected activity, nor can they establish that his general union activity was a motivating factor in any retaliatory action by DEP. They assert that the conditional rating on the 2013 Evaluation and the issuance of the Warning Memorandum were both unrelated to Echelman's union activity and valid exercises of managerial discretion that would have been regardless of such activity. Accordingly, Respondents request that the Board deny all of Petitioners' claims.

DISCUSSION

In deciding the instant matter, we must determine whether sufficient probative evidence has been presented to establish that the alleged adverse employment actions against Echelman

were taken as a result of his union activity, in violation of NYCCBL § 12-306(a)(1) and (3). This Board finds the evidence does not support the conclusion that anti-union animus motivated DEP's employment actions against Echelman, specifically, issuance of an evaluation for less than a 12 month period with a "conditional" rating and a Warning Memorandum. Accordingly, no violation of the NYCCBL has been proven.

To determine whether an alleged action constitutes impermissible discrimination or retaliation based on anti-union animus, the Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny. The test provides that, to establish a *prima facie* case of discrimination or retaliation under the NYCCBL, the 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 (BCB 2013). If the petitioner establishes a *prima facie* case, then the employer "may attempt to refute this showing on one or both elements or demonstrate that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006); *see also Feder*, 4 OCB2d 46, at 49 (BCB 2011).

For union activity to be protected under the NYCCBL, "it must be related, even if indirectly, to the employment relationship and must be in furtherance of the collective welfare of employees." *Local 1087*, *DC 37*, 1 OCB2d 44, at 25 (BCB 2008) (citations omitted). If it is demonstrated that the employer has knowledge of the protected union activity, then the first prong of the *prima facie* case is met. *See Local 376*, *DC 37*, 73 OCB 15, at 13 (BCB 2004). The

second prong of the *Bowman* test requires proof of a causal connection between the alleged improper act and the protected union activity. *See SBA*, 75 OCB 22, at 22 (BCB 2005). The petitioner may carry its burden of proof "by deploying evidence of proximity in time, together with other relevant evidence." *CWA, L. 1180*, 77 OCB 20, at 14 (BCB 2006). This proof must rely on "specific, probative facts rather than on conclusions based on surmise, conjecture or suspicion." *Feder*, 1 OCB2d 27, at 17 (BCB 2008). Absent an "outright admission of any wrongful motive, proof of the second element must necessarily be circumstantial." *CWA*, *L. 1180*, 77 OCB 20, at 15 (BCB 2006) (citation omitted).

We first address Petitioners' claim that DEP retaliated against Echelman for his union activity by issuing the 2013 Evaluation for a shortened time period and awarding him a "conditional" rating on one of its five tasks and standards. Initially, we find that Echelman was engaged in protected union activity when he met with fellow Union representatives Awad and Kowalczyk on February 14, 2013. Respondents do not dispute that Echelman's supervisors were aware of his active involvement with the Union both in the past and during the period at issue. Further, Echelman and Kowalczyk's testimony that they were discussing Union business in Awad's office is unrebutted. Thus, the first prong of the *Bowman* test has been met.

Petitioners have also established the second prong of the *Bowman* test. The record reflects that the 2013 Evaluation marked the first time in Echelman's 20 years at DEP that he received a written evaluation for a period shorter than one year. Canning's explanation for the change was that he needed to move the evaluation process from paper to the e-performance system. This rationale, upon which Canning did not elaborate, is non-responsive in that it does not clarify the reason for the shortened time period. It also does not comport with the statement on the 2013 Evaluation which provides that the evaluation period is from January to April because

Echelman's "Tasks and Standards have changed," particularly since those tasks and standards did not change from the prior evaluation period. (*Compare* Resp. Ex. 8 *with* Resp. Ex. 9) We find that DEP failed to provide a plausible explanation for its issuance of the 2013 Evaluation for a three month period. We further find temporal proximity between the February 14, 2013 meeting and the 2013 Evaluation, which was issued less than two months after the meeting. The proximity in timing, in conjunction with other evidence of causation, is sufficient to establish a *prima facie* case.

However, we find that other evidence in the record effectively rebuts Petitioners' *prima facie* showing. First, DEP required its employees to complete their review of the Chemical Hygiene Plan by January 25, 2013, a date that fell weeks before the February 14, 2013 meeting. Echelman failed to complete his review by that deadline, and maintained that requiring him to complete the review was inappropriate, signing the evaluation "Under Protest" on just these grounds. Indeed, it is reasonable to conclude that Echelman would have received an "unsatisfactory" rating on Task 4 regardless of whether he participated in the February 14 meeting or received the evaluation nine months later. The record also reflects that Echelman was evaluated for the identical task on his 2010 and 2012 performance evaluations and received a conditional rating on that task in 2010 for the same reason provided in the 2013 Evaluation, absent any connection to his union activity. Finally, neither Echelman's receipt of a conditional rating on one of the five tasks and standards in the 2013 Evaluation, nor the fact that he was evaluated for a shorter than typical time period resulted in any negative consequences to him. (*See* Resp. Exs. 7, 9) His overall rating on the 2013 Evaluation remained a "good." These facts undermine the linkage between Echelman's union activity and the 2013 Evaluation. In short, the record evidence negates the inference that the evaluation of Echelman for a shorter time period than in the

past and his receipt of a conditional rating on one task in the 2013 Evaluation resulted from anti-union animus. Accordingly, we dismiss this claim.

We similarly find that Petitioners have demonstrated the requisite causal connection to establish a *prima facie* case of retaliation on its second claim, but that Respondents have provided a legitimate business reason for issuing the Warning Memorandum. As discussed above, Echelman has a long history of engaging in protected union activity on behalf of himself and his fellow employees at DEP. Here, we find that Echelman was acting in his capacity as a Union official when he questioned Sudol and his intern to see if Sudol had any Union matters to discuss and to verify that they were following workplace safety procedures. *See Local 376, DC 37*, 6 OCB2d 39, at 20 ("Under the NYCCBL, any activity that relates, directly or indirectly, to the employment relationship and is in furtherance of employees' collective welfare is protected."); *Feder*, 4 OCB2d 46, at 46 (activity deemed by the Board to fall within the protection of NYCCBL § 12-305 "must be related, if only indirectly, to the employment relationship between the City and bargaining unit employees").

As to the second prong of the *Bowman* test, the evidence shows that Lipsky issued the Warning Memorandum to Echelman less than ten days after the incident with Sudol. This temporal proximity is bolstered by circumstantial evidence of animus. First, Lipsky conceded that this was the only occasion during his eight years as Chief of DWQSR that he had ever been involved with the issuance of a warning to an employee. *See, e.g., DEA*, 70 OCB 40, at 24 (BCB 2007) (supervisor's admission that his evaluation of the grievant was the most harsh he had ever issued was a factor in finding of causation). Second, neither Lipsky nor any other DEP official spoke with Echelman prior to issuing the Warning Memorandum to ascertain his version of the

events.[15] This evidence is sufficient to suggest a causal relationship between the protected activity and the alleged retaliatory act to the extent required to make out a *prima facie* case.

Notwithstanding the above, we find that Respondents have effectively demonstrated that it issued the Warning Memorandum for reasons unrelated to Echelman's Union activity. At the outset, we note that Sudol, not management, initiated the process that led to the Warning Memorandum, and that nothing in the Warning Memorandum suggests that DEP disciplined Echelman for inquiring about union-related issues. That DEP responded to a complaint made by an employee concerning another employee's inappropriate treatment of not only himself, but an intern not within the bargaining unit is inconsistent with anti-union animus, especially as we credit Sudol's testimony that Echelman's tone and behavior towards him and his intern were inappropriate. Sudol testified that Echelman addressed them in a demeaning and harassing way, asking his intern "who are you and what are you working on" while the intern was engaged in work. The fact that he was so offended by this behavior to promptly report it to management bolsters his credibility.[16] Accordingly, we find, based on Sudol's credible testimony, that Echelman's conduct towards Sudol and the intern was viewed by another employee as inappropriate, thereby rebutting the *prima facie* case. *See Local 376, DC 37*, 5 OCB2d 31, at 23 (BCB 2012) ("we have long held that even if it is established that a desire to frustrate union activity is a motivating factor [in an employer's action], the employer is nevertheless held to have

[15] We reject Respondents' characterization of the issuance of the Warning Memorandum as a non-disciplinary action. It is well-established that placement of a warning notice such as the one at issue here in a personnel file is a disciplinary action. *See Local 375*, *DC 37*, 5 OCB2d 27, 15-16 (BCB 2012) (finding that counseling memo was intended to be disciplinary where, among other factors, the memo explicitly stated that it would be placed in grievant's personnel folder and did not state that it should not be construed as discipline).

[16] It is also undisputed that Echelman previously received a verbal warning regarding his conduct towards a DEP intern.

complied with the NYCCBL where it is proven that the action complained of would have occurred in any event for valid reasons.") (citations and quotation marks omitted) Here, the fact that Echelman initiated a discussion that included, among other topics, union issues does not insulate him against discipline for other inappropriate workplace behavior towards his colleagues. *See Local 376*, *DC 37*, 4 OCB2d 58, at 15 (BCB 2011).

In sum, Petitioners have failed to demonstrate that DEP violated NYCCBL §12-306(a)(3) and, as such, there can be no derivative violation of NYCCBL § 12-306(a)(1). *See Feder*, 1 OCB2d 23, at 20 (BCB 2008). Accordingly, we dismiss the petitions in their entirety.

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 petitions, docketed as BCB-3086-13 and BCB-4004-13, filed by Civil Service Technical Guild, Local 375, AFSCME and Todd Echelman be, and hereby are, dismissed.

Dated: June 24, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER