Sergeants' Benevolent Ass'n, 75 OCB 22 (BCB 2005)

[Decision No. B-22-2005] (Docket No. BCB-2367-03).

Summary of Decision: The Union alleged that the NYCCBL was violated by NYPD when a sergeant, who was also a Union delegate, was improperly denied a training request and later transferred. The Board granted, in part, the Union's Petition finding that NYPD interfered with the Union members' rights during disciplinary proceedings through its demonstrable disfavor of this sergeant, who had previously expressed dissatisfaction with the manner and the degree in which his superior meted out discipline in the unit. The Board also held that NYPD retaliated against this sergeant by rejecting his training request, and transferring him. The Board found the business reasons proffered NYPD to be illegitimate because they were logically incongruous and factually unsupportable. However, the Board dismissed the Union claim that NYPD dominated or interfered with the Union's actual administration of its internal structures. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SERGEANTS' BENEVOLENT ASSOCIATION and SERGEANT GERARD PETILLO,

Petitioners,

- and -

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

Respondents.

DECISION AND ORDER

On November 12, 2003, the Sergeants' Benevolent Association of the City of New York ("SBA" or "Union"), on behalf of Union delegate Sergeant Gerard Petillo, filed a verified improper practice petition against the City of New York and the New York City Police

Department ("City" or "NYPD"). The Union alleges that NYPD violated § 12-306(a)(1) and (2) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by rejecting Petillo's training requests, altering his scheduled vacation, and transferring him to a different unit in the Forensic Investigations Division, thereby forcing him into a less desirable work schedule and relegating him to a position that failed to utilize his extensive knowledge, training, and experience. After completion of a hearing and submission of Post-Hearing briefs, the Union moved, on January 28, 2005, to amend the petition to include a violation of NYCCBL § 12-306(a)(3). The Union claims that the evidence demonstrates that, due to Petillo's advocacy of Union members in disciplinary proceedings, NYPD interfered with the rights of the Union members, dominated the internal administration of the Union, and retaliated against Petillo. The City maintains that Petitioners failed to articulate *prima facie* claims under NYCCBL § 12-306(a)(1), (2), and (3) because: Petillo was not engaged in protected Union activity; Petitioners did not prove anti-union animus; and NYPD has demonstrated legitimate business reasons for its actions. This Board grants the motion to amend, finds that NYPD has violated NYCCBL § 12-306(a)(1) by interfering with the Union members' rights during disciplinary proceedings, and finds that NYPD has violated NYCCBL § 12-306(a)(1) and (3) by rejecting Petillo's training request, and transferring him. However, this Board does not find that NYPD violated NYCCBL § 12-306(a)(2). Accordingly, the petition is granted, in part, and dismissed, in part.

BACKGROUND

The Forensic Investigations Division ("FID") of NYPD is part of the Detectives' Bureau

and consists of five units: the Police Laboratory, the Crime Scene Unit, the Latent Prints Section, the Bomb Squad, and the Firearms Analysis Section ("FAS"). The goal of FID is to collect, document, analyze, and secure forensic evidence involved in crimes that are under investigation. FAS is responsible for testing the operability of firearms, conducting microscopic analysis of ballistic evidence, and performing computerized investigative searches of the ballistic evidence. FAS is housed in the Police Laboratory building, is supervised by the lab director and the commanding officer of FID, and is staffed by civilian and uniformed employees. The hours of operation are Monday through Friday 8:00 a.m. to 12:00 midnight.

The Police Laboratory, another unit of FID, is divided into smaller sections including the Evidence Control Unit ("ECU"). In ECU, police personnel provide security for the Police Laboratory, conduct the intake of evidence, distribute evidence to the proper analysts, and note the chain of custody for all evidence in FID. ECU is housed in the Police Laboratory building, is supervised by the commanding officer of FID, is staffed by uniformed employees, and is open 24 hours a day, seven days a week.

Petillo became a police officer in 1983 and was promoted to sergeant in 1992. In July 2001, Petillo applied for a supervisory position in FAS. After reviewing a number of applications and interviewing a select amount of candidates, NYPD transferred Petillo to FAS. The commanding officer of FID, then-Inspector Denis McCarthy, selected Petillo because he had previously worked under McCarthy, had extensive training and knowledge in firearms, was "highly recommended" by his commanding officer, received excellent performance evaluations, and was an accomplished shooter and gun afficionado for over 20 years.

Petillo testified that as a sergeant in FAS he oversaw the examination and analysis of

ballistic evidence by FAS officers, detectives and civilian employees, mentored these subordinates in the field of firearms analysis, handled issues they could not resolve, and worked with outside ballistic consultants. Petillo stated that he also engaged in administrative activities such as supervising payroll distribution and drafting administrative reports. However, according to McCarthy, "[m]ost of the technical work is all done by detectives and cops . . . . sergeants do administrative review, which is basically crossing the Ts and dotting the Is." Hearing Transcript ("Tr.") at 169. Further, McCarthy testified that peer review is used to address minor ballistic issues, and outside consultants, who are not present in FAS everyday, supervise all substantive ballistic work and resolve major ballistic issues.

According to Petillo, to bolster his supervisory capabilities and expertise in the area of ballistic evidence analysis, he became certified in serial number restorations, Interrogated Ballistic Identification System, macroscopic analysis, and microscopic comparisons of ammunition specimens. He became a member of the Association of Firearms and Tool Mark Examiners, the International Association of Firearms Identification, and the New York Microscopical Society. He also became a licensed armorer for Smith & Wesson, Colt, Remington, Mossberg, Beretta, Kahr, and Glock. He has lectured on the topics of oblique and coaxial lighting used in firearms identification, ammunition components discovered at crime scenes, and serial number restoration. Accordingly, Petillo, has achieved a high level of expertise in the area of ballistic analysis.

In December 2001, Petillo was selected as the Union delegate for FID, and, as such, acted as the liaison between NYPD and the Union, represented members in disciplinary proceedings, and kept them informed of all Union related business. In January 2002, Petillo represented

Sergeant Geraldine Delany, who received two Command Discipline ("CD") charges and was recommended for transfer. Petillo believed these CDs were baseless and the penalty inequitable. Petillo explained the situation to McCarthy, who found one CD unsubstantiated and reduced the penalty of the other to a "warned and admonished."[1] McCarthy offered no testimony regarding this event.

In March 2002, Sergeant Robert Spampinato received a CD for "failure to supervise" because he left approximately two hours before the end of his tour without proper authorization. Since Spampinato's early departure was due to a family emergency, Petillo attempted to secure a reduced penalty. However, McCarthy decided to transfer Spampinato to ECU because he had received previous CDs and accumulated two "warned and admonished" penalties. Petillo and Spampinato testified that on August 5, 2002, they agreed to the transfer only because McCarthy assured them that it was temporary and Spampinato would return to FAS. McCarthy does not recall such a conversation, and Petillo and Spampinato admit that the CD makes no mention of the transfer's temporary nature.

Petillo testified that after several months had passed, he approached McCarthy to discuss Spampinato's return to FAS, but McCarthy dismissed Petillo's request and insisted that Spampinato's transfer was permanent. McCarthy did not recall this conversation. Spampinato testified that he also met with McCarthy regarding his return to FAS, but McCarthy refused his request. Spampinato further testified that during this meeting, McCarthy inquired about the

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[1] "Warned and admonished" indicates that the charges were substantiated and a written warning issued. This warning remains in an employee's personnel file from one to two years and may have a cumulative effect on later disciplinary penalties. Other CD penalties include minor suspensions, loss of annual leave time, and transfers.

progress of a pending petition to remove Petillo as the Union delegate, and about Spampinato's confidence in Petillo as a Union delegate. On cross-examination, Spampinato admitted that his transfer to ECU became permanent because he received another CD on December 11, 2002. McCarthy did not recall meeting with Spampinato, the subsequent CD, or its effect on Spampinato's duration in ECU.

Petillo testified that in January 2003, he and the Detectives' Endowment Association delegate in FID met with Chief Robert Gianelli to discuss the CDs being issued in FID. Petillo asserted that he informed Chief Gianelli that some of these CDs were unsubstantiated, but the recipients still received some form of punishment, usually "warned and admonished." Further, Petillo stated that CDs were not being adjudicated within the time frame set forth in NYPD Patrol Guide. Chief Gianelli recalled meeting with Petillo and stated that while he does not recall having a specific conversation with McCarthy regarding these matters, after every meeting with employees, he routinely speaks with the commanding officer of those employees in order to discuss the particular issues raised. McCarthy stated that he did not recall Chief Gianelli speaking with him about these issues.

Both Petillo and McCarthy testified that they had a functional, working relationship. However, according to Petillo, after the January 2003 meeting with Chief Gianelli, McCarthy's demeanor and disposition toward him changed, and communication between the two was abrupt and unfriendly. McCarthy testified that his disposition toward Petillo has not changed.

Prior to March 14, 2003, the Police Laboratory hired an outside consultant, Ed Hueske, to evaluate the Police Laboratory and FAS, note any deficiencies, and formulate a strategy to address these inadequacies in preparation for re-accreditation by American Society of Crime Lab

Directors Laboratory Accreditation Board ("ASCLD Board"). The consultant's report recommended, among other things, that FAS sergeants be given a greater role in the supervision of civilian examiners and have greater input on their performance evaluations. Further, this report stated that FAS is understaffed and should hire new examiners to be trained by internal and external trainers. Even though McCarthy was the commanding officer of FID, he testified that he never saw this report because it was addressed to Lab Director Mark Dale only.

Around this same time, Petillo submitted an application to the National Firearms Examiners Academy ("NFEA"), which is organized by the United States Bureau of Alcohol, Tobacco and Firearms. The record indicates that this intensive program was nearly one year long and required attendees to train in Washington D.C. for 17 weeks. Completion of this course is comparable to a masters degree and satisfies many of the accreditation requirements of the ASCLD Board. On March 14, 2003, Petillo received his acceptance into this program.

By memorandum, dated March 17, 2003, Petillo requested permission from NYPD to attend this academy. Petillo's written request outlined his extensive training in the field, his exemplary performance for NYPD, and a recommendation from his supervisor at the time, Lieutenant Glynn, who wrote:

> The Firearms Analysis Section as well as this laboratory can only benefit from having a graduate of the NFEA here . . . and [Petillo] has the background to maximize the training obtained at the NFEA. His graduation from this academy will clearly fill the void of technical supervision for the Firearms Analysis Section.

Union Exhibit 4 at 3. After approval by the Lab Director Mark Dale, Petillo's request was sent to McCarthy, who rejected it.

Upon learning that his request was rejected, Petillo confronted McCarthy. On direct

examination, McCarthy testified that Petillo's request was denied because he had "too much training," 17 weeks away from FAS was excessive, and that a backlog of cases existed. On cross-examination, McCarthy admitted that shortly after this conversation, he began soliciting FAS officers, detectives, and civilians who would be able to attend this program because, in McCarthy's estimation, these other employees needed the training more than any FAS sergeant since they engaged in the actual ballistic analysis. Ultimately, no one from FAS attended NFEA because no other employee satisfied the program's stringent entrance requirements.

Petillo testified that he then met with Chief Gianelli and informed him of McCarthy's rejection and subsequent solicitation of other FAS personnel, and Chief Gianelli said he would investigate this matter. Petillo testified that Chief Gianelli told him that McCarthy rejected the training request because Petillo failed to submit it in writing. McCarthy, however, testified that Chief Gianelli never spoke with him regarding Petillo's request. Chief Gianelli testified that he recalled meeting with Petillo regarding the training request, and that while he does not recall having a specific conversation with McCarthy regarding this matter, he would have spoken to McCarthy regarding this meeting with Petillo, as is his customary practice.

In April 2003, Sergeant Elisa Quartucci received a CD that charged "failure to follow Standard Operating Procedures" because she did not make requisite logbook entries during her shift. She testified that this was her second CD in four months and she faced a loss of one day of annual leave. Quartucci, without representation from the Union, met with her supervising Captain, who offered to reduce the penalty to a loss of two hours of annual leave, if she issued a formal explanation for her failure to make the requisite entries in the logbook. Quartucci rejected this offer. She testified that she was being singled out and that other sergeants routinely failed to

make the same entries. This CD remained unadjudicated.

Quartucci and McCarthy testified that in December 2003 they met at a NYPD holiday party and discussed this matter. McCarthy offered the loss of two hours of annual leave and removed the condition of submitting a formal explanation, which Quartucci still refused. Shortly thereafter, she sought the representation of Petillo. The record demonstrates that after Petillo examined the logbooks, he met with McCarthy and stated that Quartucci was being singled out and that she should not lose annual leave time. In response, McCarthy, at the meeting, rescinded his offer and insisted on the loss of one day of annual leave as penalty. Petillo then informed Quartucci that the offer of the reduced penalty had been rescinded and that the original penalty was reinstated.

Quartucci stated that following her conversation with Petillo, she met with a colleague who told her to meet with McCarthy outside the presence of Petillo. Quartucci, who followed the advice of her colleague, met with McCarthy and informed him that she did not "know what's going on between you [McCarthy] and Gerry [Petillo], but I don't want to be the dolphin that gets caught in the tuna net." (Tr. at 121.) After further discussion, McCarthy again offered the loss of two hours of annual leave, and Quartucci accepted it. Quartucci testified that prior to approving the CD settlement, she raised the issue that the CD had to be "signed off" by Petillo. McCarthy responded:

> don't worry about Gerry. He is not going to be your delegate for much longer, we have about 18 signatures to remove him. Then I believe he called somebody else in, a crime scene sergeant, to sign off on the CD.

(Tr. at 122.) McCarthy testified that he did not recall the specific details of this meeting, but that he did offer Quartucci a reduced penalty.

Petillo successfully bid for the week of July 4th as his vacation; however, prior to this week, Petillo was advised by one of his supervisors that he could not take vacation that week due to "manpower reasons." Petillo testified that his initial reaction was "if they [NYPD] were short people and they needed me to step up, I had no problem with it." (Tr. At 78.) However, in August 2003, Petillo learned that two other sergeants in FID were awarded that week off, even though they had less seniority than Petillo. He testified that this decision was contrary to the practice that awarded vacation slots to the bidders with the most seniority. The City did not dispute this testimony.

In August 2003, Petillo was transferred from FAS to ECU. The record indicates that a sergeant in ECU began to "burn time," which means that the employee was using his accrued days off in contemplation of retirement. At the same time, Spampinato was transferred out of ECU and into Quality Assurance, another subdivision of the Police Laboratory, in preparation for the Police Laboratory's re-accreditation. The record shows that the three remaining sergeants in ECU had to cover all 21 shifts.[2] McCarthy testified that with only three sergeants covering 21 shifts in ECU, he decided to move one of the three sergeants from FAS to ECU because two sergeants were sufficient to cover the ten shifts in FAS. McCarthy testified that after examining the seniority of each FAS sergeant, he transferred Petillo because he was the least senior and had experience in dealing with evidence.

Around this same time, a sergeant in FAS also began to "burn time." To fill the vacancy

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[2] Since ECU is operational seven days per week, 24 hours per day, the work day consists of three 8-hour shifts, thus ECU has 21 shifts per week. In contrast, since FAS is open only five days per week, sixteen hours per day, the work day consists of two 8-hour shifts, thus FAS has 10 shifts per week.

in FAS that was created by Petillo's transfer and the retirement of another sergeant, McCarthy brought in a sergeant from a different division, who had more seniority than Petillo. McCarthy testified that transferring Petillo to ECU and replacing him with a sergeant from a different division was the only option. McCarthy felt that FAS was the only unit in FID that could function with one less sergeant, Petillo possessed a more extensive knowledge of evidence control, while the new sergeant was completely unfamiliar with these concepts, and the new sergeant had more seniority than Petillo.

Due to the transfer, Petillo, who had worked Monday through Friday 4:00 p.m. to 12:00 midnight in FAS, worked Tuesdays through Saturdays from 12:00 midnight to 8:00 a.m. in ECU. McCarthy testified that Petillo was placed in this shift because it was the one worked by the sergeant who was "burning time." According to Petillo, the new work schedule interfered with his personal obligations and restricted his ability to work overtime because most of the available overtime interfered with his off-duty obligations. McCarthy testified that ample overtime opportunities were available but Petillo chose not to work these shifts.

It is undisputed that shortly after the transfer, Petillo confronted McCarthy regarding this transfer, and was informed that "manpower concerns" were the impetus for the reassignment. Convinced that this reassignment was in retaliation for his advocacy of other sergeants, Petillo and the Union filed the instant petition against the City and NYPD. The petition and amended petition seek an order: stating that the City and NYPD violated NYCCBL § 12-306(a)(1), (2), and (3); revoking Petillo's transfer to ECU; reassigning Petillo to FAS on his regular work schedule; directing NYPD to post appropriate notices; and directing NYPD to cease and desist from retaliating against the Union from discouraging members from consulting their Union

delegates, and involving itself in Union affairs.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that NYPD violated NYCCBL §12-306(a)(1) and (3) because NYPD interfered with and retaliated against Petillo for his action as a Union delegate when it denied his training request to the NFEA, and transferred Petillo from FAS to ECU.[3] NYPD had knowledge of Petillo's protected activity because Petillo represented many sergeants in disciplinary procedures that were adjudicated by McCarthy. Furthermore, Petillo, who believed that disciplinary proceedings were being abused in FID, met with Chief Gianelli, who, in turn, informed McCarthy of Petillo's contentions. As a result of his statutorily protected actions, friction developed between McCarthy and Petillo causing his request to attend an exclusive training program to be denied and his transfer out of FAS. Therefore, Petitioners have demonstrated a *prima facie* claim for retaliation.

In response to the City's proffered legitimate business reasons, the Union asserts they are

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[3] NYCCBL § 12-306(a) provides, in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

NYCCBL § 12-305 provides, in relevant part:
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 . . . .

a pretext for retaliatory action. With regard to the rejection of the NFEA request, McCarthy's denial was not based on the programs' extensive time commitment and/or the backlog of cases in FAS because McCarthy then solicited FAS detectives, officers, and civilians to attend this program, even though, in McCarthy's estimation these FAS employees were the only ones who engaged in actual ballistic evidence analysis. With regard to the transfer, McCarthy's decision could not have been based on Petillo's familiarity and knowledge of evidence control concepts because Petillo had never performed the duties of an ECU sergeant. McCarthy's justification for replacing Petillo with the new sergeant, who was a novice in ballistic analysis, flies in the face of reason because Petillo is an expert in this field and FAS sergeants must supervise subordinates in this extremely specialized field, solve ballistic analysis problems, and act as a conduit between other FAS employees and outside consultants.

The Union also asserts that NYPD violated NYCCBL § 12-306(a)(2) by dominating and interfering with the Union's ability to represent its members. When Quartucci met with McCarthy to settle her pending CD, McCarthy's actions at this meeting exemplified his ongoing attempt to control the Union's ability to represent its membership with the delegates of their choosing. Further, McCarthy's comments to Spampinato regarding the petition to remove Petillo as a Union delegate were intended to interfere with the Union's representation of its members because it infers that McCarthy could remove Union delegates he disliked.

In support of the Motion for Leave to Amend Petition, dated January 28, 2005 ("Motion to Amend"), the Union contends that its motion is proper under §§ 1-7(c)(7) and 1-10(i) of the

Rules of Practice and Procedure of OCB ("OCB Rules").[4] First, although the original pleadings contain allegations related only to interference and domination claims, the testimony given at the hearing addressed these two claims, but also demonstrated that there was retaliation in a violation of NYCCBL § 12-306(a)(3). Thus, in accordance with OCB Rules, Petitioners move to amend their pleadings to conform with the evidence presented at the hearing.

Second, the Union indicates that many of the facts that give rise to the interference and domination claims also give rise to the retaliation claim. The original pleadings prominently use some variation of the word "retaliate." Further, the testimony and amended pleadings remain consistent and clearly state a *prima facie* case for all three claims. Further, the City received all of the Union's submissions, was present at the hearing, had the opportunity to cross examine the witnesses, and had the opportunity to oppose Petitioners' Motion to Amend. The City cannot claim that they have been prejudiced in any manner.

City's Position

In opposition to the Motion to Amend, the City asserts that Petitioners are time-barred from asserting new claims because all events in the instant matter occurred more than four months ago. Further, Petitioners did not assert that the new facts alleged during the hearing

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[4] Section 1-07(c)(7) of the OCB Rules states:
After a hearing and upon good cause shown, the trial examiner may permit a party to amend a pleading to conform to the evidence. The request to amend shall be on notice to all parties.

Section 1-10(i) of the OCB Rules states:
A variance between an allegation in a pleading and the proof shall not be deemed material unless it is so substantial as to be misleading, If a variance is not material, the trial examiner may admit such proof and the facts may be found accordingly. A party may move to amend a pleading to conform to the evidence in accordance with § 1-07(c)(7) of these rules.

occurred within the four month statute of limitations, or that they constituted a continuous violation, thereby tolling the running of the statute of limitations.

Regarding these new facts that allegedly give rise to a retaliation claim, the City contends that they mirror the facts presented in the original pleadings. This amendment is an attempt to cover up Petitioners' oversight, when it failed to plead this claim in the first place. Alternatively, if these facts were discovered after the original pleading, Petitioners had ample time to allege them, rather then raising them in the Post-Hearing brief.

The City also contends that Petitioners did not satisfy the criteria used by the Board, when analyzing motions to amend pleadings. Petitioners did not allege nor establish good cause for making such amendment. Furthermore, Petitioners cannot overcome the prejudice inflicted upon the City by this amendment because the City's pleadings, line of questioning at the hearing, and overall defense strategy were designed to rebut interference and domination claims, not retaliation claims. Finally, to allow an amendment at such a late juncture runs contrary to judicial economy because all subsequent charges could be amended to add new claims at anytime, thereby forcing the City to defend any and all claims at anytime. As such, the Motion to Amend should be denied.

The City asserts that if this Board grants the Motion to Amend, then the substantive retaliation claim should be dismissed, along with Petitioners' interference claim. Simply, Petitioners failed to establish that NYPD interfered with and/or restrained Petillo's execution of his §12-305 rights, nor did they demonstrate NYPD retaliated against Petillo. The Union failed to show that Petillo was engaged in protected activity, and the record does not support Petillo's contention that he spoke with Chief Gianelli regarding CDs in FID. Rather, Petillo's real, selfish

motivation behind his meeting with Chief Gianelli was to complain about his training request rejection.

Assuming *arguendo* that Petillo was engaged in protected activity, the Union failed to establish that NYPD was motivated by anti-union animus with regard to Petillo's training request rejection and/or his transfer from FAS to ECU. Rather, the Union's claims are speculative and conclusory. Further, the mere fact that a Union delegate was subject to managerial action does not indicate that NYPD's actions were improperly motivated.

Even if Petitioners could establish a *prima facie* claim, the City contends that NYPD demonstrated legitimate business reasons for rejecting Petillo's training request. Seventeen weeks away from ones duties would have been excessive, and a backlog of cases required Petillo to remain in FAS. NYPD solicited other FAS employees to attend this program, despite the backlog of cases, because it would have been more valuable to these employees, as opposed to a FAS sergeant, especially one who had received as much training as Petillo.

Regarding Petillo's transfer, the City established that ECU needed another sergeant, and that FAS was the one unit in FID that could afford to lose a sergeant. Petillo was the least senior of the sergeants in FAS; the new sergeant transferred into FAS had more seniority than Petillo; Petillo was more qualified to handle the intricacies of ECU because he worked in FAS and was familiar with ECU procedures; and the new sergeant was being placed in FAS, where no special skills would be required because all substantive ballistic analysis is performed by his subordinates. Thus, Petillo was the most logical selection for the ECU vacancy.

The City asserts that Petitioners failed to establish a violation of NYCCBL §12-306(a)(2) because Petitioners did not demonstrate that NYPD interfered with the administration of the

Union or supported the Union in such a fashion that it could be construed as a tool of NYPD. NYPD did not dominate or interfere with the Union by transferring Petillo because his reassignment satisfied a staffing need and was not motivated by an intent to disrupt the administration of the Union. In fact, Petillo remained in FID and in the Police Laboratory building. Also, McCarthy never made any comments to Quartucci and Spampinato that could have been construed as an attempt by NYPD to dominate or interfere with the Union. Furthermore, violations of NYCCBL § 12-306(a)(1) and (3) do not necessarily equate to violations of NYCCBL § 12-306(a)(2).

DISCUSSION

A. Motion to Amend

We grant Petitioners' Motion to Amend. OCB Rules §§ 1-07(c)(7) and 1-10(i) specifically authorize the amendment of pleadings when a variance between the pleadings and the proof exists, provided that the variance does not render the pleading misleading. When the party opposing the amendment is on notice of the amended claims, such as in instances when the amended claim arises out of the facts that are basis for the original claim, this Board has held that the variance does not render the pleading misleading. *Cerra*, Decision No. B-27-81 at 14. Also, the Board will allow a party to amend its petition to "further develop" what arguably is a new claim, when the original pleading gives notice of the occurrences that constitute the basis for the cause of action, provided that the opposing party was on notice of the asserted claims. *McAllan*, Decision No. B-2-83 at 10 (this Board will not preclude petitioners from amending their petitions in order to develop claims that were not expressly stated in their previous filing because

petitioners should not be penalized for technical inaccuracies or oversights); *see also Moore v. Richmond Hill Savings Bank*, 117 A.D.2d 27, 30 (2nd Dep't 1986).

We find that the circumstances here warrant that we grant the Motion to Amend and rule on Petitioners' retaliation claim. While the original petition failed to state specifically a violation of NYCCBL 12-306(a)(3), Petitioners' original petition made numerous references to the alleged retaliation to which Petillo was subjected. For example, the petition stated, "the command discipline structure in the Forensic Investigations Division engaged in a series of acts calculated to retaliate against Sergeant Petillo for his protected activity and to discourage members of the SBA from consulting with Sergeant Petillo." (Petition, ¶ 22.) And, "[t]he real reason Sergeant Petillo was transferred was to retaliate against him for his protected activity." (Petition, ¶ 29; *See also* Petition, ¶ 32.[5]) Petitioners' Brief in Support of Petition, dated November 10, 2003 ("Petitioners' Brief"), reads: "Sergeant Petillo was transferred from his regular assignment and work schedule in retaliation for his protected activity as an SBA delegate." (Petitioners' Brief at 1.) And the first sentence of the "Legal Argument" section reads: "The elements needed for a retaliation charge are neither novel nor new." (Petitioners' Brief at 7.)

Throughout the hearing, witnesses for both sides testified extensively regarding events of alleged retaliation, such as Petillo's training request denial and his transfer from FAS. The City is not prejudiced by the amended petition because it had ample opportunity to cross-examine the Union's witnesses concerning the allegations of retaliation and to offer testimony of its own witnesses to attempt to refute the retaliation claim. We find that the amended petition was

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[5] In the original petition, the Addendum clause states, in pertinent part: "the SBA and Sergeant Petillo seek an order: . . . d) directing that the NYPD cease and desist from retaliating against the SBA and its members for engaging in protected activity." (Petition, p. 8.)

merely an attempt by the Union to correct a technical oversight and to conform the pleadings to the evidence presented at the hearing. Since the City had notice and a full opportunity to defend the Union's retaliation claim, we grant the Motion to Amend and consider the substantive claims contained therein.

B. NYCCBL § 12-306(a)(1)

NYCCBL § 12-306(a)(1) states that it is unlawful for a public employer "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter." We find that NYPD discouraged and inhibited Union members from using Petillo as their Union representative because we have found that an "attempt by an employer to decide which union representative it chooses to deal with in connection with contractual grievances would be inimical to the rights of employees and to the entire collective bargaining process." *Lehman*, Decision No. B-23-82 at 11. Thus, the denial of access for the purpose of restraining or preventing employees from utilizing the representative's services in processing grievances constitutes a *prima facie* violation of NYCCBL § 12-306(a)(1). *Id.* In *Lehman*, the employer denied a grievance representative access to a work location to handle employees' grievances but did not deny access to other union representatives. The employer's permitting free access to other representatives was not sufficient to avoid a violation because "it is not within [the employer's] power to decree that it will allow other Union representatives to handle employees' grievances, but not the [Union's designated representative]." *Id.* at 11-12.

Here, McCarthy's actions amounted to a violation of NYCCBL § 12-306(a)(1). Petillo credibly testified that after his meeting with Chief Gianelli, McCarthy's demeanor toward him appeared hostile and that this change affected Petillo's ability to represent his constituency

effectively. Quartucci testified that she was encouraged by other union members to speak directly with McCarthy because "maybe things will turn out better for you." (Tr. at 121.) In fact, when Quartucci met with McCarthy outside of Petillo's presence, she was successful in renegotiating her penalty. Then, despite Quartucci's request for Petillo, McCarthy refused and selected another Union official to "sign off" on the CD. McCarthy's setting of Quartucci's penalty at a loss of two hours of annual leave and then raising it to a loss of one day of annual leave when Petillo became involved demonstrates the restriction placed upon the employees' ability to utilize Union representation. Further, McCarthy's refusal of Quartucci's request for Petillo's representation and McCarthy's comments to Spampinato and Quartucci indicating the tenuous nature of Petillo's delegate status further illustrates McCarthy's disapproval of a particular delegate, which may have affected Union members' decisions to utilize Petillo as a representative. In sum, we find that the total effect of McCarthy's actions was to discourage and inhibit the members of the Union from using Petillo as a Union representative, thereby violating NYCCBL §12-306(a)(1).

C. NYCCBL § 12-306(a)(1) and (2)

While McCarthy's conduct violated § 12-306(a)(1), it did not constitute a violation of NYCCBL § 12-306(a)(2), which states that it is unlawful for a public employer to "dominate or interfere with the formation or administration of any public employee organization." A violation of NYCCBL § 12-306(a)(2) occurs when the record shows preferential treatment of one union over another, interference with the formation or administration of the union, or assistance to the union to such an extent that the union must be deemed the employer's creation. *Local 237, IBT*, Decision No. B-12-2001 at 9-10. Moreover, we have held that offering preferential treatment to

a particular union official or electoral slate violates NYCCBL § 12-306(a)(2). *Gravius*, Decision No. B-13-2004 at 11; *Seabrook*, Decision No. B-7-95 at 10. However, the disfavoring of a union delegate by management, in the context of grievance procedures does not constitute a violation of NYCCBL § 12-306(a)(2) **provided** that it does not dominate or interfere with the union's actual administration of the union's internal structures. *Local 376, District Council 37*, Decision No. B-6-2004 at 12 (emphasis added).

Here, even though McCarthy made several comments to Spampinato and Quartucci regarding the uncertain status of Petillo as Union delegate for FID, we find that Petitioners failed to show that McCarthy initiated the petition to remove Petillo, campaigned for support of this petition, or somehow orchestrated the efforts to remove Petillo. McCarthy's actions did not dominate or interfere with the Union's internal organization and/or administration; therefore, we dismiss that portion of the petition pertaining to a violation of NYCCBL § 12-306(a)(2).

D. NYCCBL § 12-306(a)(1) and (3)

We find that NYPD violated NYCCBL § 12-306(a)(1) and (3) by retaliating against Petillo because of his advocacy of FID sergeants.

To determine if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, Decision No. B-51-87. 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.

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie*

case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See Rivers*, Decision No. B-32-2000.

For the purposes of this standard, the purported union activity must be the type protected by the NYCCBL and the employer must have knowledge of such protected activity. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 12. Representing an employee in a disciplinary proceeding in one's capacity as a union delegate constitutes protected activity, and thereby satisfies the first prong of this standard. *Local 1182, Communications Workers of America*, Decision No. B-26-96 at 20.

Here, we find that Petillo was engaged in protected activity when he represented several FID sergeants during the adjudicatory process of their CDs and spoke with Chief Gianelli regarding the problems with these CDs. We find that NYPD knew of Petillo's protected activity because McCarthy adjudicated many of these CDs and Petillo also spoke directly to Chief Gianelli on behalf of the bargaining unit members. Therefore, we find that Petitioners have satisfied the first prong of the *Salamanca* test.

Proof of the second element must necessarily be circumstantial absent an outright admission. *City Employees Union, Local 237,* Decision No. B-13-2001 at 9; *Communications Workers of America, Local 1180*, Decision No. B-17-89 at 13. At the same time, petitioner must offer more than speculative or conclusory allegations. Alleging an improper motive without showing a causal link between the management act at issue and the union activity does not state a violation of the NYCCBL. *Ottey*, Decision No. B-19-2001 at 8; *Correction Officers' Benevolent Ass'n,* B-19-2000 at 8.

We find a causal connection between Petillo's protected activities and his denial of training, and transfer to ECU. We conclude that McCarthy acted with anti-union animus, and this animus was the motivating factor for his decision to engage in these acts.

At first, McCarthy selected Petillo for FAS because, among others things, Petillo had served under him previously and he viewed him as a competent sergeant. When Petillo first became a Union delegate, McCarthy and Petillo had a functional, working relationship. However, once Petillo, as a delegate, had disagreements with McCarthy regarding the CDs in FID and met with Chief Gianelli concerning alleged irregularities with these proceedings, McCarthy became abrupt with Petillo, he inquired about Petillo's removal as the Union delegate in FID, and he discussed that possibility with other bargaining unit members. McCarthy also increased Quartucci's penalty from a loss of two hours of annual leave to a loss of one day of annual leave only after Petillo represented her. Once Quartucci met with McCarthy outside of Petillo's presence, McCarthy lowered the penalty back to a loss of two hours of annual leave. In fact, McCarthy did not even want Petillo to approve Quartucci's acceptance of her penalty, despite Quartucci's request for Petillo. McCarthy further informed her that Petillo would not be the FID delegate for much longer. In addition, McCarthy inquired about Spampinato's confidence in Petillo as a delegate and about a petition being circulated in FID to remove him as the FID delegate.

In addition, Petillo's vacation slot, which he had been awarded through the customary bidding procedure based on his seniority, was altered. Prior to his vacation, NYPD informed Petillo that, due to manpower concerns, he could not take this week for vacation. However, the City did not dispute the testimony that two other sergeants, with less seniority than Petillo, were

awarded that particular vacation slot. The alteration of Petillo's vacation bid violated the common practice used to assign vacation, and it demonstrates NYPD's anti-union animus toward Petillo.

Accordingly, Petitioners have made a *prima facie* case by satisfying its burden under the *Salamanca* test, and the burden of persuasion shifts the City to establish that NYPD was motivated by legitimate business reasons. When examining whether the reasons proffered by the public employer are legitimate, this Board will look to whether the record supports their contentions. *Local 1182, Communications Workers of America*, Decision No. B-26-96 at 23. When the reasons provided are unsupported and/or inconsistent with the record, this Board will find that the public employer committed an improper practice. *Patrolemn's Benevolent Ass'n*, Decision No. B-25-2003 at 13. Here, we find that the business reasons proffered by the City are not legitimate because they are unsupported by the record.

In furtherance of his duties as a FAS sergeant, Petillo applied for and was accepted into the NFEA; however, his request for leave to attend this program was immediately rejected by McCarthy less than two months after Petillo's meeting with Chief Gianelli, even though Petillo's attendance was approved by Lab Director Mark Dale. Also, this program would have helped the entire Police Laboratory in its pending re-accreditation, satisfied the deficiencies noted in consultant Ed Hueske's evaluation, and "fill the void of technical supervision" in FAS. McCarthy claims that Petillo's request was denied because Petillo already had a high level of proficiency in this area, an existing backlog of caseload that required Petillo's attention, and the program required attendees to spend 17 weeks in Washington D.C.

However, these business reasons are inconsistent with the evidence. First, as to Petillo's

high level of proficiency in ballistics as a reason to deny his training request, the NFEA accepts only highly qualified applicants. Second, as to backlog of cases as a reason for denying Petillo's request, it seems incongruous that McCarthy actively solicited other FAS officers, detectives, and civilians, who, according to McCarthy, actually perform substantive ballistic work, while denying the request of Petillo, who, McCarthy asserts, only "cross[es] Ts and dot[s] Is." Third, as to the excessive time away from FAS as a reason for denying the request to attend the NFEA, it is also incongruous that McCarthy, who told Petillo that 17 weeks in Washington D.C. was excessive, would then actively solicit other FAS employees to attend the NFEA.

Shortly after Petillo's vacation bid was altered, he was transferred from FAS to ECU, even though Petillo was an expert in the specialized field of ballistic evidence analysis and had more training than any other FAS sergeant, while the sergeant replacing Petillo was untrained in this field. The City stated that ECU needed another sergeant, FAS was the one unit in FID that could afford to lose a sergeant, Petillo was the least senior of the sergeants in FAS, and he was familiar with the duties of an ECU sergeant. Despite the vacancy created in FAS by Petillo's transfer, the City argues that NYPD chose to bring in a new sergeant from a different division into FAS rather than ECU because the new sergeant had more seniority than Petillo; Petillo was more qualified to handle the intricacies of ECU; and no special skills are required of FAS sergeants because they do not perform substantive ballistic analysis.

We find these business reasons are not supported by the facts and are logically inconsistent. McCarthy testified that FAS sergeants do not engage in substantive ballistic analysis, and thus no specialized ballistic knowledge is necessary to supervise in FAS. However, based upon Petillo's credible testimony and the fact that every other sergeant in the other FID

units engage in substantive analysis and need to be well trained in their respective field, we find that FAS sergeants do need to possess a level of proficiency in ballistics and engage in substantive analysis. Moreover, McCarthy testified that Petillo was selected for transfer, in part, because he was familiar with the duties of an ECU sergeant. However, Petillo credibly testified that he never acted as an ECU sergeant and was thus no more prepared to act as sergeant in ECU than any other sergeant in NYPD.

Accordingly, Petitioners have established that NYPD violated NYCCBL § 12-306(a)(1) and (3), and the City has failed to prove any legitimate business reasons to justify its unlawful actions toward Petillo.

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 Motion for Leave to Amend Petition, dated January 28, 2005, filed by the Sergeants' Benevolent Association, be, and the same hereby is, granted; and it is

ORDERED, that the improper practice petition, BCB-2367-03, filed by the Sergeants' Benevolent Association, be, and the same hereby is, granted to the extent that the Police Department has violated New York City Collective Bargaining Law § 12-306(a)(1); and it is further

ORDERED, that the improper practice petition, BCB-2367-03, filed by the Sergeants' Benevolent Association, be, and the same hereby is, granted to the extent that the Police Department has violated New York City Collective Bargaining Law § 12-306(a)(1) and (3); and it is further

ORDERED, that the improper practice petition, BCB-2367-03, filed by the Sergeants' Benevolent Association, be, and the same hereby is, dismissed to the extent that the Police Department did not violate New York City Collective Bargaining Law § 12-306(a)(2); and it is further

ORDERED, that, should Petitioner Sergeant Gerard Petillo remain in the employ of the Police Department, then the Police Department return Petitioner Sergeant Gerard Petillo to the Firearms Analysis Section and to the shifts that he worked prior to his unlawful transfer; and it is further

ORDERED, that the Police Department cease and desist from retaliating against the

Union, and from discouraging Union members from consulting their Union delegates; and it is further

ORDERED, that the Police Department post the attached Notice to Employees for no less that thirty days at all locations used by the Police Department for written communications with the bargaining unit employees.

Dated: New York, New York
June 20, 2005

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

GAY SEMEL
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER