

OSA, 7 OCB2d 20 (BCB 2014)
(IP) (Docket Nos. BCB-3056-12 & BCB-3089-13)

Summary of Decision: The Union alleged that the NYPD violated NYCCBL § 12-306(a)(1) and (3) when it denied one of its representatives a promotion and transferred her because of her Union activity. It argued that the failure to promote the Union representative was improperly motivated because NYPD officials did not think that she could separate her Union activity from the duties of the position. It further argued that she was transferred because of statements she made while representing a Union member at a disciplinary proceeding. The City argued that the Union has not set forth a *prima facie* claim of retaliation, and that the NYPD had legitimate business reasons for its actions. The Board found that the Union established a *prima facie* case of retaliation regarding both claims. The Board further found that the City provided a legitimate business reason for not promoting the Union representative, but that its purported business reason for transferring her was pretextual. Accordingly, the petition was granted, in part, and denied, in part. (*Official decision follows*)

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

In the Matter of the Improper Practice Proceeding

-between-

ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On October 19, 2012, and July 11, 2013, the Organization of Staff Analysts (“OSA” or “Union”) filed verified improper practice petitions against the City of New York (“City”) and the New York City Police Department (“NYPD”) on behalf of its member, Naomi Aice. The Board

determined that, due to the overlapping facts and issues presented, the petitions should be consolidated for hearing and decision. The Union alleges that the NYPD violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) when it denied Aice a promotion and transferred her in retaliation for her Union activity. The Union argues that the failure to promote Aice was improperly motivated because NYPD officials did not think that she could separate her Union activity from the duties of the position. Further, it argues that Aice was transferred because of statements that she made while representing a Union member at a disciplinary proceeding. The City argues that the Union has not set forth a *prima facie* claim of retaliation, and that the NYPD had legitimate business reasons for its actions. This Board finds that the Union has established a *prima facie* case of retaliation regarding both claims. The Board further finds that the City has provided a legitimate business reason for not promoting Aice, but that its purported business reason for transferring her was pretextual. Accordingly, the petition is granted, in part, and denied, in part.

BACKGROUND

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

OSA is a public employee organization representing over 4,600 members in various titles, including the titles Administrative School Security Manager (“ASSM”) and Associate Supervisor of School Safety (“Associate”), employed by the NYPD. Aice is an ASSM in the NYPD’s School Safety Division (“SSD”) who, from approximately 2005 until March 2013, served as the Borough Manager of the NYPD’s Manhattan North Command. In this role, Aice was responsible for managing the operations of approximately 132 sites and 283 schools

between 59th and 220th Streets. In March 2013 Aice was transferred to Central Headquarters where she currently serves as a Commanding Officer (“CO”) for Support and Special Services. Since approximately 2003, Aice has served as an OSA representative and she is currently a member of the executive board. In her capacity as a representative, Aice participates in contract negotiations, acts as an advocate for other OSA members in disciplinary actions, and brings Union issues to the attention of NYPD management.

While serving as Borough Manager of Manhattan North, Aice received an overall mark of “above standards” on her performance evaluations for the years 2009, 2010, and 2011. She was also nominated for the NYPD’s 2009 “Perfect Attendance Recognition For Civilian Member of Service.” (Union Ex. A) Additionally, Aice received endorsements from Deputy Commissioner Michael Farrell and Assistant Chief Brian Conroy (hereinafter, “Chief Conroy”) complimenting her on the results of quality assurance evaluations that were conducted on facilities in the Manhattan North Command. Aice’s disciplinary history includes one command discipline from 2009, in which she forfeited one day of annual leave as a penalty.¹

The Lieutenant Policy

Prior to May 2011, Associates worked as second-in-command under ASSMs and also served as Integrity Control Officers (“ICOs”). In May of 2011, the NYPD implemented a new policy in which Lieutenants were hired and brought in to work under ASSMs and serve as the ICOs (“Lieutenant Policy”). This meant that the Lieutenants were now second in command and charged with supervising those below them, including the Associates. Previously, the Associates were supervised directly by the ASSMs. Aice explained that this Policy upset a number of

¹ The command discipline arose out of a complaint from one of Aice’s subordinates that she used improper language with him.

Associates who had served as ICOs for the past 12 to 13 years and who were not happy that they were now the assistants to the Lieutenants. She further explained that the Lieutenants do not have “line supervision” over the Associates, which means that the Lieutenants can’t evaluate or discipline them and, therefore, in her opinion, this meant that they did not have the authority to supervise the Associates. (Tr. at 16)

Aice explained that after the Lieutenant Policy was implemented, she requested a meeting with Chief Chan, who was then the head of the SSD, to discuss the Associates’ issues. During this meeting, Aice asked that the policy be put in writing so that “everyone understood the parameters that they were supposed to work under.” (Tr. at 17) When this did not occur, Aice brought the issue to OSA’s attention, and OSA held a meeting to discuss what should be done. Aice stated that this meeting occurred sometime between March and May of 2011 and that OSA’s president decided that the issue needed to be brought up with the NYPD’s Office of Labor Relations Department (“OLR”). Approximately two weeks later, OSA held a meeting with OLR. Aice testified that the Union did not receive a favorable response from NYPD management.

Chief Conroy testified that he has been employed by the NYPD for 32 years. He began working as the CO of the SSD in August 2011. He explained that the Lieutenant Policy was implemented by the NYPD Commissioner in May 2011. When Chief Conroy came to the SSD, he was briefed by the Chief of Community Affairs regarding this policy, and he was instructed to ensure that it was carried out and adhered to. He stated that the impetus of the Lieutenant Policy was that “there were several incidents of disciplinary issues with the higher ranks within the [SSD], including the deputy director position, [and the NYPD] felt there needed to be a change to bring a more professional level of performance to the [SSD].” (Tr. at 56) Chief Conroy stated

that the policy was conveyed to the staff in the SSD by his predecessors at CO conferences and at various other meetings.

Chief Conroy testified that some of the Associates were resistant to this new policy because they felt as though they were in a higher rank than the Lieutenants, who had effectively taken over their jobs. He further stated that some of the ASSMs worked very well with their Lieutenants while others tried to isolate them. Chief Conroy observed that Aice in particular was obviously not in favor of the policy, as she did not actively support it and did not work as well with her Lieutenant as she could have. Chief Conroy stated that he repeatedly had to re-emphasize in CO meetings that the Lieutenant Policy needed to be adhered to, and he felt as though this was unnecessary and a problem. Aice was in attendance at these meetings, and Chief Conroy stated that he had also addressed this concern with her informally in one-on-one conversations. However, Chief Conroy testified that he never addressed concerns over adherence to the policy with OSA. Further, he stated that he did not attend, nor was he aware of, the labor-management meeting regarding these concerns which was held sometime in the spring of 2011. It was not until after the filing of the first improper practice petition that he became aware that the meeting had taken place.

Lieutenant Leslie Simmons testified that she has been employed as the ICO in the Manhattan North SSD since May of 2011. She worked directly below Aice until Aice's transfer. She characterized her relationship with Aice as a basic, cordial working relationship. However, Simmons stated that she was aware that Aice felt that she and the other Lieutenants should not be supervising the Associates. Simmons described an instance in March 2012 in which she was instructed to monitor the time and attendance of a particular Associate. She stated that Aice and the Associate were aware that she was assigned to do this and that she believed that "at that time

everybody was in agreement” (Tr. 2 at 66) A few months later, in June 2012, Simmons called the Associate into her office for a conferral regarding his time and attendance issues. The Associate then stated, “You can’t give me a conferral. You don’t supervise me.” (Tr. 2 at 64) He also stated that Aice had already given him a conferral.

According to Simmons, when she told Aice what happened Aice stated: “Well you can’t supervise him.” (*Id.*) Simmons replied that she does in fact supervise the Associate, and Aice stated: “Nobody told me that I need someone of a competent authority to tell me that.” (*Id.*) The two then argued about who was a competent authority. Afterwards, Simmons called her supervisor to describe what happened, and she and Aice were then called down to meet with Chief Conroy.

Aice testified that she informed the subordinates in her command about the policy that Lieutenants supervise the Associates. She also stated that she never told any of her subordinates not to follow the policy. When asked what she would do if an Associate didn’t listen to a Lieutenant, she said “it depends on the circumstances, I never could encourage them or told them not to listen to the Lieutenants.” (Tr. at 46-47)

Deputy Director Position

In March 2012, the NYPD sent out a personnel bureau memo stating that it was recruiting for the managerial position of “[ASSM] (Managerial Details) M-II, designated Deputy Director, Field Operations, Manhattan/Bronx” (“Deputy Director position”). (Union Ex. D) According to the job description, the Deputy Director would be “responsible for managing, overseeing, and directing the work of four (4) Borough Managers in charge of field operations within the Manhattan and Bronx boroughs.” (*Id.*) Aice applied for this position and was interviewed later that month by a panel that included Chief Conroy and approximately five other members of

management. Aice stated that during the interview she presented the panel with information regarding her education, her performance evaluations, and her eight years of experience as a CO. Aice was aware of four other ASSMs who were also interviewed for the position.

Chief Conroy testified regarding the Deputy Director openings and the process by which those openings were filled. He stated that the positions became available after two Deputy Directors were served with disciplinary charges. As a result of these charges, one was demoted, and the other retired. He stated that, because of these previous problems, he was looking for “somebody that had very strong leadership qualities and somebody who would be able to . . . carry out the mission and adhere to . . . current policies.” (Tr. at 61) He further explained that he felt as though the SSD was at a crossroad and that these openings presented important opportunities to make significant changes.

Chief Conroy explained that a bulletin was circulated announcing the position. The candidates were then interviewed by a group of upper management personnel which included himself. Chief Conroy stated that he asked some questions during the interviews but he felt that his primary role was just to observe and listen to the candidates’ answers to questions. The other board members filled out a rating sheet but he did not. He explained that he saw the interviews as an important part of the process but that they were not his only consideration.

Chief Conroy explained that when choosing the two individuals to receive the promotion he “took a look at [the candidates’] personnel records and put all that together [with] conferrals with some of the upper management.” (Tr. at 64) He also took into consideration “how they worked, how they interacted, how they worked with their Lieutenants as executive officer, how they embraced it, how they took advantage of what the Lieutenants had to offer and how they carried out the policies of the [NYPD].” (Tr. at 65) Conroy believed that the two individuals

selected had “two of the better working relationships with the Lieutenants.”² (*Id.*) He said that this made a difference in how their boroughs were run and how well the Associates there were working. Chief Conroy felt that the two chosen candidates had stronger leadership skills than Aice and that this was critically important because the SSD needed a “strong leader, somebody who would adhere to department policies[.]” (Tr. at 66)

Chief Conroy testified that when he spoke with Aice about his decision he told her that he didn’t believe she was the best person for the job at that time. Further, he stated that he liked her professionally and personally, that they’d had some good conversations, but that he felt that it was not the right time to promote her “based on the other candidates that [he] had an opportunity to select.” (Tr. at 67) He assured her that this decision did not mean that she wouldn’t have additional opportunities to become a Deputy Director in the future. However, he stated that she wasn’t the right candidate “partially based on the fact that [he] didn’t think she embraced the Lieutenant in her borough, [and] that the relationship within her borough was not what [he] thought it should have been.” (Tr. at 67) Chief Conroy testified that the topic of Aice’s Union activity was not discussed during this conversation.

During cross-examination, Chief Conroy acknowledged that he is aware that Aice is an OSA delegate. However, he stated that she never formally approached him as an OSA delegate to discuss issues related to the Lieutenant Policy. Rather, he testified that he was aware of her issues with the policy through routine discussions that he had with all of the managers.

Aice testified that she learned she did not receive the promotion on June 19, 2012, during a meeting with Chief Conroy. Aice stated that after he informed her of his decision she asked

² The evidence reflects that of the two individuals chosen, one had more managerial experience than Aice. The other individual was singled out by Conroy as having the best working relationship with his Lieutenant. (*See* Tr. at 65)

him for an explanation, and he replied that “everybody knows that you’ve been fighting against the Lieutenants being here . . .” (Tr at 37) Aice then asked him how he would know this, since he didn’t come to the SSD until July. Chief Conroy noted that he began working there in August, but that this was an issue that everyone was aware of. Aice then explained to him that she brings the complaints to management on behalf of those she represents but that she doesn’t object to the issue of the Lieutenants one way or another, as it does not affect her professionally or personally. Aice testified that Chief Conroy said “yes, but I don’t feel that you can separate your [U]nion affiliation from the position.” (Tr. at 37) Aice then asked him if he understood that if she was promoted she would no longer be in the Union and he again stated that he still did not believe she could separate the two. When Aice stated that she may not be able to work for the NYPD any longer since she “had another chief telling [her she] can’t get promoted,” Chief Conroy told her “Naomi, we don’t want to lose you, you’re so well-respected.” (Tr. at 38)

Two days later, Aice wrote an interdepartmental memo to Director Ramon Garcia, the Director of Patrol Operations for the SSD. In this memo, she stated that she was writing to ask for his advice and assistance. She then described her meeting with Chief Conroy and wrote that he stated that she did not receive the promotion “because I was not on board and I had been fighting the Lieutenants being here since May of 2011 when it started and he did not feel that I could separate my union affiliation from the Deputy Director position.” (Union Ex. F) Aice’s memo goes on to state that “at no time was it declared that a candidate’s union affiliation would be considered negatively or positive in deciding whether or not one was qualified for the position.” (*Id.*) Further, she stated that “[i]t is obvious that my years of dedicated service, my character, my integrity and my work performance played no role in this decision. My qualifications were put aside and I was judged solely on my union affiliation.” (*Id.*) Her memo

closes by stating that “any advice you can provide me as to how I should proceed from here would be greatly appreciated.” (*Id.*) Aice testified that she never received a response and that when she saw the Director Garcia about six months later he said that he could not respond to what Chief Conroy had said.

March 5, 2013 Disciplinary Hearing

On March 5, 2013, Aice served as a Union representative for Associate Ramon Galarza at a disciplinary hearing in Manhattan South. Also present at the hearing were ASSM Sheila Skinner, who was serving as the Union representative for another Associate who had also been brought up on disciplinary charges; Associate Level II Ronnie Williams, who was the hearing officer responsible for adjudicating the charges; and Lieutenant Andre Brown, who was the ICO who wrote Galarza up for the charges. Aice, Skinner, Williams and Brown all testified regarding the hearing.

The hearing involved charges that Galarza failed to abide by the ICO’s orders to monitor and inspect an absence control sign-out log (“logbook”). Aice testified that she advised Galarza that this logbook was not an officially sanctioned NYPD instrument because it was something that was made up by an employee who was a lesser rank than Galarza. CO Williams opened up the hearing and read the charges, and Galarza was then given an opportunity to explain his side of the story. During the course of this, some questions came up, and according to Aice, Lieutenant Brown “refuted the questions” and stated, “I’m your supervisor. I told you to do something and you didn’t do it.” (Tr. 2 at 34). Aice then stated, “According to [DCAS], legally and technically you are not his supervisor.” (*Id.*) She explained that she said this because “[DCAS] says because the chain of supervision is so murky [Lieutenant Brown] can initiate the CD, but it should be written by Mr. Williams.” (*Id.*)

Skinner, CO Williams, and Lieutenant Brown's versions of the events at the hearing were similar to Aice's. While their testimony differed slightly, Skinner and Williams both indicated that during the hearing Aice stated that according to DCAS, Lieutenant Brown was not technically Galarza's supervisor. Lieutenant Brown's testimony did not mention whether or not Aice's statements referenced DCAS, but he also testified that Aice stated that he was not Galarza's supervisor. CO Williams then interjected and stated that the hearing was not the forum to discuss whether Lieutenant Brown was Galarza's supervisor or not. The hearing continued and CO Williams substantiated the charges against Galarza.

Aice testified that after the hearing she went back to her command. About an hour later, she was summoned to Central Headquarters to see Chief Conroy, who questioned her about the statements that she made in the hearing. He stated, "I'm hearing that you said that the Lieutenants don't supervise the Associates." (Tr. 2 at 35) Aice then responded, "Chief, please don't tell me what somebody told you I said. Ask me and I'll tell you what I said. . . . According to DCAS, you know, [the Lieutenants] are not [the supervisors]. It's not in writing. What's the big deal?" (*Id.*) She also stated that "[e]verybody knows this is what our stance is." (Tr. 2 at 36) According to Aice, Chief Conroy then said "okay" and they started talking about a different subject for about ten minutes before he told her she could leave. (*Id.*)

Aice testified that she began to leave and then Director Garcia called her into his office. Aice's supervisor, Deputy Director Vincent Sica, was also present. According to Aice, Garcia began questioning her and repeatedly asked her to confirm that she knows that Lieutenants are the Associates' supervisors. He also told her that she gave Galarza bad advice. Aice replied that they shouldn't be having this conversation. Garcia then stated: "You being a union rep doesn't mean anything. You have to do what we say, too. You are a manager first. . . . As a manager,

you have to go along with what we want you to go along with.” (Tr. 2 at 36-37) Aice then stated: “I wear two hats. When I am representing someone, I am not a manager. I am representing them in a union way.” (Tr. 2 at 37) According to Aice, Director Garcia replied: “That doesn’t mean anything.” (*Id.*)

Transfer

Aice testified that the following week, on March 11, 2013, she was summoned back to Central Headquarters and ordered to see Chief Conroy. They then went into Director Garcia’s office. According to Aice, Chief Conroy said that he didn’t understand why Aice was taking the stance that Lieutenants don’t supervise Associates, but that since she was taking that stance he was stripping her of her command, stating: ““This is a paramilitary organization. I’ll not stand for you to be a negative influence, so you are being transferred. You’ll be assigned special projects. I am taking your vehicle. You have to get back and forth to work the best way you can.”” (Tr. 2 at 38)

Aice also received a letter of instruction from Deputy Director Sica regarding her transfer. The letter, dated and received by Aice on March 11, 2013, states:

1. On Tuesday, March 5, 2013, a command discipline hearing was held in the confines of School Safety Manhattan South where the subject of the hearing was Associate Supervisor Ramon Galarza. The hearing officer was ASSS II Ronnie Williams. While representing Associate Galarza you made a statement that Lieutenants do not supervise the Associates Supervisors of School Security I. Numerous times over the past year it has been stated by the Department’s hierarchy (Chief of Community Affairs, Commanding Officer School Safety Division and Director, Patrol Operations) the Lieutenants are second in command of SSD Borough Commands and directly [] supervise ranks of Associate Supervisors of School Security Level I and below.
2. In making these statements, you did not support the directive mentioned above. As a Commanding Officer in this Division you must support all initiatives and directives given by

hierarchy of this Division. Your failure to comply with this has resulted in you being transferred to Central Headquarters.

(Union Ex. I)

Chief Conroy testified that “[w]hen the final thing happened with the command discipline for Associate Galarza, I thought that was the final -- in my view, that we were not going to be able to come to an agreement on this.” (Tr. 2 at 53) He therefore decided after his individual conversation with Aice on March 5, 2013, that “she could no longer be in the position she was in based on her personal beliefs that the policy was not a valid policy.” (Tr. 2 at 54) He testified that he decided to move her to Central Headquarters because they were going to have an opening in the special services unit, and he felt that Aice would be a good candidate for the position once it was opened. He stated that he wanted to take advantage of her experience and that he felt it would be a new start for her. Chief Conroy also stated that there were no Associates in Central Headquarters and that he believed this contributed to his decision to transfer Aice there. He explained that around that time one of the Associates in Aice’s command mentioned to him that he was unaware of the Lieutenant Policy. Chief Conroy felt that it was a problem that after two years of the policy being in effect some of the Associates under Aice’s command were still unaware or resistant to it.

POSITIONS OF THE PARTIES

Union’s Position

The Union asserts that the NYPD violated NYCCBL § 12-306(a)(1) and (a)(3) when it denied Aice a promotion and later transferred her in retaliation for her Union activities and

advocacy concerning the supervisory role of Lieutenants over Associates.³ It argues that the City has acknowledged that Aice engaged in protected activities in her role as a Union representative and that the City does not dispute that Aice's status as a Union representative was known at all relevant times.

The Union contends that it has demonstrated that Aice's protected activity was the motivating factor in the NYPD's decision not to promote her. It asserts that Chief Conroy's own observations of the candidates in the workplace carried the most weight in this determination, and he testified that he was looking for a candidate who would adhere to the current policies. According to the Union, this meant that "Chief Conroy was looking for someone who did not question the unwritten Lieutenant policy." (Union Br. at 12) Therefore, he chose candidates that were not Union delegates and had "never advocated in the zealous fashion which ASSM Aice has over the years[.]" particularly with regard to the policy at issue. (*Id.*) Thus, the Union argues that Chief Conroy admitted that Aice's Union activity was the motivating factor in his decision not to promote her to Deputy Director.

³ NYCCBL § 12-306(a) provides, in pertinent part:

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization[.]

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."

Further, the Union argues that Chief Conroy's testimony was not credible. In particular, the Union claims that Chief Conroy's statements that he had to continuously remind managers of the policy contradict what it characterizes as his denial of knowledge of the Union's issues with the policy. The Union also argues that Chief Conroy's denial that Aice's Union activity was discussed during the June 19, 2012 meeting is belied by his own testimony in which he stated that he did not promote Aice because he didn't think she embraced the Lieutenant in her borough.

The Union further asserts that the City has failed to establish a legitimate business reason to justify the NYPD's decision to deny Aice the promotion. It argues that, although the City asserted in its answer to the first improper practice petition that one of the reasons why Aice was not chosen was because of her disciplinary record, Chief Conroy never testified that this was a factor in his decision. Therefore, the Union asserts that the City's justification is pretextual.

Regarding Aice's transfer, the Union argues that the City does not dispute that Aice was engaged in protected activity during the hearing on March 5, 2013, but claims that the NYPD's action was taken in response to her "direct refusal to follow NYPD policy" (*Id.* at 15, citing *Ans. 2* at ¶ 45) However, according to the Union, Aice never refused to follow the Lieutenant Policy at issue at any point in time. She was never served with charges or issued a command discipline penalty for a violation of the policy. Rather, while acting in her capacity as a Union representative, she merely reiterated a "well-known, agency-recognized Union position" when she questioned the legitimacy of the policy. Thus, the Union argues that Aice's comments unquestionably constitute protected activity under the NYCCBL, and therefore the transfer based on these statements was unlawful.

The Union further argues that Aice's transfer was inherently destructive of employee rights because she was "unquestionably directly and unambiguously penalized" for engaging in protected conduct. (*Id.* at 17) The Union argues that here, as in *OSA*, 6 OCB2d 26 (BCB 2013), the fact that the NYPD did not agree with Aice's statements did not make them inappropriate, nor did they lose their protection under the NYCCBL. The Union asserts that by punishing Aice because it disagreed with her statements, the NYPD is "effectively telling other Union members that it is inappropriate to espouse a union position which is contrary to NYPD policy and, if done, punishment will follow." (Union Br. at 18)

City's Position

The City argues that the Union has failed to establish that any action taken by the NYPD was implemented in retaliation for protected Union activity. The City acknowledges that Chief Conroy was aware that Aice was a Union representative and that Aice's issues with the Lieutenant Policy were well-known throughout the NYPD. With regard to the Deputy Director position, Chief Conroy testified that the NYPD was looking for strong leaders who would be able to carry out the Department's mission and adhere to current policies, including the Lieutenant Policy. The City asserts that Chief Conroy determined that two other employees were the best candidates for the position based on the fact that they had excellent working relationships with their Lieutenants that was reflected by better results within their commands.

The City contends that "Chief Conroy strongly denied" making the statement that Aice did not receive the promotion because she couldn't separate her Union affiliation from the position. (City Br. at 18) Further, it argues that this alleged statement would not make any sense when considered in context with the promotion which would have taken Aice out of the Union and into a management position. The City asserts that without this statement, the Union is left

only with Aice's belief that she was being penalized for her Union advocacy. However, mere speculation and conclusory allegations cannot establish the requisite causal link for a claim of retaliation.

Furthermore, the City argues that even if the Board were to find that the Union has established a *prima facie* case regarding the promotion, nevertheless the NYPD had a legitimate business reason for its decision to promote two other individuals. Chief Conroy testified that in choosing who to promote he conducted a holistic review focusing on the interviews, as well as his own observations, conferrals with upper management, and a review of the candidates' personnel records. According to the City, the candidates chosen clearly had better working relationships with their Lieutenants than Aice, who failed to accept the Lieutenants' addition into the hierarchy and failed to take advantage of their skills. Thus, as Chief Conroy explained, Aice was not as strong of a leader as the selected candidates. Further, the City argues that the fact that Aice had a disciplinary record for failing to show respect towards a subordinate bolsters the City's legitimate business reason.

Next, the City argues that the Union has failed to prove that Aice's transfer was motivated by her Union activity and asserts that it was instead a consequence of Aice's repeated refusal to enforce the Lieutenant Policy. According to the City, "[e]mployees who take actions wearing their 'union hats' are not shielded from potential consequences in their 'employee hats.'" (*Id.* at 19) The City contends that Aice's statements at the March 5, 2013 hearing served to undermine the Lieutenant policy. While Aice may be a Union representative, she is also a high-ranking supervisor at the NYPD and, as such, she has a duty to uphold the NYPD's policies and chains of command. Thus, according to the City, it is inconsequential that Aice's statements

were made in a Union context, as this does not make her immune from the NYPD's rules and regulations.

The City further asserts that the NYPD had a legitimate business reason for transferring Aice. It contends that the testimony establishes that ever since the Lieutenant Policy was enacted by the NYPD, Aice had a problem with it and neglected to enforce it. As evidence, the City points to Lieutenant Simmons' testimony that Aice had instructed an Associate that Simmons was not his supervisor. Additionally, the City characterizes Aice's statements made at the March 5, 2013 hearing as a refusal to enforce an NYPD initiative based upon her under own understanding of thirty-year old DCAS job specifications. As a consequence of failing to support NYPD initiatives, she was moved to a position where she would no longer be required to enforce a policy that she disagreed with.

Finally, the City argues that neither the denial of a promotion to Aice nor her later transfer constitute an independent violation of NYCCBL § 12-306 (a)(1). It asserts that it cannot be reasonably said that the NYPD's decision to promote two other highly-qualified people instead of Aice "directly and unambiguously penalizes or deters" protected Union activity, nor does it create a "visible and continuing obstacle[] to the future exercise of employee rights." (City Br. at 27, *citing CIR*, 51 OCB 26, at 41-42 (BCB 1993))

DISCUSSION

The Union claims that the NYPD retaliated and discriminated against Aice because of her Union activity in violation of NYCCBL § 12-306(a)(1) and (3). To determine whether an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, 39 OCB 51 (BCB

1987), and its progeny. This test states that, in order to establish a *prima facie* claim of retaliation, a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
2. the employee's union activity was a motivating factor in the employer's decision.

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

As to the first prong of the *Bowman-Salamanca* test, for 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) (citing *Finer*, 1 OCB2d 13 (BCB 2008)). In order to establish the second prong, "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions which are the subject of the complaint." *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007) (citing *Local 376, D.C. 37*, 73 OCB 15, at 14 (BCB 2004)). Proof of improper motivation must necessarily be circumstantial absent an outright admission. *Id.* "However, a petitioner must offer more than speculative or conclusory allegations, as claims of improper motivation must be based on statements of probative facts." *DC 37, L. 983*, 6 OCB2d 10, at 29 (BCB 2013) (citing *Morris*, 3 OCB2d 19, at 15 (BCB 2010)).

If the Union is able to establish a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements, or may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU*, 77 OCB 35, at 18 (BCB 2006); *see also Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011).

Denial of Promotion

Regarding the Union's claim that Aice was denied a promotion in retaliation for her Union activity, we find that the Union has met its burden of establishing a *prima facie* case, but that the City has nevertheless established a legitimate business reason for the NYPD's actions.

The City does not dispute that the NYPD had knowledge of Aice's Union activity and, thus, the first prong of the *Bowman-Salamanca* test has been met. With regard to the second prong, we find a causal connection has been established between Aice's Union advocacy and the NYPD's failure to promote her. Aice testified that after Chief Conroy informed her of his decision she asked for further explanation and he stated that "everybody knows that you've been fighting against the Lieutenants being here . . ." (Tr at 37). She further testified that after she explained to the Chief that she brings complaints with the Lieutenant Policy to management on behalf of those that she represents but that she doesn't object to the Policy personally or professionally, he replied: "yes, but I don't feel that you can separate your [U]nion affiliation from the position." (Tr. at 37). We find that Aice's testimony in this regard was reliable because the inter-departmental memo to Director Garcia that she wrote only two days later was consistent with her testimony and stated that the Chief made the alleged statement. *See COBA*, 2 OCB2d 7, at 52 (BCB 2009) (corroboration strengthens credibility). Furthermore, we find that Chief Conroy's testimony does not refute Aice's, as he was never directly questioned as to whether or not he made the alleged statement.⁴ Consequently, because we find that Aice's Union activity

⁴ We note that we do not find Chief Conroy's and Aice's testimonies to be at odds with one another because they appear to be describing what was stated at different points of the June 19, 2012 meeting. Chief Conroy's testimony focused only on what he told Aice were the reasons for his failure to promote her, namely her performance as an ASSM. In this regard, Chief Conroy's testimony that Aice's Union activity was not discussed is credited. The Chief was not questioned about Aice challenging his decision. Aice did not dispute Chief Conroy's testimony. Instead, her testimony focused only on what was said after he explained his decision and she

was discussed at some point during the meeting in which she was informed she was not receiving the promotion, we find that the Union has met its burden of establishing a *prima facie* case of retaliation.

The City argues that, should the Board find that a *prima facie* case of retaliation has been established, nevertheless the NYPD had a legitimate business reason for not offering Aice the promotion to Deputy Director because she did not follow and support NYPD policies in her role as an ASSM and because she had a prior disciplinary history while the employees chosen for the promotion did not. The Union argues that the NYPD's proffered business reasons are pretextual because there is no evidence that Aice failed to follow the policy or that her disciplinary history played a role in the decision not to promote her.

Initially, we find that the proffered business reasons for the NYPD's decision to promote two other candidates over Aice are legitimate. While Aice's advocacy against the Lieutenant Policy in her role as a Union representative is protected activity, this is a distinct issue from her performance as a supervisor. Indeed, in a case with similar facts, we previously found that an employer had a legitimate business reason to demote a supervisor who was an active union representative based in part on her failure to ensure that newly-initiated department procedures were being carried out in her unit. *See Local 768, DC 37, AFSCME, AFL-CIO*, 63 OCB 15, at 17-18 (BCB 1999). In *Local 768*, as here, the supervisor had actively spoken out in her opposition to the procedures both in her role as a union representative as well as in her role as a supervisor at staff meetings. When told to implement the new procedures, the supervisor asked for written documentation on the procedures and informed her staff that if they believed the procedures caused them to work outside of their job description, they should file a grievance. In

challenged his reasoning. Therefore, we find that both witnesses' testimony was credible as to different parts of the same meeting.

finding the employer's reasons for demoting the supervisor legitimate, the Board stressed that even if the supervisor believed that the employer was wrong in implementing the new procedures without consulting with the union, it was nevertheless her responsibility as a supervisor to ensure compliance with those procedures within her unit. *Id.* at 17. *See also State of N.Y. (OMRDD)*, 24 PERB ¶ 3036, at 3075 (1991). Thus, Aice did indeed have a duty to separate her beliefs as a Union advocate from her performance as an ASSM.

Based on the above, we find that the NYPD had a legitimate business reason for not offering Aice the promotion to Deputy Director. Chief Conroy testified credibly regarding the process by which he chose the two employees who received the promotion. In particular, he stated that when choosing who would fill the open positions he was looking for strong leaders who would adhere to and support NYPD policies, including the Lieutenant Policy. He stated that in making a decision he relied upon his own observations of the candidates' performance, and he also reviewed personnel records and conferred with members of upper management. Chief Conroy explained that, based on his assessment, he did not believe that Aice was the best candidate for the job because she did not fully embrace the Lieutenant in her borough while the other two candidates had excellent working relationships with their Lieutenants. This explanation was communicated to Aice during the June 19, 2012 meeting.

Chief Conroy's testimony is corroborated by that of Lieutenant Simmons, who stated that Aice questioned her authority as a supervisor and informed an Associate that Lieutenant Simmons could not supervise him, even though this went directly against the Lieutenant Policy.⁵

⁵ Lieutenant Simmons testified that this incident occurred sometime in June 2012. Aice was informed that she did not receive the promotion on June 19, 2012. While it is not clear whether the incident occurred before or after Chief Conroy made his decision, nevertheless, we find that Lieutenant Simmons' testimony bolsters Chief Conroy's testimony that Aice did not fully support the policy in her role as an ASSM.

Simmons' testimony was not rebutted. Aice's actions in this regard occurred in her role as an ASSM, not as a Union representative. Furthermore, when Aice was questioned as to what she would do if an Associate didn't listen to a Lieutenant, she responded somewhat evasively, stating: "it depends on the circumstances, I never could encourage them or told them not to listen to the Lieutenants." (Tr. at 46-47) We do not find this testimony to be persuasive evidence that Aice consistently enforced the Lieutenant Policy as an ASSM. Accordingly, we find that the Union did not rebut the City's evidence that it had a legitimate business reason for not offering Aice the promotion to Deputy Director.

The City also argued that Aice's disciplinary history was a factor in the decision not to promote Aice. The Union contends that this proffered business reason is pretextual because Chief Conroy did not testify that Aice's disciplinary history formed a basis for his decision. Concerning allegations of pretext, we have previously stated that "when a public employer offers, as a legitimate business defense, a reason that is unsupported by or inconsistent with the record, the defense will not be credited by this Board." *District Council 37, AFSCME, 77 OCB 33*, at 35 (BCB 2006). We agree that there is no independent evidence in the record to suggest that Aice's disciplinary history played a significant role in the NYPD's decision not to promote her. Chief Conroy's testimony did not specifically mention anything about Aice's previous command discipline, nor was he ever questioned as to whether this played a role in his decision. However, he did state that part of his decision-making process included reviewing the candidates' personnel files. Thus, while we find that the importance of this factor in the NYPD's decision was not significant, we cannot find that the City's assertion that Aice's command discipline was considered is wholly unsupported or inconsistent with the record. Therefore, we do not find that the NYPD's proffered business reasons are pretextual, and instead find that the

NYPD had legitimate business reasons for not offering Aice the promotion to Deputy Director. Accordingly, we dismiss this portion of the Union's claim.

Transfer

Regarding the Union's claim that Aice was transferred in retaliation for her Union activity, we find that the Union has met its burden of establishing a *prima facie* case, and that the City has not proven the NYPD had a legitimate business reason for its actions.

As stated above, the City does not dispute that the NYPD had knowledge of Aice's Union activities. Additionally, there is evidence that by the time of Aice's transfer the NYPD harbored anti-union animus. Approximately one hour after the March 5, 2013 disciplinary hearing, Aice was summoned to headquarters where Chief Conroy questioned her about her statements. She was then called in to speak to Director Garcia, who told her that in representing Galarza she gave him bad advice. He further stated: "You being a union rep doesn't mean anything." (Tr. 2 at 37) This evidence was not rebutted nor did the City call Director Garcia as a witness. Less than a week later, Aice was once again summoned to speak with Chief Conroy and Director Garcia where she was informed that she was a negative influence and that she was being transferred. We find that this evidence demonstrates that the NYPD was upset and agitated by Aice's Union activity.

Further, we find that there is clear temporal proximity between the statements Aice made while representing a fellow Union member at the March 5, 2013 command discipline hearing, and her transfer which occurred on March 11, 2013. The March 11, 2013 Letter of Instruction, informing Aice that she is being transferred, directly ties the statements she made during the hearing to her transfer. Specifically, it instructs Aice that in making the statement that Lieutenants do not supervise the Associates during the command discipline hearing, she did not

support the Lieutenant Policy. The Letter further states that her failure to do so had resulted in her being transferred. *See* Union Ex. I. We construe the Letter of Instruction as direct evidence of causation between Aice's protected activity and the NYPD's decision to transfer her and, accordingly, we find that the Union has established a *prima facie* case of retaliation.

In attempting to refute the *prima facie* case, the City contends that it is inconsequential that the statement at issue occurred in a protected context because this does not shield Aice from the consequences of her actions, which it labels as inappropriate and unacceptable. Indeed, we have previously stated that "certain inappropriate activities that occur in the context of otherwise protected activity may provide the basis for disciplinary action." *Local 376, DC 37*, 4 OCB2d 58, at 15 (citing *State of N.Y. (OMRDD)*, 24 PERB ¶ 3036). However, we do not find that the statement at issue here was in any way inappropriate or unacceptable. Contrary to the City's arguments, Aice was acting solely in her capacity as a Union representative when she maintained OSA's position that Lieutenants were not authorized to supervise Associates at the command discipline hearing. While representing a Union member, it is not Aice's job to enforce NYPD policies, but rather it is to zealously advocate for the member she is representing. The mere fact that the NYPD disagreed with her statement does not make the statement inappropriate, "nor does [it] lose its protection under the NYCCBL." *OSA*, 6 OCB2d 26, at 9 (BCB 2013) (citing *State of N.Y. (Div. of Parole)*, 41 PERB ¶ 3033 (2008); *Comsewogue Union Free Sch. Dist.*, 15 PERB ¶ 3018, at 3029-30 (1982); *Binghamton City Sch. Dist.*, 22 PERB ¶ 3034, at 3080 (1989)). Consequently, we find that the City has not refuted the Union's *prima facie* case.

Since it is clear that Aice's protected activity formed a basis for the NYPD's decision to transfer her, we must now assess whether the NYPD nevertheless had a legitimate business reason to transfer her. In the case of a decision based on a dual or mixed motive, "even if it is

established that a desire to frustrate union activity is a motivating factor, the employer is nevertheless held to have complied with the NYCCBL where it is proven that the action complained of ‘would have occurred in any event and for valid reasons.’” *Local 768*, 63 OCB 15, at 18 (BCB 1999) (quoting *CWA, L. 1180*, 43 OCB 17, at 19 (BCB 1989)). Here, the City argues that Aice’s transfer was a legitimate business decision necessitated by her “repeated refusal to enforce the [Lieutenant Policy]” (City Br. at 24)

Based on the evidence presented, we are not persuaded that Aice would have been transferred had it not been for the statements she made at the March 5, 2013 command discipline hearing. While the City argues that Aice repeatedly refused to follow the Policy, the only example it presented that related to her performance as an ASSM is the incident that occurred nine months earlier between Aice and Simmons, in June of 2012. No additional incidents which demonstrated a “repeated refusal” to follow the Policy were presented. Further, the Letter of Instruction notifying Aice of the transfer does not refer to a repeated refusal to follow the Lieutenant Policy. Rather, it cites only to the statement that Aice made during the March 5 hearing.

We also find that Chief Conroy’s testimony does not establish a legitimate business reason. Chief Conroy testified that Aice’s statement at the hearing was the final straw, and that he felt she “could no longer be in the position she was in based on her personal beliefs that the policy was not a valid policy.” (Tr. 2 at 54) This testimony refers only to Aice’s actions and beliefs as an advocate of the Union rather than her performance as an ASSM. Consequently, “[w]here, as here, proffered legitimate business reasons ‘are unsupported and/or inconsistent with the record, this Board will find that the public employer committed an improper practice.’” *SBA*, 4 OCB2d 50, at 27 (BCB 2011) (citing *SBA*, 75 OCB 22, at 24 (BCB 2005)).

In light of all of the above, we find that the City's justifications for transferring Aice are pretextual. We simply cannot conclude based on the evidence that Aice would have been transferred were it not for her protected Union activity. Consequently, we find that the NYPD violated NYCCBL § 12-306(a)(1) and (3) when it transferred Aice in retaliation for her Union activity.⁶

⁶ We have found that the NYPD's actions with regard to Aice's transfer were motivated by her Union activity. Accordingly, the § 12-306(a)(1) violation found is derivative of the retaliation claim and, therefore, it is not necessary to consider separately whether Aice's transfer was inherently destructive of employee rights and an independent violation of § 12-306(a)(1).

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 the Organization of Staff Analysts, docketed as BCB-3056-12, be, and the same hereby is, denied; and it is further

ORDERED, that the improper practice petition filed by the Organization of Staff Analysts, docketed as BCB-3089-13, be, and the same hereby is, granted; and it is further

ORDERED, that the NYPD rescind the transfer of OSA representative Naomi Aice and reinstate her as Borough Manager of the Manhattan North Command; and it is further

ORDERED, that the NYPD post appropriate notices detailing the above-stated violation of the New York City Collective Bargaining Law.

Dated: September 9, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER

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

We hereby notify:

That the Board of Collective Bargaining has issued 7 OCB2d 20 (BCB 2014), determining an improper practice petition between the Organization of Staff Analysts and the New York City Police Department.

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

ORDERED, that the improper practice petition, docketed as BCB-3089-13, be, and the same hereby is, granted as to claims that the NYPD violated § 12-306(a)(1) and (3) by retaliating against OSA representative Naomi Aice for engaging in protected Union activity; and it is further

ORDERED, that the New York City Police Department rescind the transfer of OSA representative Naomi Aice and reinstate her as Borough Manager of the Manhattan North Command; and it is further

ORDERED, that the New York City Police Department post appropriate notices detailing the above-stated violation of the New York City Collective Bargaining Law.

The New York City Police Department
(Department)

Dated: _____ (Posted By)
(Title)

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