

**DC 37, L. 3621, 7 OCB2d 29 (BCB 2014)**

(IP) (Docket No. BCB-4006-13)

**Summary of Decision:** The Union alleged that the FDNY violated NYCCBL § 12-306(a)(1) and (3) when it transferred an EMS lieutenant, removed him from its Ceremonial Unit, and delayed his transfer back to his home station, in retaliation for his union activity. It argued that these actions were also inherently destructive of employee rights. Respondents argued that the Union failed to state a *prima facie* case of retaliation, that the FDNY has a statutory right to transfer its employees, and that its actions do not constitute an independent violation of NYCCBL § 12-306(a)(1). Respondents contended that, even if the Board finds that a *prima facie* case is established, the FDNY's actions were taken for legitimate business reasons. The Board determined that Respondents did not refute the Union's *prima facie* case of retaliation and that the evidence did not support their proffered legitimate business reasons. Accordingly, the petition was granted. (*Official decision follows.*)

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

**In the Matter of the Improper Practice Proceeding**

*-between-*

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,  
AND ITS AFFILIATED LOCAL 3621,**

*Petitioners,*

*-and-*

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

*Respondents.*

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**DECISION AND ORDER**

On September 23, 2013, DC 37, AFSCME, AFL-CIO, and its affiliated Local 3621 (“Union”), filed a verified improper practice petition against the City of New York (“City”) and the New York City Fire Department (“FDNY” or “Department”). The Union alleges that the

FDNY 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 transferred Michael Sheridan, a lieutenant in the FDNY’s Emergency Medical Service (“EMS”), removed him from the FDNY’s Ceremonial Unit, and delayed his transfer back to his home station, in retaliation for his union activity. The Union argues that these actions were also inherently destructive of employee rights. Respondents argue that the Union failed to state a *prima facie* case of retaliation, that the FDNY has a statutory right to transfer its employees, and that its actions do not constitute an independent violation of NYCCBL § 12-306(a)(1). Respondents contend that, even if the Board finds that a *prima facie* case is established, the FDNY had legitimate business reasons for their actions. The Board finds that Respondents did not refute the Union’s *prima facie* case of retaliation and that the evidence did not support their proffered legitimate business reasons. Accordingly, the petition is granted.

### **BACKGROUND**

The Trial Examiner conducted five days of hearings in this matter and determined that the totality of the record established the relevant facts to be as follows:

The FDNY is the municipal provider of pre-hospital emergency medical treatment and transport throughout the City. The Union is the certified bargaining representative for EMS lieutenants employed by the FDNY. The FDNY and the Union are parties to a 2002-06 Emergency Medical Services Agreement (“Agreement”), which remains in *status quo* pursuant to NYCCBL § 12-311(d).

Lt. Sheridan worked at EMS for over 30 years and served as an EMS lieutenant for nearly

22 years.<sup>1</sup> For the majority of his tenure at EMS, he was assigned to the overnight shift, working from 10:00 p.m. to 6:00 a.m. From 2004 until his November 2012 transfer, Sheridan worked at Station 47 in Rockaway, Queens. As a lieutenant, Sheridan's responsibilities were to manage the facility, ambulances, and field personnel, including paramedics and emergency medical technicians ("EMT").

In addition, in approximately 2007, Lt. Sheridan was appointed to the FDNY's Ceremonial Unit. As a member of the Ceremonial Unit, he represented the FDNY at public functions such as funerals, parades, and sporting events. There are no formal written selection criteria for appointment to this Unit. Rather, Ceremonial Unit members are sought out via recommendations from senior EMS and fire personnel. Lt. Sheridan received overtime pay for serving in the Ceremonial Unit.

#### Lt. Sheridan's Union Activity

In 2009, Lt. Sheridan was appointed as the Union delegate for EMS Division 4, which covers the borough of Queens. In that role, he performed duties similar to those of a shop steward. Lt. Sheridan testified that, in his capacity as the Union's Division 4 delegate, he advocated for Union members, attempted to resolve issues between members and management, and served as a Union witness in grievance arbitrations. Union President Vincent Variale characterized Sheridan as a "very active" delegate and DC 37 Council representative Tracy Ziembra described him as more outspoken than most delegates. (Tr. 28)

During his tenure as a delegate, Lt. Sheridan was particularly active in addressing overtime distribution issues in Division 4. Lt. Sheridan testified that the correct procedure was to distribute

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<sup>1</sup> Lt. Sheridan retired from the FDNY in the spring of 2014, prior to the conclusion of the hearing in this matter.

overtime based on seniority. Throughout Division 4, however, he observed that management was not distributing overtime according to seniority but rather on a first come, first served basis or by other methods, such as who had the lowest percentage of overtime. Lt. Sheridan raised the issue with Chief Roger Ahee, the top Division 4 official during the period when the dispute over overtime distribution was occurring. President Variale provided unrebutted testimony that Chief Ahee and some deputy chiefs subsequently began to visit or follow Lt. Sheridan at night, which was unusual, and would ask Lt. Sheridan why he was causing problems and making a big deal about overtime. Notwithstanding this, according to Lt. Sheridan, he and the Union persisted on the overtime distribution issue and management eventually reverted back to a seniority-based overtime assignment policy shortly before he was transferred in late 2012. Lt. Sheridan further testified that, as the Division 4 delegate, he constantly raised other workplace issues with Chief Ahee, such as safety hazards in the facilities, appropriate locker room facilities, and traffic safety. He also erred on the side of not disciplining fellow employees, which caused friction between him and some of the Division 4 officers.<sup>2</sup>

Lt. Sheridan also testified as a Union witness in a “span of control” grievance, in which the Union alleged that the FDNY violated its own regulations on staffing ratios. In the 2009 and 2010 arbitration hearings on that matter, Lt. Sheridan testified about the impact of the staffing violations in Division 4, particularly in life-threatening emergency situations. In September 2012, an

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<sup>2</sup> Additionally, during his tenure as a Union delegate, when Lt. Sheridan asked for individual days off, he was informed by management that he could only take five consecutive days and not individual days. According to Pres. Variale, Lt. Sheridan had more seniority than nearly everyone in Division 4 and therefore should have had priority in the selection of vacation days. Lt. Sheridan spoke to Pres. Variale about the situation, and Pres. Variale advised him to request a five-day vacation and then return early and rescind the remaining days. Pres. Variale testified that Lt. Sheridan did this a few times and was informed by the deputy chiefs that he was causing problems.

arbitrator issued a decision finding that the FDNY had violated the Agreement and its rules and regulations by failing to adhere to the Department's span of control guidelines.

Events Surrounding Lt. Sheridan's Transfer to EMD and Removal from the Ceremonial Unit

On October 29, 2012, the evening that Hurricane Sandy hit, Lt. Sheridan was unable to report for his regular night shift due to the storm's severity. He reported to his assigned station, Station 47, the following morning to find it flooded with approximately five feet of water. Lt. Sheridan provided un rebutted testimony that the station was "unsecured" when he arrived, with radios, vehicle keys, and other valuables left out, and the narcotics locker hanging off the wall with narcotics still in it, and that he secured these items. He testified that he and a paramedic transported the narcotics locker to a temporary EMS station, opened it, verified the drug count, cleaned the drugs, and wiped out the box.

Lt. Sheridan further testified that, in order to put an ambulance in service and send and receive messages, you must log onto the computer terminal in the truck. He explained that he had relieved a colleague, Lt. Waryold, on the night after Hurricane Sandy. Lt. Waryold was supposed to return to the station the next morning at 6:00 a.m. but did not arrive on time. By 6:10 a.m., Waryold was not there and the truck needed to be put into service. Lt. Sheridan testified that he "put [Waryold's] number in the truck, I logged on, assuming that [Waryold] would be there in short order." (Tr. 154-55) According to Lt. Sheridan, he got called back to the station later that day by Division 4 Deputy Chief Joseph Sanders, who asked him what happened that morning. He informed Deputy Chief Sanders that he had logged in with Lt. Waryold's number and Deputy Chief Sanders said okay.

On October 31, 2012, the FDNY issued a Human Resources Order ("HR Order") reassigning Sheridan from Station 47 to a dispatch supervisor position at Emergency Medical

Dispatch (“EMD”), effective November 11, 2012. EMD, located in Brooklyn, is a division of the EMS Bureau of Communications. The HR Order indicated that Sheridan’s transfer was an “administrative reassignment.” (See Pet., Ex. A) Lt. Sheridan testified that an administrative reassignment has a stigma attached to it because it is commonly a disciplinary measure or is perceived as one.<sup>3</sup> No FDNY or EMS official provided a reason or explanation for the reassignment to Lt. Sheridan or the Union.<sup>4</sup>

On November 5, 2012, Joe LaPointe, Commanding Officer of the FDNY’s Ceremonial Unit, informed Lt. Sheridan that he had been removed from the Ceremonial Unit. According to Lt. Sheridan, Abdo Nahmod, the Chief of EMS, advised Officer LaPointe that Lt. Sheridan was unable to continue on the Ceremonial Unit because “he’s got issues.” (Tr. 168) Lt. Sheridan testified that no one informed him why he was removed from the Ceremonial Unit.

Chief Nahmod testified that he ordered Lt. Sheridan’s removal from the Ceremonial Unit. He further testified that Jerry Gombo, the Assistant Chief of EMS Operations, informed him that Lt. Sheridan was being administratively transferred and that there was an “ongoing investigation” by the FDNY’s Bureau of Investigations and Trials (“BITS”).<sup>5</sup> (Tr. 330) Chief Nahmod stated

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<sup>3</sup> Indeed, Lt. Sheridan testified that a coworker, upon learning of his reassignment, asked him what he had done wrong.

<sup>4</sup> Lt. Sheridan testified that the reassignment to EMD created a financial and personal hardship for him. During the three-week EMD training period, he was assigned to a different tour and platoon from the one he had been on for the prior 20 years. Lt. Sheridan explained that his income was impacted because he temporarily lost opportunities to earn a night shift differential. He also testified that the reassignment impacted his marriage because both he and his wife, also an EMS employee, had previously worked nights. When he was transferred to EMD, he was assigned to a day shift but his wife continued to work nights. In addition, he stated that he did not receive adequate training to perform the job at EMD. Typically training for the dispatcher position is three months but that he received only three weeks of training.

<sup>5</sup> BITS is the FDNY unit that investigates disciplinary matters.

that, until Chief Gombo informed him otherwise, Lt. Sheridan would remain off the Ceremonial Unit. He testified that he did not ask Chief Gombo about any of the details of the investigation, including why Lt. Sheridan was being administratively reassigned.<sup>6</sup> He also testified that members of the Ceremonial Unit must be in good standing, without discipline or any cause for “disrepute” to the Department, and that he had previously removed one other lieutenant from the Unit. (Tr. 333) Chief Nahmod testified that he is “not familiar” with Lt. Sheridan’s role in the Union. (Tr. 328)

At the hearing, Chief Gombo testified that he knew that Lt. Sheridan was a shop steward although he was unfamiliar with Lt. Sheridan’s role in raising the overtime distribution issue in Division 4. He was also a witness in the span-of-control grievance arbitration and acknowledged attending the entire proceeding but denied being present for Lt. Sheridan’s testimony at the proceeding.

Chief Gombo facilitated Lt. Sheridan’s reassignment from Station 47 to EMD.<sup>7</sup> He testified that he received a call from BITS Assistant Commissioner Robert Wallace informing him that Lt. Sheridan needed to be reassigned. Chief Gombo further testified that he didn’t ask Asst. Comm. Wallace about any details of the investigation nor did Asst. Comm. Wallace volunteer

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<sup>6</sup> Shortly after Lt. Sheridan was transferred and removed from the Ceremonial Unit, Pres. Variale saw Chief Nahmod at a promotional ceremony and asked him why the FDNY had taken these actions. According to Pres. Variale, Chief Nahmod responded that Lt. Sheridan was a “bad man” who did “some bad things.” (Tr. 55-56) Chief Nahmod denied having made this statement.

<sup>7</sup> Chief Gombo oversees EMS’ daily operations and serves as its liaison to administrative units within the FDNY, including BITS and the Equal Employment Opportunity (“EEO”) Office. His duties include handling interdivision reassignment requests and staffing. He is also the contact person for facilitating administrative transfers. Chief Gombo testified that a unit may request an administrative reassignment if there’s an ongoing investigation, an order of protection, or EEO issues, and that each matter is handled on a case-by-case basis.

them. However, he also testified that, based on his discussion with Asst. Comm. Wallace, he assigned Lt. Sheridan to EMD because he would be supervised “24/7” there. (Tr. 277) He acknowledged, however, that Lt. Sheridan was not always under constant supervision during his tenure at EMD.

Chief Gombo denied that Lt. Sheridan was reassigned for disciplinary reasons or due to operational requirements. Rather, he testified, the reassignment was “for the good of the service.” (Tr. 287) When pressed to explain what this term meant, Chief Gombo stated that the reassignment was due to an “ongoing investigation.” (Tr. 292-93)

In early November, Lt. Sheridan spoke to Pres. Variale to find out why he was being reassigned. Pres. Variale, who also didn’t know the reason for the transfer, made inquiries of various FDNY officials, including Chief Nahmod, FDNY Labor Relations Director David Zweifler, Chief Ahee, and Captain Joseph Gasperini, Sheridan’s supervisor at Station 47, but did not receive definitive or clear answers from any of them.

Pres. Variale and Rep. Ziembra, as well as Lt. Sheridan, testified as to their repeated and ongoing attempts over the course of the following months to learn the reason for the reassignment from FDNY officials and to request that Lt. Sheridan be returned to Station 47. Shortly after learning of Lt. Sheridan’s reassignment, Pres. Variale informed Zweifler that he believed Lt. Sheridan was being transferred due to his removal of the narcotics box in the aftermath of Hurricane Sandy. He told Zweifler that, if this were the case, it was inappropriate because the FDNY’s operational procedures prohibit reassignments for disciplinary reasons. Zweifler said he would look into the situation.

Pres. Variale spoke with Capt. Gasperini, Sheridan’s supervisor at Station 47, to ascertain whether there were any disciplinary issues pertaining to Lt. Sheridan. He testified that Capt.



Gasperini told him that Chief Ahee instructed him to write up charges against Lt. Sheridan for the narcotics box incident that occurred during Hurricane Sandy. Shortly thereafter, the Union obtained a copy of a proposed charge against Lt. Sheridan, dated November 11, 2012, stating that Lt. Sheridan violated EMS regulations when he “forcefully removed the narcotics lockers from the wall at station 47 without authorization.” (See Pet, Ex. B) For reasons that are not clear from the record, that charge was never issued. However, Pres. Variale also spoke with Chief Ahee, who confirmed that Lt. Sheridan would be receiving formal charges.<sup>8</sup>

On November 16, 2012, the Union filed a grievance alleging that the FDNY transferred Lt. Sheridan for disciplinary reasons, in violation of § 4.3 of the FDNY’s Operations Guide Procedure 104-06 (“Ops Guide 104-06”), and without due process. Ops Guide 104-06 addresses “Reassignment Requests.” (See Ans., Ex. 1) Section 4 of Ops Guide 104-06, “Policy,” provides, in part:

- 4.1 Requests for reassignment will be for the good of the Department and shall be considered based on:
  - 4.1.1 Existence of an available position at the requested division or station.
  - 4.1.2 Review of the member’s most recent (within the last

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<sup>8</sup> Exhibit 4 to Respondents’ Answer is a copy of an FDNY document titled “Charges for Violation of Regulations.” The charges are dated November 14, 2012, and state:

Lieutenant Sheridan logged and worked C472 on 10/31/12 without prior permission from either RCC or a Chief Officer. Lieutenant Sheridan worked C472 on 10/31/12 but logged on with the Lieutenants [sic] Waryold shield #. Lieutenant Sheridan did not at anytime make an entry in the unit history indicating he was working C472.

(Ans., Ex. 4) At the bottom of the document, Division 4 Deputy Chief Sanders is listed as the “Complainant” and Division 4 Chief Ahee is listed as the preparer of the charges. No testimony was elicited about this document. BITS subsequently issued similar charges in February 2013, discussed *infra*.

six months) performance evaluation, disciplinary and attendance/punctuality records.

- 4.2 Reassignments may be initiated by Commanding Officers with the approval of the Division Commander for administrative reasons.
- 4.3 Reassignments shall not be used for disciplinary purposes unless it is the result of an Office of Administrative Trials and Hearings (OATH) proceeding.
- 4.4 The EMS Command may initiate involuntary reassignments based on the operational requirements of the Department.
  - 4.4.1 Involuntary reassignments will be made based on inverse seniority within a Station.
- 4.5 EMTs, Paramedics, Lieutenants, and Captains may only request a reassignment to a specific **Division or Station**.

*(Id.)* (emphasis in original) As a remedy, the Union requested that the FDNY immediately transfer Lt. Sheridan back to Station 47.

A Step II conference was held on January 3, 2013 to discuss the grievance. Present at the conference were Pres. Variale, Rep. Ziembra, Assistant Chief of EMS Operations Jerry Gombo, Zweifler, and Lt. Sheridan. Pres. Variale and Rep. Ziembra testified at the conference that Chief Gombo stated that there were no pending charges pertaining to the lockbox incident or anything that occurred during Hurricane Sandy, and that the reassignment was not due to the lockbox incident. Chief Gombo told them that an administrative unit within the FDNY had requested Lt. Sheridan's reassignment, but he would not specify which FDNY unit made the request or why. The grievance was denied at Step II.

The Union appealed the denial of the grievance and an arbitration hearing was subsequently held before Arbitrator James Brown. He issued an Opinion and Award on April 11, 2014, of which the Board takes administrative notice. In his Opinion, Arbitrator Brown

determined that the FDNY transferred Lt. Sheridan from Station 47 to EMD for disciplinary reasons, in violation of § 4.3 of Ops Guide 104-06. Arbitrator Brown noted that Lt. Sheridan was restored to Station 47 after the arbitration commenced.

#### EEO Complaint and BITS Charges

In mid-February 2013, Lt. Sheridan received a letter from the EEO Office asking him to appear for a meeting regarding a complaint filed against him that was subsequently determined to be unsubstantiated. About a week later, Lt. Sheridan received a set of charges from BITS. The BITS charges, dated February 7, 2013, state “FDNY Disciplinary Case” at the top and list the following specifications:

On or about October 31, 2012, Lieutenant Michael Sheridan, Station 47, violated the sections of the EMS Operating Guidelines listed above; in that he remained on duty for (overtime) without prior authorization by a Chief Officer or designee working as Condition Car 47 tour two, in vehicle 959. He was logged on to the mobile date terminal (MDT) using another Lieutenant’s shield number.

In addition, Lieutenant Sheridan failed to make accurate entries in chronological order as to the events of the tour he was responsible for in the Station 47 log book.

Lieutenant Sheridan failed to make accurate entries in chronological order while operating as condition car 47 and logged on as another Officer.

Lieutenant Michael Sheridan’s conduct was prejudicial to the good order, or the discipline of the Department, in that he provided false representation to the Department when he logged on with a different shield number in an effort to cover for the other Officers’ lateness. Lieutenant Sheridan’s conduct was prejudicial to the efficiency of the Department in that there was an Officer on duty sitting at Station 47, waiting to work as C472.

(Pet., Ex. E)

Both Pres. Variale and Rep. Ziembra testified that they were unaware of any other member of the Union or the union representing paramedics and EMTs who received charges for incidents

arising during Hurricane Sandy. Pres. Variale noted that some members, however, were awarded medals for their work during the crisis. Lt. Sheridan offered un rebutted testimony about a conversation he had with Division 4 Deputy Chief Sanders months after the BITS charges were issued. In that conversation, Deputy Chief Sanders admitted that he had written the BITS charges and that Chief Ahee told him to write them. Lt. Sheridan testified that he reminded Deputy Chief Sanders of the conversation they had the day after Hurricane Sandy hit regarding the actions he took to keep operations running during the storm, and stated that the BITS charges were not true. Lt. Sheridan asked Deputy Chief Sanders to withdraw the charges and he responded, “they’re not going to let me do that.” (Tr. 199) Dep. Chief Sanders did not testify in this proceeding.

On February 19, 2013, Lt. Sheridan appeared at the EEO Office for a meeting regarding the complaint that had been filed against him.<sup>9</sup> Present at the meeting were Pres. Variale, Union Vice President Mike Taletti, and EEO attorney Brian Aquart. During the meeting, Lt. Sheridan asked how long the investigation would take because he had been reassigned due to the EEO charges. The EEO attorney responded that he didn’t know anything about a reassignment. It is undisputed that EEO Assistant Commissioner Margo Ferrandino subsequently appeared at the meeting and informed the participants that EEO was not responsible for the reassignment. Asst. Comm. Ferrandino expressed dismay that the EEO Office was being named as an excuse to move employees.

Later that day, Lt. Sheridan appeared for a meeting at BITS regarding the charges filed against him. At the meeting, BITS advocate Marie Arcentales proposed that Lt. Sheridan take

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<sup>9</sup> The details of the EEO complaint are not entirely clear from the record and the complaint itself is not in evidence. According to Lt. Sheridan, the complaint indicated that he created a hostile work environment for a pregnant co-worker. Pres. Variale provided un rebutted testimony that he subsequently spoke with the complaint, a Station 47 lieutenant, who told him that she had filed the complaint in early 2012.

four annual leave days as discipline. The Union rejected the offer, stating that Lt. Sheridan had already been disciplined by being transferred. Arcentales responded that BITS had nothing to do with the transfer and that it was EEO that ordered the transfer.<sup>10</sup> Neither Ferrandino nor Arcentales testified in this proceeding.

Rosharna Hazel, BITS Deputy Director of Legal Affairs, supervises a staff of attorneys, investigators and department advocates in their investigations of employee misconduct, among other duties. She testified that BITS received the complaint involving Lt. Sheridan from the Station 47 lieutenant and referred the matter to the EEO Office for investigation. Based on the allegations, Hazel sent an October 26, 2012 email to BITS Asst. Comm. Wallace “recommending that Lt. Sheridan . . . be temporarily detailed from Station 47” while the investigation was pending. (Resp. Ex. 5) Hazel testified that she made this recommendation because there were allegations that Lt. Sheridan had inappropriately influenced some of the witnesses in the investigation.<sup>11</sup>

On March 6, 2013, the EEO Office issued a letter stating that it had concluded its investigation and determined that the charges against Lt. Sheridan were unsubstantiated. It further stated that it had closed the case and would take no further action. Hazel testified that she was unaware that EEO Asst. Comm. Ferrandino had denied the EEO’s involvement in Lt. Sheridan’s reassignment.

#### Lt. Sheridan’s Transfer from EMD to Division 4

Following the issuance of the EEO letter finding the complaint unsubstantiated, Pres.

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<sup>10</sup> In October 2013, Lt. Sheridan received a letter from BITS stating that it was likely to substantiate the charges against him. BITS proposed a penalty of a 10-day suspension or 15 days’ pay. Lt. Sheridan declined the offer and elected to have a hearing at OATH. At the time of the instant hearing, the matter was still pending before OATH.

<sup>11</sup> The lieutenant who filed the EEO complaint against Lt. Sheridan was detailed to another station but not on an “administrative reassignment”.

Variale informed Zweifler of the EEO Office's findings and requested that Lt. Sheridan be restored to Station 47. According to Pres. Variale, he had consistently emphasized to Zweifler and other FDNY officials that Sheridan wanted to be transferred specifically back to Station 47.

He testified as follows:

Q: . . . did you have other conversations with the Fire Department between November [2012] and March [2013] asking that Lieutenant Sheridan be restored to Station 47?

A: Oh, I had conversations at least three, four times a week with Director David Zweifler on it. I occasionally mentioned it to Chief Abdo Nahmod about putting him back. It was constant. It was the number one thing. There was no way anybody could forget about it.

Q: And in those conversations did you specify Station 47?

A: Absolutely, I specified Station 47 and the Ceremonial

Unit.

(Tr. 84-85)

According to Pres. Variale, Zweifler responded that Lt. Sheridan should make a formal transfer request and that Zweifler would talk to management. Lt. Sheridan testified that Capt. Lobel informed him that he could only request to be reassigned to Division 4, but not specifically to Station 47. Pres. Variale again spoke with Zweifler, who suggested that they get Lt. Sheridan back to Division 4 first and then to Station 47. Based on this direction, Lt. Sheridan made a transfer request to be restored to Division 4. He sent the request through his chain of command at the EMS Bureau of Communications, which included Michael Fitton, the Deputy Assistant Chief of EMS' Bureau of Communications and Chief of EMD, and Mark Lobel, the Commanding Officer of EMD.

Various FDNY officials testified about the handling of Lt. Sheridan's request for

restoration to Station 47. Capt. Lobel testified that Lt. Sheridan informed him that he was going to seek reassignment back to Station 47, and that he might have recommended to Lt. Sheridan that he not specify a specific station in his request in order to have a better chance of getting out of his current position. He considered this to be advice, not a directive. Capt. Lobel further testified that, pursuant to § 4.1.2 of Ops Guide 104-06, he was required to obtain certain documentation, including an evaluation, to facilitate Lt. Sheridan's transfer. He did not receive the documentation and therefore could not process the request. Chief Fitton, who oversees the EMD, testified that he received Lt. Sheridan's request for a transfer from EMD to Division 4 and signed it "provisionally" because the EMD tries to backfill vacancies. He also testified that the "operating guide is clear. You either put in for a station or a division." (Tr. 368-69) Chief Gombo acknowledged having had multiple conversations with Union officials in which they requested that EMS return Sheridan specifically to Station 47. However, Gombo testified that even if there had been an opening at Station 47, he did not consider returning Sheridan there because his reassignment request only stated "Division 4."

Effective June 2, 2013, the FDNY reassigned Sheridan back to Division 4, but not to Station 47. Instead, he was assigned to Station 46, another station within Division 4. He was assigned to a vacation relief spot, which is not a permanent assignment and is generally assigned to junior officers. It is undisputed that during the period Lt. Sheridan was assigned to Station 46, a new lieutenant with only a few months on the job was working at Station 47 on a temporary detail.

Upon learning from Zweifler that Lt. Sheridan was being transferred to another station within Division 4 but not Station 47, Rep Ziemba testified:

I said Division 4, why is he going to Division 4. I was very shocked. So [Zweifler] said well, that's what he requested. I said no, we filed a grievance for him to go to [Station] 47, he never requested to go to Division 4, and [Zweifler] said well, that's what I

was told . . . and I said . . . everyone in the service knows Mike Sheridan wants to go back to [Station] 47, I don't understand why this is happening.

(Tr. 240) Lt. Sheridan served at Station 46 until December 2013 when Division 4 Chief Terranova, who replaced Chief Ahee, authorized his reassignment back to Station 47. Lt. Sheridan was never restored to the Ceremonial Unit. In his testimony, Chief Nahmod stated that Lt. Sheridan had not been restored to the Ceremonial Unit because the BITS charges are still pending against him.

### **POSITIONS OF THE PARTIES**

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

The Union argues that Respondents violated NYCCBL § 12-306(a)(1) and (3) by transferring Lt. Sheridan out of Station 47, removing him from the FDNY's Ceremonial Unit, and deliberately delaying his transfer back to Station 47, in retaliation for his Union activity.<sup>12</sup> The Union contends that Lt. Sheridan's role as an active Union delegate in Division 4 was well known to the EMS chiefs as a result of his participation in grievance hearings, including the span of control hearing, and being a central player in the Union's "fight with the Queens Division Commander" to abide by seniority principles in the distribution of overtime. (Un. Brief p. 26) It

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<sup>12</sup> 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;

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



asserts that there is no credible excuse for the “litany of negative employment actions” taken against Lt. Sheridan other than his union activity. (Un. Brief p. 27) It further contends that Respondents have failed to present any legitimate business reasons for their actions. In the absence of any business rationale for such adverse actions, the Union argues that the Board must infer a nexus to Lt. Sheridan’s protected union activity.

The Union rejects the FDNY’s justifications for Lt. Sheridan’s transfer out of Station 47 and removal from the Ceremonial Unit. It argues that the rationales offered by the FDNY, that the transfer was “for the good of the service” and an “administrative reassignment,” do not exist in Ops Guide 104-06. The Union argues that this Board has recognized retaliatory work assignments as examples of adverse employment actions. It also notes that Respondents’ justification for assigning Lt. Sheridan to EMD – to ensure that he received 24/7 supervision—is belied by the fact that he was permitted to work in the field without close supervision while assigned to EMD. Accordingly, this justification is simply pretext. The Union maintains that its claims are bolstered by the fact that many of the “decision-makers” in this case, such as Chief Ahee, were the same people with whom Lt. Sheridan battled as a Union delegate. (Un. Brief p. 31)

The Union asserts that BITS never issued a report or findings on the investigation of Lt. Sheridan that it initiated, and that the EEO Office never requested Lt. Sheridan’s transfer. It notes that Hazel testified that she only asked for a temporary detail. Notwithstanding this request, Lt. Sheridan was ordered out of Station 47 on an administrative reassignment, which it contends is an adverse action in itself. The Union argues that the allegation that Hazel used to justify her recommendation was unsubstantiated. In this regard, the Union points to Arbitrator Brown’s determination that the reassignment was a “prohibited disciplinary transfer.” (Un. Brief p. 29)

The Union argues that the February 2013 BITS charges were also retaliatory, given their “specious character” and in light of Lt. Sheridan’s heroic actions during Hurricane Sandy. (Un. Brief p. 30) The Union emphasizes that Lt. Sheridan was the sole member of either the Union or Local 2507, representing over 4500 members, who received disciplinary charges for actions arising out of Hurricane Sandy. The Union notes that the BITS charges are merely the “flimsiest” justification for continuing to keep Lt. Sheridan off the Ceremonial Unit and to maintain a sense of doubt about his integrity. (Un. Brief p. 31)

Further, the Union asserts that the FDNY’s refusal to promptly restore Lt. Sheridan to Station 47 and the Ceremonial Unit following the issuance of findings of unsubstantiated charges at the EEO Office was yet another retaliatory, adverse employment action for which there is no reasonable basis. It contends that assuming, arguendo, that Lt. Sheridan’s transfer prior to the EEO’s issuance of its findings was justified, after the EEO letter was issued, he should have been transferred back. Nevertheless, after the EEO complaint was dismissed, Lt. Sheridan continued to be subjected to eight months of adverse employment action with no justifiable business rationale. It asserts that Capt. Lobel’s instruction to Lt. Sheridan that his reassignment request would not be accepted if he specified a particular station, rather than a division, was inconsistent with the FDNY’s own operating procedures.

The Union also maintains that Lt. Sheridan was consistently given the least desirable assignments both at EMD and while assigned to Division 4, and was also subject to “petty humiliations”. (Un. Brief p. 33) For example, he was assigned to vacation relief following his transfer to Division 4, an assignment usually given to the most junior officers and was subjected to platoon and tour changes, which were a hardship on him and his family.

Finally, the Union argues the FDNY's retaliatory actions against Lt. Sheridan were inherently destructive of employee rights, pursuant to NYCCBL § 12-306(a)(1). It contends that prior to November 2012, Lt. Sheridan was the primary Union representative for Division 4 and the Union's most visible advocate in the fight with EMS, and Chief Ahee in particular, over its overtime policy in 2012, in addition to being an important witness in the "critical" span of control grievance. (Un. Brief p. 36) The Union argues that in response to Lt. Sheridan's Union activism, Respondents engaged in a series of retaliatory actions against Lt. Sheridan designed to "aggravate and humiliate a thirty year veteran" of the Department. (Un. Brief p. 36) It contends that this Board has held that some actions taken for the purpose of frustration of a union's representation of its members is inherently destructive, and may have a chilling effect on employees' right to engage in union activity. Citing Board precedent, the Union argues that under such circumstances no proof of anti-union animus is required. Such is the case here, according to the Union.

### **Respondents' Position**

Respondents argue that the Board must dismiss the petition because the Union failed to demonstrate a *prima facie* case of retaliation. They assert that the Union presented no evidence beyond broad speculation to indicate that Lt. Sheridan's transfer to EMD in November 2012, his removal from the Ceremonial Unit, and his transfer from EMD to Division 4 in June 2013 were at all related to his Union activity.

Respondents argue that the FDNY personnel involved in this action credibly testified that they were "completely unaware" of Lt. Sheridan's status as a Union delegate or with the issues he raised while serving in that role. (Resp. Brief p. 21) While the Division 4 chiefs may have been aware of his union activity, Chiefs Nahmod and Gombo, who ultimately made the decision to

reassign Lt. Sheridan, gave un rebutted testimony that they were unfamiliar with his Union role and any issues he may have raised as shop steward until months after the transfer during the related arbitration hearing. Accordingly, the Union has failed to satisfy the first prong of the Bowman analysis and any claim of retaliation against Lt. Sheridan should be dismissed. Even assuming, *arguendo*, that the Union demonstrated knowledge of Lt. Sheridan's union activity by FDNY officials, Respondents contend that there is no evidence to show that his union activity was a motivating factor in the alleged actions at issue.

Should the Board find that the Union established a *prima facie* case, Respondents argue that the FDNY had legitimate business reasons for the alleged retaliatory actions and would have taken such actions even in the absence of any protected union activity. Respondents argue that the FDNY has the managerial right and discretion to transfer employees pursuant to NYCCBL § 12-307(b). To the extent that the Union argues that the FDNY's reassignment of Lt. Sheridan constitutes an improper practice, such a claim must therefore be dismissed. Respondents contend that the same argument holds true for Lt. Sheridan's removal from the Ceremonial Unit, and notes that there is no contractual right to membership in such Unit and that Chief Nahmod has discretion to appoint EMS employees to the Unit.

Respondents contend that Lt. Sheridan was transferred from Station 47 to EMD because BITS was investigating an EEO complaint by Lt. Sheridan's co-worker, in which she claimed that he discriminated against her because she was pregnant. BITS believed it was appropriate to detail Lt. Sheridan to another unit so that EEO could conduct a proper investigation and he would not be able to potentially influence witnesses. Respondents assert that, although the personnel action came in the form of an administrative transfer rather than a detail, this does not change the fact that there was no link to Lt. Sheridan's union activity. They note that the NYCCBL does not

authorize the Board to second guess how EMS officials choose to reallocate personnel pursuant to requests from administrative units.

According to Respondents, the fact that the FDNY transferred Lt. Sheridan to EMD rather than to another EMS station also does not imply any anti-union animus. They assert that, as Chief Gombo explained, there was a request that Lt. Sheridan be under constant supervision by a superior officer, which was only possible at EMD. There is simply no evidence to show that such placement was selected for retaliatory purposes.

Additionally, the claims alleging that Lt. Sheridan's transfer from EMD to Division 4 rather than to Station 47 was for retaliatory purposes must also be dismissed. Initially, Respondents argue, Lt. Sheridan's testimony that Capt. Lobel told him that his transfer request would not be accepted unless he put in for a division rather than a station is not credible. Capt. Lobel is a member of the Union and, while this fact does not absolve a supervisor from discriminatory conduct, it does call into question whether any proof of retaliation actually exists. Capt. Lobel denies making this statement, and offered a "more sensible" account of what was told to Lt. Sheridan concerning his transfer request. (Resp. Brief p. 25) Moreover, the Department transferred Lt. Sheridan to Station 46 in accordance with his own request to be reassigned to Division 4.

As to Chief Nahmod's decision to remove Lt. Sheridan from the FDNY Ceremonial Unit, the Union failed to present any evidence to show that his decision was in retaliation for Lt. Sheridan's union activity. Respondents argue that Chief Nahmod determined that it was "inappropriate for an employee accused of discriminating against a pregnant co-worker to represent the Department in public events." (Resp. Brief p. 26) They contend that Chief Nahmod testified that he had removed people from the Ceremonial Unit when they were facing

disciplinary action. Respondents further argue that the Union's claims that the Department's decision not to return Lt. Sheridan to the Ceremonial Unit following the dismissal of the EEO complaint must also fail because there was still a pending BITS investigation regarding his alleged misconduct during Hurricane Sandy.

Finally, Respondents argue that none of the FDNY's actions in the instant matter are of the type that this Board has found to be "inherently destructive" of employee rights. It asserts that, in order for an employer's conduct to be found inherently destructive, this Board has held that it must carry unavoidable consequences which the employer not only foresaw but must have intended. According to Respondents, it cannot be reasonably argued that the transfer of an employee during a pending EEO investigation "directly and unambiguously penalizes or deters" protected union activity. (Resp. Brief p. 31) There is also no evidence in the record to suggest a continuing obstacle or any deterrence from the future exercise of employee rights. Accordingly this claim must be dismissed.

### **DISCUSSION**

The Union claims that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by transferring Sheridan, removing him from the Ceremonial Unit, and failing to promptly restore him to Station 47, in retaliation for his Union activity. Upon review of all of the evidence adduced in this case, we find that the Union established a *prima facie* case of retaliation and that Respondents have not refuted that *prima facie* case nor have they provided a credible defense that the FDNY would have taken the same actions even in the absence of Lt. Sheridan's protected activity. We also conclude, based on the record evidence, that the FDNY's retaliatory actions were inherently destructive of important employee rights. We therefore find that the FDNY violated NYCCBL §

12-306(a)(1) and (3).

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 by the New York Public Employment Relations Board (“PERB”) 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).

#### The Union’s *Prima Facie* Case of Retaliation

It is undisputed that, at all periods relevant to this matter, Lt. Sheridan was active in the Union. He served as the Union’s Division 4 delegate and participated in numerous matters that constitute protected union activity. Lt. Sheridan’s union activity was open and pervasive. The FDNY was aware that he provided testimony on the Union’s behalf that was critical of the Department at the span of control grievance hearing. *See UFA*, 1 OCB2d 10, at 22-23 (BCB 2008) (public criticism of working conditions is protected activity); *DC 37*, 1 OCB2d 6, at 29 (BCB 2008) (testifying at an arbitration is protected activity). In addition, it is undisputed that Lt.

Sheridan was in regular contact with EMS Division 4 senior officials, including Division Chief Ahee, regarding Union matters such as overtime distribution. Thus, we find that Petitioners have satisfied the first prong of the *Bowman* test.

Regarding the motivation behind the employment actions in question, “typically, this element is proven through the use of circumstantial evidence, absent an outright admission.” *Feder*, 5 OCB2d 14, at 25 (BCB 2012) (citation omitted); *see also CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). However, to establish a motive, “a petitioner must offer more than speculative or conclusory allegations.” *SBA*, 75 OCB 22, at 22 (BCB 2005). Rather, “allegations of improper motivation must be based on statements of probative facts.” *Feder*, 5 OCB2d 14, at 25 (citation omitted). In addition, while “temporal proximity alone is not sufficient to establish causation, the temporal proximity between the protected union activity and the allegedly retaliatory action, in conjunction with other facts supporting a finding of improper motivation, [may be] sufficient to satisfy the second element of the *Bowman/Salamanca* test.” *Feder*, 4 OCB2d 46, at 44; *see Colella*, 79 OCB 27, at 55 (BCB 2008).

Here, there is temporal proximity between Lt. Sheridan’s reassignment to EMD and removal from the Ceremonial Unit, and his union activity. In the year prior to his transfer, Lt. Sheridan advocated strongly for a change in the overtime assignment procedure in Division 4. Division 4 officials yielded to the Union’s campaign to reinstitute the proper procedure, reverting back to the seniority-based procedure in the latter part of 2012, shortly before Lt. Sheridan’s transfer. In addition, in September 2012, the arbitration decision in the span of control grievance was issued, assessing liability on the FDNY for violating its own rules and regulations. Lt. Sheridan had testified in this proceeding on the Union’s behalf and was therefore instrumental in achieving this result.



We also find a causal connection between Lt. Sheridan's protected activity and the adverse employment actions taken by the FDNY between November 2012 and December 2013, including Lt. Sheridan's transfer to EMD and removal from the Ceremonial Unit, the issuance of the BITS charges, and Lt. Sheridan's delayed restoration to Station 47. First, we find that there is ample evidence in the record to establish that the intent of Lt. Sheridan's transfer to EMD was punitive and disciplinary. Lt. Sheridan was reassigned as a dispatcher at EMD, a position that was undesirable for a number of reasons, including the fact that it altered his 20-year work schedule and impacted his income through a loss of the night shift differential. In addition, the Department labeled Lt. Sheridan's transfer an "administrative reassignment." It was not disputed that administrative reassignments are widely perceived as disciplinary measures. Respondents offered no credible explanation for transferring Lt. Sheridan by administrative reassignment when BITS requested a "temporary detail" of Lt. Sheridan pending the investigation of an EEO complaint. There was also no reasonable explanation for why the reassignment continued well beyond the issuance of the EEO's March 6, 2013 letter finding the complaint to be unsubstantiated. Moreover, there was significant inconsistency in the record regarding who initiated the transfer and the motivation behind it. *See Local 1757, DC 37*, 6 OCB2d 13, at 20 (BCB 2013) (citing *DC 37*, 1 OCB2d 6, at 30-31 (party's prior inconsistent conduct may be used to impeach its explanation of events) (citing *State of New York v. Dawson*, 50 N.Y.2d 311, 318 (1980))). Finally, our conclusion is bolstered by Arbitrator Brown's factual finding that the purpose of Lt. Sheridan's reassignment was indeed disciplinary, in violation of the FDNY's Ops Guide 104-06. In light of this evidence, combined with the temporal proximity of Lt. Sheridan's reassignment to his union activity, we conclude that the FDNY's action in this regard was retaliatory.

We also find that the Union established a *prima facie* case that the FDNY removed Lt.

Sheridan from the Ceremonial Unit for retaliatory reasons. Lt. Sheridan was removed from the Ceremonial Unit less than a week after the issuance of October 31, 2012 Order transferring him to EMD. Chief Nahmod testified that he ordered Lt. Sheridan's removal after learning from Chief Gombo that he had been administratively reassigned due to an "ongoing investigation." Chief Nahmod admitted that he did not ask Chief Gombo for any of the details of the investigation, including the reason for the transfer. Notwithstanding his lack of basic information about the circumstances which lead to the reassignment, including whether it was for disciplinary reasons, Chief Nahmod took swift action to remove Lt. Sheridan from the Unit. We find it implausible that the EMS Chief would take such strong action against a 30-year employee without attempting to ascertain whether the nature of the investigation warranted the removal. Lt. Sheridan's un rebutted recounting of his conversation with Ceremonial Unit Commanding Officer LaPointe also casts doubt on Chief Nahmod's credibility. Lt. Sheridan testified that he asked Officer LaPointe why he had been removed from the Unit, to which Officer LaPointe responded that he was informed by Chief Nahmod that Lt. Sheridan has "issues."

There is also evidence that the BITS charges against Lt. Sheridan were retaliatory in nature. As an initial matter, the charges were initiated by Division 4 Chief Ahee, the official who clashed with Lt. Sheridan regarding overtime distribution and to whom Lt. Sheridan consistently brought ongoing workplace complaints. Further, Lt. Sheridan was charged with committing fraud despite the fact that the actions he took were to keep the station running under emergency circumstances. In addition to covering the post when his relief was delayed due to the storm's aftermath, it is undisputed that Lt. Sheridan took measures to prevent looting of the station's narcotics supply. Moreover, Lt. Sheridan promptly informed his superior, Dep. Chief Sanders, of his actions within hours of taking them. There is no record evidence that Sanders disapproved of

Lt. Sheridan's actions. To the contrary, when reminded by Lt. Sheridan of the conversation, Dep. Chief Sanders confirmed that Chief Ahee had directed him to write up the charges and that he could not get them withdrawn. This evidence, combined with our finding of temporal proximity, leads us to conclude that the Union has established causation on this claim.

We also find that there is sufficient evidence in the record to establish that Lt. Sheridan's delayed restoration to Station 47 was retaliatory in nature. Lt. Sheridan was cleared of any wrongdoing in the EEO matter in early March 2013, but was not transferred out of EMD for approximately three months or returned to Station 47 for over nine months, despite the Union's clear and consistent requests. Moreover, despite his seniority, Lt. Sheridan was placed in a vacation relief spot, a position that is generally reserved for junior staff. Finally, Lt. Sheridan was restored to Station 47 only after Chief Ahee was replaced as the Division 4 chief. We find that this evidence is sufficient to establish a causal relationship between the protected activity and the FDNY's retaliatory acts to the extent required to establish a *prima facie* case.

#### Respondents' Proffered Defenses to the *Prima Facie* Case

As an employer, the FDNY has the right to reassign and schedule its employees as it deems necessary. NYCCBL § 12-307(b) authorizes the City to direct its employees, to maintain efficient operations, and to exercise control and discretion over its organization. However, this provision "does not provide [the Employer] unlimited protection from claims that its decisions violate the NYCCBL." *CSTG, L. 375*, 4 OCB2d 61, at 23 (BCB 2011); *see also DC 37*, 61 OCB 13, at 16 (BCB 1998) ("the right to manage is not a delegation of unlimited power, nor does it insulate the City from an examination of actions claimed to have been taken within its limits"). In short, actions taken within an employer's "managerial prerogative . . . may not be taken for a retaliatory purpose." *SBA*, 4 OCB2d 50, at 25 (BCB 2011).

We now examine whether Respondents established legitimate business reasons for the adverse employment actions taken against Lt. Sheridan. “When examining whether the reasons proffered by the employer are legitimate, this Board will look to whether the record supports their contentions. When the reasons provided are unsupported and/or inconsistent with the record, this Board will find that the employer committed an improper practice.” *SBA*, 75 OCB 22, at 24 (BCB 2005) (citations omitted). Here, we find that the FDNY’s attempts to refute the *prima facie* case and to demonstrate that it would have taken the same actions even in the absence of Lt. Sheridan’s protected union activity must fail because they are inconsistent with record evidence.

Respondents argue that the FDNY reassigned Lt. Sheridan to EMD because of an EEO complaint against him. Even accepting as true that Lt. Sheridan’s transfer followed Hazel’s recommendation, we find that this proffered reason does not overcome the overwhelming evidence suggesting that the implementation of the transfer and the manner in which it was carried out was retaliatory. The record reflects that Hazel requested that Lt. Sheridan be “temporarily detailed” due to an EEO investigation. No explanation was offered for why the FDNY did not follow Hazel’s recommendation for a temporary detail and instead transferred him on an “administrative reassignment,” which implies employee misconduct. Chief Gombo’s testimony in this regard was vague and failed to provide a sufficient explanation. He testified that the administrative reassignment was for the “good of the service,” but could not elaborate on the meaning of that phrase. Chief Gombo further testified that, although the transfer originated from BITS, which handles disciplinary matters, he assumed that the transfer was not disciplinary because it was due to an “ongoing investigation.” Moreover, the EEO Office never requested Lt. Sheridan’s transfer and appeared to know nothing about it. Further, even after the EEO complaint was dismissed, the FDNY did not return Lt. Sheridan to Station 47 for another nine months.

Respondents failed to explain why, if the EEO complaint were truly the impetus for the transfer, Lt. Sheridan was not promptly returned to Station 47 upon the issuance of the EEO letter finding the complaint unsubstantiated.<sup>13</sup> Accordingly, we conclude that Respondents' proffered business reason for Lt. Sheridan's transfer to EMD is pretextual.

Further, Respondents maintain that the FDNY transferred Lt. Sheridan to EMD, as opposed to another EMS station because, due to the nature of the allegations in the EEO complaint against him, he needed to be under supervised "24/7." Yet, Chief Gombo conceded that Lt. Sheridan was not under constant supervision while assigned to EMD. Even assuming BITS expressed legitimate concerns regarding the supervision of Lt. Sheridan, there is no evidence in the record to show that Lt. Sheridan was reassigned promptly after the complaint was made to address such concerns. In this regard, Pres. Variale already testified that his investigation showed that Lt. Sheridan's accuser made her EEO complaint in early 2012, but Lt. Sheridan was not transferred until November 2012.

Similarly, we are not persuaded that Respondents established a legitimate business reason for Lt. Sheridan's removal from the Ceremonial Unit. They argue that Chief Nahmod determined that it was inappropriate for an employee accused of discriminating against a pregnant co-worker to represent the Department in public events. However, this assertion is simply not reflected in the record. In fact, Chief Nahmod, who ordered the removal, testified that he did not ask Chief Gombo why Lt. Sheridan was being investigated, or any other details of the investigation, when he made the decision to remove Lt. Sheridan from the Ceremonial Unit. Accordingly, by his own admission, Chief Nahmod was unaware of the nature of the accusation against Lt. Sheridan. Moreover, if the FDNY had truly removed Lt. Sheridan from the Ceremonial Unit for this reason,

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<sup>13</sup> We note that Arbitrator Brown also rejected the FDNY's assertion that the motivation for Lt. Sheridan's transfer to EMD was the EEO complaint.

it would have placed him back on the Ceremonial Unit following the EEO's finding that the charges were unsubstantiated. Instead, Lt. Sheridan was never restored to the Ceremonial Unit. Respondents counterargue that Chief Nahmod did not put Lt. Sheridan back on the Ceremonial Unit even after the EEO letter was issued because there was still a separate BITS investigation pending against him. However, we have already determined that the motive for the BITS charges was retaliatory.<sup>14</sup> Accordingly, we reject FDNY's proffered business reasons for the FDNY's removal of Lt. Sheridan from the Ceremonial Unit.

Finally, Respondents argue that the FDNY had legitimate business reasons for its nine month delay in restoring Lt. Sheridan to Station 47. However, the record evidence again belies their proffered business reasons. The record reflects that, notwithstanding what Capt. Lobel and Chief Fitton advised Lt. Sheridan about whether a request to be returned to Station 47 would be granted, the FDNY had no intention of immediately restoring him to Station 47. Chief Gombo, who oversees EMS's reassignments and staffing, testified that even if there had been an opening at Station 47, he did not consider returning Lt. Sheridan there because his reassignment request stated "Division 4." This disingenuous statement strikes a blow to the FDNY's credibility in light of the undisputed testimony that Lt. Sheridan, and the Union on his behalf, made it patently clear to FDNY officials from the time he was initially reassigned in November 2012 that he was seeking to be transferred back to Station 47. It is also undisputed that, relying on the advice of Zweifler and

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<sup>14</sup> We note that Respondents offered no rationale for the BITS charges independent from stating that Lt. Sheridan's use of his co-worker's login number was prejudicial to the good order or discipline of the Department. While Lt. Sheridan's use of his colleague's login number may have been a technical violation of FDNY rules, given the emergency circumstances, it is not obvious how Lt. Sheridan's actions were not reasonable or why the charges were warranted. Although the charges allege that he was covering for another employee's lateness without authorization while a third coworker was available to do the work, Respondents failed to present any evidence to support these assertions. Therefore, we cannot find that Respondents have rebutted the Union's *prima facie* case that the BITS charges were retaliatory.

other senior FDNY officials, Lt. Sheridan listed Division 4 on his reassignment request for the sole purpose of expediting his transfer out of EMD, not because he was amenable to being returned to another station within Division 4. Accordingly, we reject Respondents' proffered reasons for delaying Lt. Sheridan's return to Station 47.

In short, this Board does not find that Respondents established legitimate business reasons for their actions and or overcame the strong evidence demonstrating that the FDNY retaliated against Lt. Sheridan for his Union activity. Therefore, we find that Respondents committed an improper practice, in violation of NYCCBL § 12-306(a)(3) and, derivatively, § 12-306(a)(1). In light of our finding, we also conclude that the FDNY's retaliation against an outspoken Union delegate based on his protected union activity was inherently destructive of important employee rights, in violation of § 12-306(a)(1). *See OSA, 7 OCB2d 20, at 27 n.6 (BCB 2014)* (concluding that the Board's determination of a derivative § 12-306(a)(1) violation of the petitioner's retaliation claim makes it unnecessary to consider separately whether there was an independent § 12-306(a)(1) violation).

Lt. Sheridan was restored to Station 47 in late 2013 and subsequently retired prior to the issuance of this Decision and Order. Accordingly, the Board grants the Union's only remaining viable request for relief, which is the posting of appropriate notices.

**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, docketed as BCB-4006-13, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621, be and hereby is, granted; and it is further

ORDERED, that the Respondents shall cease and desist from all efforts to interfere with, restrain or coerce public employees in the exercise of their rights under the NYCCBL, and it is further

ORDERED, that the New York City Fire Department post this Notice for no less than thirty (30) days at all locations it uses for written communications with employees represented by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621.

Dated: November 10, 2014  
New York, New York

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

PAMELA SILVERBLATT  
MEMBER

CHARLES G. MOERDLER  
MEMBER

PETER B. 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 29 (BCB 2014), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621, and the City of New York and the New York City Fire 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, Docket No. BCB-4006-13, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621, and the same hereby is, granted to the extent that the New York City Fire Department has violated New York City Collective Bargaining Law § 12-306(a)(1) and (a)(3) by retaliating against EMS Lt. Michael Sheridan as a result of his protected union activity and engaging in unlawful interference with important employee rights; and it is further

ORDERED, that the New York City Fire Department shall cease and desist from all efforts to interfere with, restrain or coerce public employees in the exercise of their rights under the New York City Collective Bargaining Law, and it is further

ORDERED, that the New York City Fire Department post this Notice for no less than thirty (30) days at all locations it uses for written communications with employees of District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621.

New York City Fire 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.*