CSTG, L. 375, 7 OCB2d 9 (BCB 2014)

(IP) (Docket No. BCB 3087-13 & BCB-4002-13)

Summary of Decision*:** Petitioners alleged that DEP violated NYCCBL § 12-306(a)(1) and (3) by retaliating against a Union official for engaging in protected Union activity by disciplining and transferring him. The City argued that Petitioners failed to establish a *prima facie* case of retaliation because Petitioners failed to demonstrate a causal link between the alleged protected activity and DEP's alleged retaliatory action. The City further argued that DEP had legitimate business reasons for disciplining and transferring the Union official. The Board found that while Petitioners established a *prima facie* case of retaliation, DEP had legitimate business reasons for the challenged actions. Accordingly, the petitions was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and ALEXANDER FRENZEL,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On June 25, 2013, the Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO ("Local 375" or "Union") and Alexander Frenzel, a Union official, filed a verified improper practice petition against the City of New York ("City") and the New York City

Department of Environmental Protection ("DEP").[1] Petitioners alleged that DEP 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") by retaliating against Frenzel for engaging in protected Union activity by disciplining and transferring him.[2] The City argues that Petitioners failed to establish a *prima facie* case because Petitioners failed to demonstrate a causal link between the alleged protected activity and alleged retaliatory action. The City further argues that DEP had a legitimate business reason for disciplining and transferring Frenzel. The Board finds that, while Petitioners have established a *prima facie* case of retaliation, DEP had legitimate business reasons for the challenged actions and, accordingly, denies the petition.

BACKGROUND

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

DEP is an agency of approximately 6,000 employees that manages and conserves the City's water supply; distributes clean drinking water; collects and treats wastewater; regulates air quality, hazardous waste, and critical quality of life issues; and oversees large capital construction projects related to these goals. Local 375 is the certified collective bargaining representative for City employees in various scientific and engineering titles.

[1] This petition was docketed as BCB-3087-13. On August 26, 2013, Petitioners filed a second petition alleging additional acts of retaliation, docketed as BCB-4002-13. These two petitions were consolidated for the purpose of the hearing and for this decision and order.

[2] While Petitioners cite to NYCCBL§ 12-306(a)(4), they have not argued in the post-hearing brief that DEP refused to bargain and we find no facts that would support finding a violation of NYCCBL § 12-306(a)(4). Accordingly, this claim is dismissed.

Frenzel was hired by DEP in 1998 in the Civil Service title of Assistant Civil Engineer ("ACE"). He worked in the Biosolids Management Section of DEP's Bureau of Wastewater Treatment ("BWT") from 1999 until that section was disbanded in 2010.[3] He was transferred to BWT's Requirement Contracts Section, where he continued to work on biosolids contracts, until August 26, 2013, when Frenzel was transferred to BWT's Structural Engineering Section.

Alleged Union Activity

Frenzel has been a Union official since 2001, when he became the Executive Chair of Chapter 8 of Local 375. In 2008, Frenzel became First Vice President of Chapter 8. Since April 2013, Frenzel has also served as a Local 375 Grievance Representative.

Frenzel has filed four out-of-title grievances, three of which he won or favorably settled; the outcome of the fourth, filed in June 2013, is not in the record. In September 2001, Frenzel filed his first out-of-title grievance, which was settled in July 2005 by DEP appointing Frenzel a Provisional Associate Project Manager ("APM") Level I and paying him back pay for the period from September 2001 through July 2005. Frenzel held the Provisional APM Level I title until March 2009 when DEP restored him to his ACE title in response to the creation of a civil service list for the APM title. Frenzel filed a second out-of-title grievance, which he won in 2009, with the arbitrator finding that he was still doing the work of an APM and awarding him back pay. Frenzel filed a third out-of-title grievance, which he won on February 1, 2013, and was awarded back pay as an APM Level II for the period from March 29, 2012, to the cessation of his out-of-title duties, which was on August 26, 2013, when he was transferred to the Structural Engineering Section. DEP paid Frenzel as an APM Level II from March 29, 2012, until his transfer to the Structural Engineering Section.

[3] After organic matter in sewage is processed, it is called biosolids.

On April 2, 2013, Frenzel met with Harry Donas, the President of Chapter 8, to discuss a potential grievance concerning an email from management in Donas' Bureau stating that, as of April 2013, employees were to have a fixed lunch hour which they would need permission to change. The meeting took place during work hours at a DEP work location.

In July 2013, Frenzel complained to DEP regarding proposed plans for the restructuring of the biosolids work. Frenzel testified that the Assistant Commissioner of BWT held a meeting on July 10, 2013, regarding the restructuring of biosolids work. Frenzel was not invited to the meeting but attempted to attend in order to represent Local 375 members who had no desire to perform biosolids work. He was asked to leave the meeting and did so without incident. Frenzel, however, did not state at that meeting that he was there to represent Union interests and also testified that another reason he went was to protect his "property rights to the biosoilds work." (Tr. 69) On July 11, 2013, Frenzel sent Vincent Sapienza, the Deputy Commissioner of BWT, an email on behalf of two Union members who did not want to be assigned biosolids work. Sapienza responded that he would forward the complaint to DEP Deputy Director of Labor Relations Aaron Feinstein. In this email chain, Frenzel also complained to Sapienza and Feinstein about the impact of the restructuring the biosolids work would have on him.[4]

On July 18, 2013, Frenzel emailed Feinstein a complaint about the miscalculation of the salary adjustment of several employees, including himself. (*See* Pet., Ex. A)

Alleged Retaliatory Acts

Petitioners allege that, in retaliation for Frenzel's Union activity, DEP: (i) in April 2013 issued Frenzel a warning memorandum regarding his conduct when he was approached by a

[4] On July 15, 2013, Frenzel sent an email to Sapienza and the Assistant Commissioner of BWT who held the July 10 meeting to complain about being excluded. In that email, Frenzel identified himself as a Local 375 Grievance Representative and copied it to the President of Local 375.

manager during his April 2 meeting with his Chapter President, Donas; (ii) in August 2013 issued Frenzel a formal Notice of Charges followed by a recommended ten day suspension for his failure to fully attend and for disrupting a required writing seminar; and (iii) on August 26, 2013, transferred Frenzel out of the Requirement Contracts Section, where he did out-of-title work and was paid at the rate of an APM Level II, to the Structural Engineering Section, where he is paid the lower ACE salary.

i. April 2013 Warning Memorandum

At 3:00 p.m. on Tuesday, April 2, 2013, Frenzel met with Donas at Donas' work location to discuss a potential grievance in Donas' unit. Donas and Frenzel work at the same DEP facility but in different units and on different floors.[5] The meeting took place during work hours and lasted only five to ten minutes. Frenzel testified that he believed that he was on release time during his meeting.[6] Frenzel, however, did not request release time or notify his supervisor that he wanted to use his release time on April 2 and his time sheets show that he requested and received cash overtime for 3:00 to 4:00 p.m. on April 2, 2013.[7] Donas works in DEP's Bureau of Water and Sewer Operations ("BWSO"). While Frenzel was speaking with Donas, BWSO Director of Field Operations Anastasios Georgelis approached them. Georgelis asked Donas if his meeting with Frenzel was work related, and stated that if it was not, Frenzel would have to

[5] DEP has no rules prohibiting employees from visiting employees on another floor or requiring them to request permission to leave their work areas for short breaks.

[6] Frenzel was granted one day (seven hours) of release time per week when he became a grievance representative and had been on *ad hoc* release time before. On May 14, 2013, Feinstein emailed Frenzel "to confirm" that his regular release day would be Thursday and that he was authorized to use release time when he needed to attend Monday Union meetings provided he informed his supervisor in advance. (Pet., Ex. H) The May 2013 email also stated that Frenzel was "free to leave [his] work area to represent [U]nion members on Thursday but you must first notify your supervisor that you will be leaving." (*Id.*)

[7] DEP does not pay overtime for time spent on union matters or release. (*See* Tr. 333)

leave. Donas responded that the meeting was not work related and that Frenzel was just leaving; Frenzel responded that he was not going to leave because he was a DEP employee and had a right to be there. Frenzel identified himself as a grievance representative, showed Georgelis his work ID, and wrote down and gave Georgelis his name and phone number.

Georgelis testified that he did not know who Frenzel was or the nature of Donas' and Frenzel's conversation when he approached them and that, upon learning that it was union-related, he informed them that they needed to have authorization from DEP's Office of Labor Relations ("OLR"). Georgelis testified that he was aware that Donas is President of Chapter 8 and that Donas' supervisor had informed him that Donas' meeting with people at his cubicle was disturbing to operations because the meetings would sometimes get loud and sometimes the participants would physically obstruct the work area.[8] Georgelis explained that "[a] union president who is constantly talking about union activities, and I've heard complaints about it, [] needs to refrain from doing it until it's cleared through [DEP's] OLR." (Tr. 173)

Georgelis testified that Frenzel refused to leave, raised his voice, flashed his ID, and demanded that Georgelis identify himself.[9] Georgelis testified that he told Frenzel that if Frenzel was not going to leave, he would call security to have him removed from the floor. Georgelis

[8] Donas testified that he meets with people at his desk regarding Union issues up to ten times a day. He acknowledged that a co-worker had complained to his immediate supervisor about the noise from these meetings, that his supervisor had discussed this issue with him at least five times over the past couple of years, and that in September 2012, his supervisor sent him an email that reads, in pertinent part: "Please be advised that all union related activities are not permitted during your regular working hours unless specifically permitted by the management. Please avoid any meeting in your office during your working hours." (City Ex. 3) In February 2013, the DEP Deputy Director of Labor Relations complained to the Union about Donas conducting union business during working hours. Donas' testimony was given in the course of a related hearing (BCB-3805-13 & BCB-4001-13) and citations are to the transcript from that hearing.

[9] Frenzel acknowledged that he knew Georgelis was management; Donas testified that Georgelis had identified himself as a Director.

testified that in response Frenzel questioned his authority and said words to the effect of: "I'd like to see that." (Tr. 172) Frenzel acknowledged hearing Georgelis say that he would call security, characterizing that statement as a threat to have him removed by force. Frenzel denied refusing to leave or making the statement "I'd like to see that."

At that point, Georgelis called out to a manager whose office was nearby and told him to call security. According to Frenzel, Georgelis was angry, turned red, and shouted at him, causing him to be concerned for his own safety as Georgelis is substantially larger than he. Donas testified that Georgelis was not screaming but described him as "confrontational" and "getting more heated" while "Frenzel maintained a lower tone." (Tr. 39) Donas testified that Frenzel stated that he was a grievance representative, made comments to the effect of questioning Georgelis' role, and that he did not like being threatened by security.

From a phone near Donas' desk, Georgelis called Deborah Singer, DEP's Director of Labor Relations, to inquire if Frenzel was authorized to be there. Singer replied that he was not, informed Georgelis that Frenzel worked in BWT, and told Georgelis that he should inform Vincent Sapienza, the Deputy Commissioner of BWT, of what was happening. Frenzel left the area during Georgelis' phone call with Singer and before security arrived.

Within an hour of the incident, Georgelis sent an email to Sapienza on which Singer was copied that fully corroborates his testimony. Within five minutes of its receipt, Singer responded: "If [Frenzel] was not on a break or given permission to leave his area, the bureau should think about requesting discipline for awol, and insubordination." (Union Ex. I) Five minutes later, Sapienza ordered BWT Director of Engineering Michael Quinn to initiate charges.

On April 29, 2013, DEP issued Frenzel a "Warning Memorandum" drafted by Quinn regarding his conduct on April 2. The Warning Memorandum is consistent with Georgelis'

testimony and his April 2 email. A warning memorandum is not considered formal discipline by DEP and is removed from the employee's file after a year if there is no further misconduct.

ii. August 7, 2013 Notice of Charges and Recommended Suspension

On August 7, 2013, DEP issued formal misconduct charges against Frenzel regarding his conduct in and failure to fully attend a mandatory Technical Writing Seminar ("Seminar").[10] Frenzel was aware that the class was mandatory and recalled receiving the email sent by a DEP agency attorney instructing him to attend. The email warns: "This is the last class. The names of those not attending will be submitted to your Division Chief. If there is any reason you cannot attend, I need to know immediately." (City Ex. 8)

Quinn testified that DEP had received a complaint from the Seminar instructor regarding Frenzel's conduct in the Seminar that resulted in the three charges: that Frenzel (i) absented himself from his assigned work location by not attending the Seminar from 8:30 a.m. to 10:30 a.m. and from 3:55 p.m. to 4:20 p.m.; (ii) neglected his duties by engaging in another activity while in the Seminar; and (iii) engaged in disruptive behavior during the Seminar. Frenzel testified that he was unaware there were any complaints regarding his behavior in the Seminar until he was charged on August 7. Frenzel denied being disruptive but acknowledged not attending the Seminar from 8:30 a.m. to at least 10:00 a.m. and from 4:00 p.m. to 4:20 p.m. and that he worked on other projects while attending the Seminar.

Frenzel admitted not attending the Seminar in the morning but explained that the Seminar, which was on a Tuesday, conflicted with a 9:00 meeting scheduled every Tuesday led by Quinn. Frenzel testified that he signed in to the Seminar before 8:30 a.m., told the instructor that he had another meeting and was leaving, that the instructor did not tell him to stay, and that

[10] Quinn testified that after DEP's legal counsel advised BWT that all of its engineers needed to improve their writing skills, BWT arranged for the Seminar to be held in its conference room.

he left without attending any part of the Seminar before going to the 9:00 a.m. meeting. Frenzel testified that he believed the meeting with Quinn ended around 10:00 a.m. Frenzel did not inform Quinn, the DEP agency attorney, or his supervisors that the Seminar conflicted with Quinn's meeting. Quinn testified that he knew Frenzel was assigned to take the Seminar but did not know when he was taking it and was unaware of the conflict. According to Quinn, if one of the participants in the weekly meeting could not make it, the meeting would either be rescheduled or cancelled, with the work scheduled to be addressed by phone or email.

Frenzel admitted leaving the Seminar at 4:00 p.m. before it ended. Frenzel's regular schedule is 7:00 a.m. to 3:00 p.m. He explained that he is only approved for an hour of overtime three days a week, that he was not approved for overtime on the day of the Seminar, and that management was aware that he was not approved for overtime on the day of the Seminar because he submitted his time sheets and overtime requests for that week, and they were approved, before the day of the Seminar. According to Frenzel, at 4:00 p.m. he said to the instructor "my time is up" and the instructor said nothing in response, so he left. (Tr. 93) Frenzel did not inform the DEP agency attorney or his supervisors that the Seminar ended after his scheduled workday, did not seek to adjust his schedule, and did not request additional overtime.

Frenzel admitted doing other work while in the Seminar, explaining that at the meeting with Quinn, he was instructed to complete a couple of contracts. Frenzel testified that he told the instructor that he had deadlines in two contracts, that the instructor said nothing in response, and that he proceeded to work on contracts during the Seminar. Quinn testified that he did not recall if any deadlines were set at the meeting but acknowledged that they may have been.

Frenzel denied that he had been disruptive and testified he has never been informed exactly what he did that was disruptive. Frenzel testified that during the Seminar, the instructor

made a comment he found derogatory of unions. Specifically, that in response to a request for a break made by another engineer, the instructor said: "What are you, union members?" (Tr. 90) Frenzel informed the instructor that he was a grievance representative and told him that "making jokes about the Union in a room full of union members [was] inappropriate." (Tr. 90) In response, according to Frenzel, the instructor granted the class a break.

An informal conference was held on August 20, 2013, and that same day a determination was issued sustaining all three charges and recommending a ten day suspension. In Frenzel's entire work history, he has had no other disciplinary action taken against him. On August 21, 2013, Frenzel informed DEP that he did not accept the recommendation. As of the close of the hearing, the matter was pending at the Office of Administrative Trials and Hearings ("OATH").

iii. August 26, 2013, Transfer

On February 1, 2013, an arbitrator ruled in favor of Frenzel in his third out-of-title grievance and ordered DEP to pay him the difference between what he received as an ACE and what he would have received as an APM Level II retroactive to March 29, 2012, and to continue to do so "until cessation of the out-of-title assignment." (City Ex. 7) Frenzel testified that because of his experience, he had "property rights to the biosoilds work" and, thus, had a right to continue the out-of-title work.[11] (Tr. 69) Frenzel testified that the value of the biosolids contracts in recent years has shrunk from $100 million to $36 million in 2013.

DEP Deputy Director of Labor Relations Feinstein testified that when he received the arbitration award, he asked BWT to cease Frenzel's current out-of-title duties and assign him duties commensurate with the ACE title. Feinstein testified that this is a typical response to an arbitrator finding that an employee is working out-of-title, and Deputy Commissioner Sapienza

[11] In a July 18, 2013 email to Feinstein, Frenzel stated he had "the right to maintain my job assignment." (Pet., Ex. A)

corroborated that this was a typical response. Quinn corroborated that Feinstein made this request right after the arbitration award was issued and explained that since Frenzel was in the middle of writing a biosolids contract in February 2013, he declined to immediately reassign Frenzel or change his duties. In August 2013, after a vacancy for an ACE opened up in the Structural Engineering Section, Sapienza decided to transfer Frenzel. Sapienza testified that Frenzel's Union activity played no part in the decision to transfer him and that BWT no longer needed to have Frenzel working on biosolids because the nature of the contracts was changing, becoming a simpler task. Sapienza noted that the value of the biosolids contracts had shrunk from $100 million to $36 million. Quinn acknowledged that he did not know the details of how Frenzel's old work would be divided. Frenzel's transfer was effective August 26, 2013, and, in accordance with the arbitration award, he was paid at the rate of an APM Level II until August 25. Thereafter, his pay was returned to that of an ACE.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners argue that the DEP retaliated against Frenzel in violation of the NYCCBL § 12-306(a)(l) and (3).[12] As Union activity, Petitioners argue that Frenzel's out-of-title grievances

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

> 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 [§] 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;

(the most recent victory in February 2013) and his advocacy as a grievance representative (beginning in April 2013) were the motivation for the April 2013 Warning Memorandum and the August 2013 disciplinary charges and transfer. According to Petitioners, when determining whether an action constitutes unlawful discrimination or retaliation, once an employer is aware of an employee's protected activity, the employee need only show that the protected activity was a motivating factor. In the instant case, the record establishes that the DEP was aware of Frenzel's protected activity. Therefore, Petitioners argue, the City must establish that DEP's actions were the result of a legitimate business reason that would have taken place even in the absence of protected conduct. According to Petitioners, the City's assertion of management rights under NYCCBL § 12-307(b) does not provide DEP with unlimited protection from claims that its decisions violate the NYCCBL.

Regarding the April 2013 Warning Memorandum, Petitioners argue that it was issued shortly after Frenzel won his third out-of-title grievance and shortly after he became a grievance representative. Additionally, according to Petitioners, the record establishes that DEP is hostile to Donas' Union activity. In the September 2012 email, in what Petitioners characterize "unlawfully sweeping language," Donas was instructed that "'union related activities are not permitted during your regular working hours unless specifically permitted by management.'" (Pet. Brief at 8) (quoting City Ex. 3). In February 2013, management complained to a Union official about Donas conducting Union business during working hours. Petitioners argue that because of Union activity, Donas' interactions with other employees were being closely

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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."

monitored and that Georgelis felt that he had to be extra vigilant about any conversations Donas was having at his desk. This, Petitioners argue, shows anti-union animus.

According to Petitioners, no restrictions were placed on Frenzel's release time until May 2013 and professional employees like him do not have to ask permission to leave their desks. There is also no official restriction barring employees from Frenzel's floor going to Donas' floor. Petitioners argue that Georgelis never explained to Frenzel who he was or why he was asking Frenzel to leave, was loud and belligerent, and did not back down when Frenzel identified himself. Frenzel and Donas were not interviewed about the incident; thus, according to Petitioners, DEP did not ascertain what had occurred even though the two employees involved were Union officials. Petitioners argue that management had no justification for issuing a disciplinary warning as Union activity was a motivating factor in Georgelis' behavior and his follow-up complaint to Frenzel's manager.

Regarding the ten day suspension for Frenzel's alleged conduct in the Seminar, Petitioners argue that the "bright flag here" is the timing. (Pet. Brief at 9) Prior to becoming grievance representative, Frenzel had no disciplinary actions taken against him for his entire 14 year career. Within weeks of becoming a grievance representative, he received the Warning Memorandum; and within weeks of complaining on behalf of members about the restructuring of the biosolids work, he received a Notice of Charges. Petitioners argue that Frenzel has an explainable defense to each charge. For all three, he had informed the instructor of the conduct the charge is based upon and the instructor did not ask Frenzel to behave differently. Petitioners argue that Frenzel made the appropriate choice to attend one of the conflicting meetings, the one held by his Bureau chief. At this meeting, the Bureau chief instructed him to finish a contract, so he worked on it during the class. In addition, he left the Seminar early as he had exceeded his

paid work day and his overtime allotment for the week. According to Petitioners, Frenzel was not disruptive at the Seminar but responded appropriately to the instructor's derogatory joke about unions. Petitioners argue that the severity of the proposed penalty far outstrips the facts demonstrated in the record, leaving only anti-union animus as an explanation.

Finally, Petitioners argue that DEP retaliated against Frenzel by transferring him in response to winning his 2013 out-of-title grievance. For 12 years, Frenzel had been filing and winning out-of-title grievances and DEP's response was to have him continue the work he was doing, provisionally promote him, and continue to pay him at the higher rate of the title commensurate with his duties. In response to Frenzel's most recent out-of-title grievances, Petitioners argue that management announces a policy of transferring employees who win out-of-title grievances. Petitioners argue that the only distinction between 2013 and prior years was that Frenzel became a grievance representative and he stepped up his union activity, such as opposing management's planned restructuring of the biosolids work in July 2013. Further, DEP's proffered legitimate business reasons are undercut by DEP transferring Frenzel before it had a replacement lined up to address the $36 million in contracts Frenzel handled.[13]

[13] After the record in this matter had been closed and after Petitioners were informed that the matter had been submitted to the Board, Petitioners requested to re-open the record pursuant to § 1-10(l) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) which states that: "Motions for leave to reopen a hearing because of newly discovered evidence shall be promptly made. The Board, in its discretion or on its own motion, may reopen a hearing and take further testimony." The Board denies the request as Petitioners has not established that any of the material they seek to submit was unavailable to them prior to the close of the record. *See PBA*, 21 OCB 10, at 7 (BCB 1978), *affd., Matter of Patrolmen's Benevolent Assn. v. Anderson*, N.Y.L.J., Feb. 22, 1979, at 6 (Sup. Ct. N.Y. Co. Aug. 7, 1979) (The Board "will not reopen and reconsider a case based on the mere failure of a party to present relevant evidence and argument which was available to it upon the initial litigation of the matter."). *See also Local 621, SSEU*, 47 OCB 37, at 4-5 (BCB 1991) (citing *Adjunct Faculty Association*, 18 PERB ¶3076 (1985); *Social Service Employees Union. Local 371*, 11 PERB ¶3004 (1978)).

City's Position

The City argues that Petitioners' claim must fail because they did not prove a *prima facie* case of retaliation or discrimination. The City argues that Frenzel's alleged union activity were actions on behalf of himself and therefore not protected union activity. Presuming he was engaged in union activity, the City argues that Petitioners have failed to demonstrate a causal link between that activity and the alleged retaliatory actions and have not established any anti-union animus on behalf of the decision makers. Georgelis testified he was not even aware who Frenzel was, let alone know that he was a union official discussing union business. Sapienza testified that Frenzel's union activity was not a factor in the decision to transfer him.

Further, the City argues that DEP had legitimate business reasons for the acts Petitioners claim were retaliatory and would have taken these same actions in the absence of Frenzel's union activity. As for the Warning Memorandum, the City argues that Frenzel was not on authorized release time; thus, he was not validly conducting Union business. Indeed, he put in for and was paid overtime for the time spent meeting with Donas. The City further argues that the Warning Memorandum was a valid exercise of that DEP's management rights under NYCCBL § 12-307(b) because the fact that an employee is engaged in union activity does not confer upon him or her immunity from otherwise appropriate and proper disciplinary actions.[14] Frenzel was directed to leave but, instead of heeding the instructions he knew came from a superior, he stayed and argued with and scoffed at Georgelis until security had to be called.

As for the disciplinary charges, the City notes that Frenzel admitted that he did not attend the entire Seminar and worked on other projects during it. Frenzel also admitted to conduct that

[14] NYCCBL § 12-307(b) provides, in pertinent part, that: "It is the right of the city . . . acting through its agencies, to . . . direct its employees; take disciplinary action;. . . determine the methods, means and personnel by which government operations are to be conducted; . . . [and] exercise discretion over its organization and the technology of performing its work."

was, according to the City, clearly disruptive. The City argues that there is nothing in the record indicating that Frenzel was treated differently for his behavior than any other employee would have been and that Petitioners have put on no evidence of pretext. It is for OATH, not the Board, to determine the validity of those charges and penalty.

According to the City, Frenzel was transferred due to DEP's operational needs and in compliance with the arbitration award which found that his assignments were out-of-title. NYCCBL § 12-307(b) guarantees the City the right to "direct its employees" and to "determine the methods, means and personnel by which government operations are to be conducted." Sapienza testified to the changing nature of the biosolids program and that, when it was feasible to do so, he transferred Frenzel to cease his out of title work, and his testimony was corroborated by Feinstein and Quinn. Frenzel himself corroborated that the value of the biosolids contracts had shrunk from $100 million to $36 million.

DISCUSSION

Petitioners claim that DEP retaliated and discriminated against Frenzel because of his Union activity in violation of NYCCBL § 12-306(a)(1) and (3). We find that the record demonstrates that DEP had legitimate business reasons for its actions and would have taken them regardless of Frenzel's union activity. Accordingly, we dismiss the petition

Prima Facie Case

In *Bowman*, 39 OCB 51 (BCB 1987), the Board adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), to determine whether an action constitutes impermissible discrimination or retaliation. To establish a *prima facie* case of a violation of NYCCBL § 12-306(a)(1) and (3), 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 Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011).

We find that Petitioners have established a *prima facie* case. For union "activity to be protected under the NYCCBL, it must be related, even if indirectly, to the employment relationship and must be in furtherance of the collective welfare of employees." *Local 1087, DC 37*, 1 OCB2d 44, at 25 (BCB 2008) (citing *Finer*, 1 OCB2d 13 (BCB 2008)) (other citations omitted). If the employer is shown to have knowledge of the protected union activity, the first prong of the *prima facie* case is satisfied. *See Local 376, DC 37*, 4 OCB2d 58, at 11; *Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004). The Board has long held that the "filing of contractual grievances constitutes activity that is protected under the NYCCBL." *DC 37*, 6 OCB2d 24, at 29 (citing *Fabbricante*, 61 OCB 38 (BCB 1998)) (other citations omitted). In addition to his out-of-title grievances, we find, based upon the July 11, 2013 email Frenzel sent Sapienza, that Frenzel raised concerns regarding the assignment of the biosolids work on behalf of Union members in his capacity as a grievance representative. (*See* Pet., Ex. C) Sapienza was aware both of Frenzel's out-of-title grievance and his complaints on behalf of members regarding the biosolids restructuring. Thus, we find that first prong has been satisfied.

As for the second prong, causation, absent an "outright admission of any wrongful motive, proof of the second element must necessarily be circumstantial." *CWA, L. 1180*, 77 OCB 20, at 15 (BCB 2006) (citing *Local 237, CEU*, 67 OCB 13, at 9 (BCB 2001)). There is no admission of animus in this case. There is, however, temporal proximity and, while "proximity in time, without more, is insufficient to support an inference of improper motivation, timing may

also be considered together with other relevant evidence." *SSEU, L. 371*, 75 OCB 31, at 13 (BCB 2005), *affd., Matter of Soc. Serv. Empl. Union, L. 371 v. N.Y.C. Bd. of Collective Bargaining*, Index No. 116054/05 (Sup. Ct. N.Y. Co. May 30, 2006) (Stallman, J.), *affd.*, 47 A.D.3d 417 (1st Dept. 2008).

The alleged retaliatory actions occurred within four months of Frenzel becoming a grievance representative and advancing concerns of employees performing biosolids work. Other factors suggesting anti-union animus may have been a motivating factor including issuing a warning memorandum for behavior stemming from a meeting between union officers regarding union business, a ten day suspension of an employee who had never been formally disciplined in his 14 year career, and DEP's choice to transfer Frenzel in response to his most recent out-of-title grievance award when, in response to past awards, it kept him in the same position (or promoted him) doing the same work at a commensurate higher rate of pay. Taken together with the temporal proximity, we find the above may be sufficient to establish the second prong and, accordingly, find that Petitioners have made out a *prima facie* case.[15]

Legitimate Business Reasons

If a petitioner establishes 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). We find that DEP established legitimate business reasons for its actions.

The Warning Memorandum was issued based upon Frenzel's response when approached by Georgelis: first, Frenzel's conduct in refusing to 1eave, prompting Georgelis to call security;

[15] As we have found that DEP had legitimate business reasons for its actions, we do not reach whether it has refuted one or both elements of the *prima facie* case.

second, Frenzel's disrespectful attitude and the statement "I would like to see that" or words to that effect. (City Ex. 5) We find that Frenzel engaged in the alleged conduct. Frenzel acknowledged that he was instructed to leave by an individual he recognized as a supervisor but did not do so until after security was called. Whether or not Georgelis' instruction to leave was justified, Frenzel ignored the instruction and chose to be confrontational. *See PBA*, 63 OCB 16, at 9-10 (BCB 1999). We also find that Frenzel made the alleged statement and acted in a disrespectful manner. We credit Georgelis' description of the incident and find that his documentation of the incident within an hour corroborates his testimony. *See Local 376, DC 37*, 4 OCB2d 58, at 12. Georgelis also was not aware of Frenzel's union activity when he approached Donas and Frenzel, or what they were discussing. Further, while Donas' testimony did not corroborate Frenzel's testimony that Georgelis was screaming, his description of Frenzel's behavior during the incident supports the employer's version of events.

We further find, on this record, that DEP would have responded in the same manner in the absence of protected union activity.[16] *See Local 376, DC 37*, 4 OCB2d 58, at 14; *Ornas*, 65 OCB 12, at 7 (BCB 2000). We note that Singer's contemporaneous email which recommended considering discipline focused solely on whether Frenzel had permission to be there and did not address why he was there. Thus, we find, on the record before us, that DEP would have issued the Warning Memorandum in the absence of any protected Union activity and find that DEP established a legitimate business reason for its actions. *See Local 376, DC 37*, 4 OCB2d 58, at 14 (citing *N.Y.C. Transit Auth.*, 34 PERB ¶ 3025 (2001)); *Ornas*, 65 OCB 12, at 7.

[16] We are mindful that the "labor relations process must tolerate robust debate of employment issues, even if occasionally intemperate." *Local 376, DC 37*, 4 OCB2d 58, at 13 (quoting *Village of Scotia*, 29 PERB ¶ 3071 (1996)) (other citations omitted). Thus, we scrutinize the context in which the remarks are made and our decision is limited to the circumstances found in the record in this case. *See Id.* at 13-14 (citing *City of Utica*, 33 PERB ¶ 3039 (2000); *Village of Scotia*, 29 PERB ¶ 3071 (1996)).

We also find that DEP would have pursued formal discipline and recommended suspension for Frenzel's failure to fully attend and for his behavior in the Seminar in the absence of any Union activity. Quinn credibly explained why DEP believed that the Seminar was necessary for all of BWT's engineers. The email from the agency attorney corroborates that the Seminar was mandatory and explicitly warned all of those scheduled to attend the Seminar that it was the last class and that "the names of those not attending will be submitted to your Division Chief." (City Ex. 8) The email further instructed that "[i]f there is any reason you cannot attend, [the agency attorney] need[s] to know immediately." (*Id.*) Frenzel admitted receiving the email, not attending the entire Seminar due to factors he was aware of prior to the Seminar, and to not contacting the agency attorney as instructed to inform her that he would not be able to attend the entire Seminar. The Seminar was held in Frenzel's Bureau, yet Petitioners did not explain why Frenzel did not attend any of the Seminar before his 9:00 a.m. meeting or why he did not return to the Seminar before 10:30 a.m. when he testified that the 9:00 a.m. meeting ended at 10:00 a.m. While the conflicting assignments were scheduled by management, Frenzel undertook no action either to inform management of the conflict or otherwise try to resolve it. Frenzel also admitted working on other matters during the Seminar. Quinn credibly testified that the instructor had complained about Frenzel's behavior. We find, based upon Frenzel's admitted behavior of coming and going during the Seminar, working on other matters during the Seminar, and telling the Seminar instructor "my time is up" when he left the Seminar that his conduct was disruptive. (Tr. 93) Nothing in the record indicates that DEP would have responded differently to another employee behaving the same way.

Finally, we also find that Frenzel's transfer was for legitimate business reasons. DEP was under no obligation to continue assigning Frenzel the work of an APM. Further, Petitioners

do not dispute that there was an opening in Frenzel's title and that transferring him brought DEP into compliance with the arbitration award. Sapineza and Quinn acted in accordance with an arbitration decision and Quinn credibly explained the timing of Frenzel's transfer. We note that Frenzel's testimony corroborates Sapienza's testimony that the value of the biosolids work had shrunk from $100 million to $36 million. Frenzel's desire to continue to perform biosolids work does not make DEP's decision to transfer him illegitimate. Accordingly, we find that DEP has demonstrated legitimate business reasons for all of the disputed actions and dismiss the petitions.

ORDER

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

ORDERED, that the Improper Practice Petitions filed by the Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO, and Alexander Frenzel, docketed as BCB-3087-13 and BCB-4002-13, be, and the same hereby are, denied.

Dated: April 3, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER