City Employees Union, Local 237, I.B.T., 77 OCB 24 (BCB 2006)

[Decision No. B-24-2006] (IP) (Docket No. BCB-2427-04).

Summary of Decision**:* Petitioner claimed that NYPD violated the NYCCBL § 12-306(a)(1), (2), (3), (4), and (5), when it unilaterally changed summer hours, ordered out-of-title work, and made threats to School Safety Agents in retaliation for the Union's challenging their assignment to work at the Republican National Convention. The Board deferred those portions of the petition which allege violations of NYCCBL § 12-306(a)(4) and (5) to the grievance and arbitration process, and dismissed the remaining claims. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CITY EMPLOYEES UNION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

CITY OF NEW YORK and
NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

On August 24, 2004, City Employees Union, Local 237, I.B.T. ("Local 237" or "Union") filed an improper practice petition alleging that the City of New York ("City") and the New York City Police Department ("NYPD") violated § 12-306(a)(1), (2), (3), (4), and (5), of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), when it unilaterally changed summer hours, ordered out-of-title work, and made

threats to School Safety Agents ("SSAs") in retaliation for the Union's challenging their assignment to work at the Republican National Convention ("RNC"). The City argues that the claims should be deferred to arbitration, that it is not required to bargain over the topics the Union raises, and that its actions were properly motivated. The Board defers those portions of the petition which allege violations of NYCCBL § 12-306(a)(4) and (5) to the grievance and arbitration process, and dismisses the remaining claims.

BACKGROUND

The Hearing Examiner found that the totality of the record established the relevant background facts to be as follows. Hearings were held on March 13 and 14, 2006.[1] During two days of hearing, the Union offered testimony from three SSAs, all members of the Mobile Task Force ("MTF"), Brooklyn South Division: Sean Hampton, Denise Credle, and Darlene Mills. Mal Patterson, a Deputy Director of Local 237, also testified for the Union. The City offered testimony from the Commanding Officer of the School Safety Division, Assistant Chief Gerald Nelson, and School Security Supervisors Douglas Cahill and Sean Cloud.

Local 237 is the sole and exclusive representative for the approximately 4,000 employees who work for the NYPD in the civil service title of SSA. Some terms and conditions of employment for SSAs are set forth in a collective bargaining agreement entitled the Special Officers Agreement, which covers the period between January 1, 2000, through March 31, 2002, and is currently in *status*

[1] Both parties made requests for adjournments of hearing dates, some of which were due to change in counsel.

quo pursuant to NYCCBL § 12-311(d). Other terms and conditions of employment for SSAs are set forth in the Citywide Agreement ("Citywide"), which covers the period between January 1, 1995, through June 30, 2001, and is currently in *status quo* pursuant to NYCCBL § 12-311(d).

SSAs are responsible for ensuring the safety of students, faculty, and visitors in the New York City Public School Buildings and surrounding streets, premises, and school areas. Their duties include: patrolling and operating scanning equipment; verifying, identifying, and escorting visitors; and removing unauthorized personnel from the premises. There are three different assignment differentials in the SSA title: Group Leader, MTF, and member of the school detector screening program.

There are approximately 250 MTF members, and each city borough has an MTF unit. MTF units are responsible for vehicular patrol outside assigned public schools at the beginning and at the end of the school day, and at special events at particular schools. In addition, MTF members testified that they assist with scanning in the morning at various schools and conduct vertical patrols of school buildings. A vertical patrol of a school building requires SSAs to patrol every floor of the building for unsafe conditions, starting at the top floor and working down, as well as checking the immediate vicinity for open doors and trespassers.

Summer Hours

Article V, § 18, of the Citywide provides for shortened workdays or heat days to eligible employees from July 1 through Labor Day every year. Article V, § 18, provides in pertinent part:

> a. Shortened workday schedules or heat days in lieu thereof for employees who have traditionally enjoyed shortened workday schedules or heat days in lieu thereof shall begin on July 1 and terminate on Labor Day. Employees who are entitled to receive heat days in lieu of shortened workdays shall receive three (3) such days.

> b. Shortened workday schedules and heat days in lieu thereof shall be abolished for employees who work in air-conditioned facilities and for outdoor and field employees. However, outdoor and field employees who traditionally enjoyed such benefits and who are required to return to an office location before the end of the workday shall be entitled to the same summer schedules enjoyed by office employees at such location on such day.
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> c. Outdoor and field employees include, but are not limited to, law enforcement personnel . . . .
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> d. No shortened workday schedules or heat days in lieu thereof, shall be granted to any employee until the employee has completed one year of service.

On July 12, 2004, Chief Nelson sent a memorandum to NYPD's Office of Labor Relations ("OLR") requesting clarification on shortened workdays for SSAs assigned to the MTF. The letter stated in pertinent part:

> The undersigned requests that clarification and direction be given regarding the provision of a shortened workday or summer hours for School Safety Agents designated as Mobile Task Force members and/or members who are primarily assigned to Radio Motorized Patrol (RMP) within the School Safety Division. Each year the undersigned receives questions regarding these particular members contractual right to receive shortened workday privileges. The union (International Brotherhood of Teamsters Local 237) is of the opinion that their membership is entitled to summer hours as a matter of past practice irregardless of intervening issues which mitigate the no air conditioning requirement of the contract language.

Chief Nelson testified that the majority of the MTF members' days are spent in air-conditioned facilities, while the members of the MTF contend that they do not spend the majority of the day in air-conditioned facilities because the air conditioners in their cars are usually broken or work extremely poorly. They also testified that the schools in which they work are not air-conditioned. Chief Nelson testified that he had not inquired whether the air conditioners in the SSAs' vehicles were in working order, but if he was aware that the air-conditioning was broken in a particular vehicle, then that vehicle would be taken out of service.

John Beirne, Deputy Commissioner of NYPD's OLR, responded to Chief Nelson's letter by memorandum dated July 22, 2004. The memorandum stated, in pertinent part:

> Those School Safety Agents assigned to an air conditioned facility would not be eligible for summer hours or heat days. Also, agents assigned to mobile patrol units, such as the Mobile Task Force, would not be eligible as the majority of their tour would be performed in an air conditioned vehicle. Finally, agents assigned outdoors are similarly excluded from receiving summer hours.

Chief Nelson testified that he completed a routing sheet on August 11, 2004, and forwarded Deputy Commissioner Beirne's memorandum to his executive staff and ancillary units for adoption. Chief Nelson testified that he is not sure when he received the memorandum, and that it could have been forwarded to him as late as August 11, but testified that once he received it and read it, he prepared the routing sheet.

Director of the School Safety Division, Patrol Operations, Ramon F. Garcia, also forwarded Deputy Commissioner Beirne's memorandum to the same staff members on August 19, 2004, for "appropriate action." (Union Exhibit 8).

On August 17, 2004, Local 237 filed an amended Step III grievance regarding the change in summer hours for members of the MTF. The grievance claimed that the failure to grant summer hours to SSAs on the MTF, effectuated in the July 22, 2004 memorandum, violated Article V, § 18, of the Citywide.

On August 23, 2004, Carl Haynes, President of Local 237, wrote a letter to Raymond Kelly, Commissioner of NYPD, demanding that Respondents negotiate with Local 237 regarding the decision to discontinue the past practice of granting summer hours or heat days to SSAs assigned to the MTF at non air-conditioned schools, as well as the impact of that decision. Since Local 237 made its demand, the parties have not negotiated over the subject.

Republican National Convention

On August 2, 2004, NYPD's Counter Terrorism Unit, School Safety Division, issued a memorandum, titled "Arrest Teams, Republican National Convention," and provides in pertinent part:

> 1. Request for Supervisors, School Safety Agent LIs, LIIs and LIII to work RNC, August 30, thru September 2, 2004 as it relates to arrest processing.
> 2. Borough managers are requested to submit names of those MOS who are familiar with the arrest processing procedures, by close of business August 4, 2004 to the X.O. Counter Terrorism Unit, SSD.

The memorandum lists a breakdown of how many employees were requested from each borough command and requests four Supervisors by name.

Local 237 took the position that the contractual rights of its members would be violated by the planned out-of-title assignment of SSAs to perform security functions at the RNC. On August 6, 2004, Local 237 filed a Step III grievance on behalf of SSAs who would perform security duties at the RNC.

Additionally, on August 11, 2004, Local 237 filed an Order to Show Cause in the Supreme Court of the State of New York, New York County, requesting that the Court enjoin the City and NYPD from ordering SSAs to perform security during the RNC and order that the City and NYPD participate in an expedited arbitration process to resolve the underlying dispute. The Union simultaneously served The City of New York Law Department, The Office of the Corporation Counsel, with a copy of the Order to Show Cause. On that same date, the Chief of Labor and Employment Law at the City of New York Law Department informed the attorneys for Local 237 by letter that NYPD rescinded the plans to deploy SSAs at the RNC.

Floyd Bennett Field

Floyd Bennett Field is under the jurisdiction of NYPD's Special Operations Division ("SOD"). NYPD utilizes Floyd Bennett Field for training exercises, and officers attached to several commands park vehicles at that location, including SSAs assigned to Brooklyn South's MTF. A mobilization drill was scheduled in advance of the RNC, which was held between August 30, 2004, and September 2, 2004. The purpose of the drill was to demonstrate the coordination of police forces who would be deployed to provide security at the RNC. The Police Commissioner and several other NYPD Chiefs were scheduled to attend this drill.

Chief Nelson testified that on August 18, 2004, Chief Kammerdener, Commanding Officer of SOD, contacted him regarding conditions at Floyd Bennett Field. Chief Nelson testified that Chief Kammerdener told him that members of Brooklyn South's MTF left garbage in the parking area at the field and requested that the SSAs clean the parking area. Chief Nelson testified that he agreed to have the SSAs clean the field because Chief Kammerdener allowed them to use the parking facilities as a courtesy, and if Chief Kammerdener said there was a mess in the parking lot because of the SSAs, he wanted it cleaned.

Chief Nelson testified that to relay the request to the SSAs, he spoke to the commanding officer in charge of that particular unit, and also to Director Garcia. Director Garcia submitted an affidavit in support of the City's answer which stated that a member of SOD contacted him regarding the mobilization drill, and, as a result, he ordered that SSAs clean the area. Director Garcia did not testify at the hearing.

On August 18, 2004, Supervisors of School Security Cahill and Cloud were instructed to have the MTF clean the parking area at Floyd Bennett Field. Cahill testified that an Associate

Gadson directed him to have the SSAs clean the parking lot at the field on that date, and Cloud testified that Chief Kammerdener asked him personally to have the SSAs clean the area. Supervisors Cahill and Cloud directed several members of the MTF to clean the area. Both Cahill and Cloud contend that other members of the NYPD were present to assist in cleaning the field and in cutting the grass: sergeants, police officers, and police academy cadets from other commands. The members of the Brooklyn South MTF who testified asserted that they were the only ones present for cleaning detail.

Several SSAs refused to participate, contending that the assignment constituted out-of-title work. At that point, Supervisor Cahill informed the agents that he would issue command disciplines if they did not follow his directive. The members of Brooklyn South MTF testified that Supervisor Cahill also threatened to take away their summer hours. Supervisor Cahill denies that he made any such statement.

Supervisor Cloud testified that he did himself not make any such statements and that he did not hear Supervisor Cahill make any statements regarding summer hours. The Union alleges, in its petition, that Director Garcia threatened SSAs with the loss of their parking privileges if they did not clean the area. Supervisors Cahill and Cloud testified that at the time they assigned the cleaning detail they were unaware of the August 6, 2004, grievance filed by the Union regarding the RNC assignment. Chief Nelson testified that although he heard the SSAs were unhappy with the order to patrol the RNC, he did not learn of the grievance and Order to Show Cause until he was on patrol at the RNC, because people asked him why he was on patrol, and then informed him why they were surprised to find him on patrol. Chief Nelson testified that he "imagine[s]" Deputy Commissioner Beirne would be aware of the Union's activities. (Transcript 140). Director Garcia averred in his

affidavit that at the time he ordered the cleaning, he was unaware of either the Union's August 6, 2004, grievance or the Union's August 11, 2004, Order to Show Cause.

Remedy

As a remedy, the Union requests that the Board order Respondent to: cease and desist from unilaterally changing the past practice of awarding summer hours or heat days to SSAs assigned to the MTF at non-air-conditioned schools; cease and desist from retaliating against SSAs for exercising their rights guaranteed under NYCCBL § 12-305; negotiate in good faith with Local 237 regarding any decision to change the practice of granting summer hours or heat days to SSAs assigned to the MTF at a non-air-conditioned school, as well as the impact of that decision; cease and desist from unilaterally changing working conditions of SSAs assigned to the MTF by ordering them to clean up refuse at Floyd Bennett Field; negotiate in good faith with Local 237 in regard to any change in the working conditions of SSAs as well as the impact of any such decision; and take any action as is necessary to effectuate the purpose of the NYCCBL.

POSITIONS OF THE PARTIES

Union's Position

The Union claims that Respondents violated NYCCBL § 12-306(a)(1), (2), (3), (4), and (5).[2]

[2] NYCCBL § 12-306(a) states 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;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective

Although Respondents argue that the Union's claim should be deferred to arbitration because the Board lacks jurisdiction to decide issues of contract interpretation, the Union does not claim that the collective bargaining agreement was violated. Instead, the Union claims that Respondents unilaterally altered a well-established past practice as to the manner in which summer hours were granted and that the change was in retaliation for the fact that Local 237 engaged in protected union activity on behalf of the affected employees. The issues of anti-union animus cannot be raised during arbitration and Respondents have not cited a clause in the contract which would allow such a claim to proceed to arbitration.

The Union contends that Respondent's decision to unilaterally discontinue the practice of granting summer hours or heat days to SSAs assigned to the MTF was in retaliation for the Union's August 6, 2004, grievance and the Union's August 11, 2004, Order to Show Cause challenging SSAs' assignment to duties at the RNC, in violation of NYCCBL § 12-306(a)(1) and (3).

The Union asserts that NYPD cannot claim that its high-ranking officers were unaware of the Union's protected activity because NYPD was a party to the grievances filed as well as the Order to Show Cause. The Union states that Chief Nelson acknowledged that he was aware of the Union's grievance and that Deputy Commissioner Beirne also knew of the Union's lawsuit. Furthermore,

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> bargaining with certified or designated representatives of its public employees;
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization. . . .
>
> § 12-305 provides in part:
> Rights of public employees and certified employee organizations.
> 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.

the Union argues that based upon the timing of events, knowledge should be imputed to Respondents.

The City offered no plausible explanation for its inaction regarding Deputy Commissioner Beirne's July 22, 2004, memorandum until August 11, 2004, the very day the Order to Show Cause was served upon Respondents. Additionally, on the day after members of the Brooklyn South MTF were threatened with adverse employment action if they did not clean Floyd Bennett Field, Director Garcia issued an endorsement of Deputy Commissioner Beirne's memorandum. The close proximity of the improper conduct to the protected activity is sufficient for the Board to find that Respondents acted with improper motive.

Moreover, NYPD's position that the change in summer hours for members of the MTF was made because they work mainly in air-conditioned facilities is not supported by the record, as MTF members testified that the air conditioners are broken or work extremely poorly, and that the schools they patrol are not air-conditioned. Thus, the City's explanation that the change in summer hours was not retaliatory is unpersuasive.

The Union also contends that Supervisor Cahill's threats that SSAs would lose their parking privileges, be subject to command discipline, and lose their summer hours if they did not perform out-of-title work by cleaning the parking lot at the field were in retaliation for the grievance filed on their behalf by Local 237 on August 6, 2004, the Order to Show Cause served on Corporation Counsel on August 11, 2004, and the August 17, 2004, grievance challenging the change in summer hours. In the midst of the Union's protected activity, and only one day after the Union filed its summer hours grievance, NYPD retaliated by issuing an order to perform out-of-title work, an unpopular assignment never given to SSAs before. It is hard to accept that Director Garcia had no

knowledge of the grievances and lawsuit, and the Board should draw an adverse inference from the City's failure to produce Director Garcia as a witness at the hearing.

Petitioner's witnesses credibly testified that Supervisor Cahill threatened SSAs with the loss of summer hours and command discipline if they did not perform the work. The remarks by Supervisor Cahill are clear evidence of anti-union animus. Thus, Petitioner has established a causal connection between the protected activity and the anti-union animus underlying the management action, as proof of such animus may be circumstantial absent an outright admission.

The Union asserts that the July 22, 2004, memorandum constitutes a unilateral change in the terms and conditions of employment for SSAs assigned to the MTF at a non-air-conditioned school because they would no longer be eligible to receive summer hours or heat days as they have in the past. The Union also argues that the assignment to clean Floyd Bennett Field on August 18, 2004, was out-of-title work which constitutes a unilateral change in terms and conditions of employment for SSAs. Thus, Respondent's failure and refusal to negotiate in good faith with Local 237 over the unilateral changes and the practical impact which results therefrom constitutes a violation of NYCCBL § 12-306(a)(4) and (5).

Finally, the Union argues that Respondent's actions were inherently destructive of important employee rights and had a chilling effect on union activity, in violation of NYCCBL § 12-306(a)(1). Through its actions, NYPD created visible and continuing obstacles to the future exercise of employee rights, possibly diminishing the Union's capacity to effectively represent employees in the bargaining unit and directly and unambiguously penalizing and deterring protected activity.

City's Position

The City argues that the present case should be deferred to arbitration. The instant matter

concerns whether NYPD's Office of Labor Relations can interpret Article V, § 18, of the 1995-2000 Citywide to find MTF SSAs ineligible for shortened workdays and whether NYPD can assign cleaning tasks to Brooklyn South MTF SSAs. Article XV, § 1, of the Citywide provides for arbitration for claims of misinterpretation or misapplication of the provisions of that agreement. Article VI, § 1(c), of the Special Officers Agreement provides arbitration of a "claimed assignment of duties substantially different from those stated in their job description." Therefore, the issues the Union raise involve the application and interpretation of existing provisions of the collective bargaining agreement, over which the Board lacks jurisdiction. Further, even if the Board determines that the dispute also involves the application of the NYCCBL, it should permit the dispute to proceed first to arbitration.

In the event the Board declines to defer, the City argues that Petitioner's allegations that NYPD violated NYCCBL § 12-306(a)(1) and (3) are without merit. First, the Union's August 6, 2004, grievance and August 11, 2004, Order to Show Cause were not motivating factors in NYPD's decision to adopt a uniform policy regarding summer hours for SSAs assigned to the MTF. The record establishes that the decision to adopt a uniform summer hours policy originated weeks before the Union filed the grievance or Order to Show Cause, and the clarification on summer hours would have been issued irrespective and independent of the Union's grievance and Order to Show Cause.

The City contends that Petitioner's attempt to bootstrap its argument by demonstrating that Chief Nelson forwarded his routing sheet regarding summer hours the same day the Union filed its Order to Show Cause is unpersuasive. Petitioner asks the Board to believe that on the very day Corporation Counsel received the Order to Show Cause, it contacted NYPD at One Police Plaza, who then instructed Chief Nelson in Long Island City to adopt a uniform summer hours policy for

approximately 500 of 4200 SSAs.

The City further argues that it did not have any incentive to retaliate against the Union, as the grievance and the Order to Show Cause were rendered moot on August 11, 2004, when Corporation Counsel informed the Union's attorney that NYPD rescinded its plans to use SSAs at the RNC. Indeed, Respondents conceded to Petitioner's grievance the very day that Petitioner filed the Order to Show Cause and within mere days of the submission of the grievance to the City.

Additionally, the Union's grievance and Order to Show Cause were not motivating factors in NYPD's decision to have SSAs assigned to Brooklyn South's MTF clean their parking area at Floyd Bennett Field. The record establishes that Chief Kammerdener of the SOD complained to Chief Nelson about litter surrounding the MTF parking lot in advance of a mock mobilization drill, and that Chief Kammerdener asked Chief Nelson to clean the mess.

The City asserts that although the petition alleges that Director Garcia threatened that the SSAs would lose their summer hours if they did not agree to clean the refuse, Petitioner did not provide testimony regarding any such statements by Director Garcia. Several witness did allege that Supervisor Cahill stated that they would lose their summer hours if they failed to comply with his directives, but Supervisors Cloud and Cahill provided credible testimony to the contrary.

The City argues that there it has no duty to bargain over the subject of a shortened workday at the unit level when no special or unique circumstances exist, and Petitioner's bare and conclusory allegations fail to give rise to a practical impact claim. Thus, Petitioner has failed to show that Respondents violated NYCCCBL § 12-306(a)(4).

Finally, the City argues that Petitioner has failed to allege facts sufficient to support a claim that the City dominated or interfered with the formation or administration of the Union. Thus, the

Union's improper practice claim should be dismissed in its entirety.

DISCUSSION

Initially, we shall address the City's request that the Board defer the Union's entire petition. This Board, like the Public Employment Relations Board ("PERB"), must comply with § 205.5(d) of the Taylor Law (Civil Service Law, Article 14), applicable to this Board as well as to PERB, which states in pertinent part:

> . . . the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

Thus, while this Board has exclusive jurisdiction under NYCCBL § 12-309(a)(4) to prevent and remedy improper public employer practices, we have declined to exercise jurisdiction over improper practices "when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement" or mutually agreed-upon policies. *Civil Service Bar Ass'n, Local 237, International Brotherhood of Teamsters*, Decision No. B-24-2003 at 10-11; *see District Council 37, Local 3621*, Decision No. B-6-2006; *District Council 37*, Decision No. B-36-2001. For example, it is an improper practice under § 12-306(a)(4) for a public employer to refuse to bargain in good faith on matters within the scope of collective bargaining, *see District Council 37, AFSCME*, Decision No. B-8-2006. It is also an improper practice under § 12-306(a)(5) for a public employer to unilaterally make any change to a mandatory subject of bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization. *Uniformed Sanitation Chief Ass'n*, Decision No. B-32-2001. However,

when, as here, the Union's claims under these provisions involve a matter that is arguably covered by a negotiated agreement, and the claim under the NYCCBL may be resolved in the arbitral process, this Board will consider deferring the claim. *See Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 11; *District Council 37, Local 3621*, Decision No. B-6-2006 at 13.

In *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003, the union filed an improper practice petition alleging that the City and the Department of Homeless Services ("DHS") retaliated against an employee for filing a grievance and unilaterally made a change in due process rights during a period of *status quo* when DHS failed to adhere to the procedure for disciplining employees in terminating the employee's employment. The Union's claims hinged, in part, on an interpretation of a provision of the collective bargaining agreement. The Board did not defer the union's claims of retaliation because the outcome of the employee's subsequent grievance alleging that Petitioner's employment was terminated without due process would not resolve the question of whether DHS retaliated against the employee. However, the Board deferred the portion of the union's claim that asserted that DHS made a unilateral change in due process rights during a period of negotiations, because the basis of the claimed statutory violation was derived from a provision of the collective bargaining agreement.

Here, the Union claims that the City violated NYCCBL § 12-306(a)(4) and (5) by unilaterally changing summer hours for SSAs assigned to the MTF and by assigning SSAs to out-of-title work when they were told to clean the parking lot at Floyd Bennett Field. The pivotal issue in determining whether the City, in issuing its uniform policy on summer hours, unilaterally changed those hours for MTF SSAs is whether under Article V, § 18, of the Citywide MTF SSAs are ineligible for summer hours. The answer may depend upon the interpretation of that provision. Thus, the basis

of the Union's unilateral change claim is derived from Article XV, § 1, of the Citywide, which defines a grievance as, among other things, a misinterpretation or misapplication of the provisions of that agreement. As in *Local 3, International Brotherhood of Electrical Workers*, Decision No. B-45-86, it is for an arbitrator to determine whether NYPD misinterpreted or misapplied the summer hours provision of the Citywide.

Furthermore, the pivotal issue in determining whether the assignment of SSAs to clean the parking area at Floyd Bennett Field was out-of-title work, constituting a unilateral change in duties, is whether SSAs were assigned to duties substantially different from those stated in their job description. Article VI, § 1(c), of the Special Officers Agreement provides for arbitration of such claims. As with the alleged change in summer hours, it is for an arbitrator to determine whether SSAs performed out-of-title work at Floyd Bennett Field. Although the Union has not yet filed a grievance regarding the alleged out-of-title duties, the City has agreed to waive any procedural or jurisdictional challenges to such a grievance. Accordingly, we will defer to the grievance process those parts of the § 12-306(a)(4) and (5) unilateral change claims that rely on the interpretation of the parties' agreements. This Board will therefore not determine if the City made a unilateral change in terms and conditions of employment by changing MTF SSAs summer hours and by assigning employees out-of-title work. This deferral is without prejudice to reopen the charge should the City raise during the grievance process any argument which forecloses a determination on the merits of the grievance or should any award be repugnant to rights under the NYCCBL. See *Committee of Interns and Residents, SEIU*, Decision No. B-40-2001.

However, we will not defer the portions of the petition which allege that the City retaliated against the Union for engaging in protected union activity. The parties have pointed to no provisions

in the contract that addresses this claim. See *District Council 37, Locals 2507 and 3621*, Decision No. B-35-1999 at 12, *aff'd sub nom. City of New York, Fire Dep't of the City of New York v. DeCosta*, No. 404122/99 (Sup. Ct. N.Y. Co. Nov. 1, 2005), *appeal filed*, Dec. 2, 2005. Here, although the grievance process may resolve the Union's claims that the City made unilateral changes in terms and conditions of employment, the outcome of the grievance process would not resolve the issue of whether NYPD retaliated against the Union and its members for their alleged union activity. Because the Union's allegations constitute an independent statutory claim under NYCCBL § 12-306(a)(1) and (3), no basis for deferral exists. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 11; *Local 1180, Communication Workers of America*, Decision No. B-28-2002 at 8.

The Union alleges that the City issued the uniform policy on summer hours, assigned SSAs to an undesirable task at Floyd Bennett Field, and then threatened them for refusing to perform that task in retaliation for protected union activity. Regardless of whether the City's actions constitute unilateral changes, the Union alleges that these actions were improperly motivated and deleterious to its and its members' rights.

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.

Here, the Union has shown that it was engaged in protected activity when it filed its grievance on August 6, 2004, regarding the alleged out-of-title assignment for SSAs to perform security functions at the RNC, and when it filed its August 17, 2004, grievance regarding the alleged change in summer hours for SSAs assigned to the MTF. *District Council 37*, Decision No. B-12-97.

The City asserts that those involved with the incidents in question had no knowledge of the Union's challenges until after those incidents occurred, while the Union contends that knowledge should be imputed to the actors. However, even if we were to impute knowledge of the Union's activities to those involved with the routing of the memorandums regarding summer hours or to those responsible for assigning SSAs an undesirable task, and then threatening them for not performing the task, the Union has not satisfied the second prong of the test.

The Union has not shown that retaliation for its protected activity was the motivating factor behind NYPD's actions. Typically, the second element of this test is proven through the use of circumstantial evidence, absent an outright admission. *Burton*, Decision No. B-15-2006. However, the mere assertion of retaliation is not sufficient to prove that management committed an improper practice, *Local 983, District Council 37*, Decision No. B-15-2001 at 6, and allegations of improper motivation must be based on specific, probative facts, rather than on conclusions based upon surmise, conjecture, or suspicion. *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6. Furthermore, that a Union has challenged an employer's action, by itself, is not a sufficient basis for a finding that an employer has acted with improper motive. *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 13; *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 7.

Here, the Union's allegations largely rest on the timing of events leading up to the actions in question. However, proximity in time, alone, is not sufficient to establish anti-union animus, *Social Service Employees Union, Local 371*, Decision No. B-26-2003 at 7, and no persuasive testimony or evidence was adduced during the hearing that would show otherwise. In contrast to the Union's assertions, the documentary evidence shows that the City sought to promulgate a uniform summer hours policy nearly a month before the Union engaged in the activity that it claims was the impetus for the City's subsequent actions. Chief Nelson asked NYPD's OLR to clarify the applicability of summer hours on July 12, 2004, and Deputy Commissioner Beirne responded to that inquiry in a memorandum dated July 22, 2004, several weeks in advance of the Union's first grievance on August 6, 2004. That the policy was routed and put into effect on the same date as the Union's Order to Show Cause was filed is not sufficient to show improper motivation, especially in light of the documentary evidence which shows that the City initiated the process which lead to the issuance of a uniform summer hours policy prior to the Union's activity. Thus, it appears that the clarification on summer hours would have been made irrespective of the Union's challenges, and the evidence produced by the Union does not show otherwise.

Furthermore, we find that the Union has not shown that retaliation for protected activity was the impetus for the NYPD's assignment to have SSAs clean the parking area at Floyd Bennett Field. The testimony adduced at the hearing and the evidence show that in advance of the RNC, a mobilization drill was scheduled to occur at the field, and a Chief from the SOD personally asked members of the School Safety Division to clean the garbage allegedly left behind by SSAs. The testimony indicates that the decision to assign SSAs to clean the parking lot at the field was motivated by that request, rather than any anti-union animus.

While Supervisor Cahill admits that he threatened SSAs with command discipline, the Union has not produced any testimony or evidence which shows that those statements were motivated by any of its challenges to NYPD's actions. The assertions that Supervisor Cahill threatened SSAs with the loss of their summer hours are specious, in part, because on August 18, 2004, summer hours had already been revoked, as acknowledged in the Union's summer hours grievance of August 17.

Although the Union asserts in its pleadings that Director Garcia threatened SSAs on that date, no testimony was adduced at the hearing that Director Garcia made such threats. The record simply does not demonstrate that NYPD was hostile to the Union and its members because it challenged the City's actions regarding the RNC assignment or regarding the alleged change in summer hours. Accordingly, we dismiss the Union's claim that the City violated NYCCBL § 12-306(a)(3). Since the union has not shown that the City violated § 12-306(a)(3), there can be no derivative violation of § 12-306(a)(1).

Further, the Union has not shown that the City's actions were inherently destructive of employee rights, in violation of NYCCBL § 12-306(a)(1). Our Board has found that two categories of conduct have been held to be inherently destructive of important employee rights - one creates "visible and continuing obstacles to the future exercise of employee rights" and jeopardizes the position of the union as bargaining agent, and the other " directly and unambiguously penalizes or deters protected activity." *Committee of Interns and Residents, Decision No. B-26-93* at 41-42, *enforced sub nom. Committee of Interns and Residents v. Dinkins*, No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993) (citations omitted). These inherently destructive actions relieve a union from having to prove an employer's improper motivation. Local 237 in this case has presented no facts to demonstrate that NYPD's conduct was inherently destructive because it has failed to show that

NYPD either created visible and continuing obstacles to the exercise of future employee rights or directly and unambiguously penalized protected activity.

Finally, the Union's claimed violation of NYCCBL § 12-306(a)(2) is misplaced. This Board has stated:

> A labor organization may be considered "dominated" within the meaning of this section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges, or recognizing a favored union when another union has raised a real representation claim concerning the employees involved.

District Council 37, Decision No. B-36-93 at 18. However, the Union did not claim that NYPD's conduct was intended to or resulted in any preferential treatment of one union over another, interfered with the formation or administration of DC 37, or provided assistance of the nature that has been found to violate the NYCCBL §12-306(a)(2). Therefore, the claimed violation of NYCCBL §12-306(a)(2) is dismissed.

Accordingly, the portions of the petition which allege an independent violation of NYCCBL § 12-306(a)(1), and violations of § 12-306(a)(2) and (3) are dismissed. The Union's claims under § 12-306(a)(4) and (5) are deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the due process contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL.

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 portion of the improper practice petition which alleges violations of NYCCBL § 12-306(a)(4) and (5), filed by the City Employees Union, Local 237, I.B.T., docketed as BCB-2427-04 be, and the same hereby is, deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the due process contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL, and it is hereby

ORDERED, that the remainder of the improper practice petition be, and the same hereby is, denied.

Dated: July 6, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

ERNEST F. HART
MEMBER