

Colella, 79 OCB 27 (BCB 2007)

[Decision No B-27-2007] (IP) (Docket Nos. BCB-2354-03 and BCB-2363-03)[consolidated].

Summary of Decision: An employee filed improper practice petitions alleging that the City violated NYCCBL § 12-306(a)(1), (2) (3), (4), and (5) by *inter alia* denying him overtime and terminating his employment. The Board dismissed claims that were untimely, beyond its jurisdiction, and for which Petitioner lacked standing. The Board found that the City violated NYCCBL § 12-306(a)(1) and (3) by denying Petitioner overtime between April 29 and June 24, 2003, and by terminating his employment because the City did not establish a legitimate business reason to rebut Petitioner’s *prima facie* case. (***Official decision follows.***)

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

In the Matter of the Improper Practice Proceedings

-between-

BRIAN COLELLA,

Petitioner,

-and-

**NEW YORK CITY FIRE DEPARTMENT and
OFFICE OF LABOR RELATIONS,**

Respondents.

DECISION AND ORDER

On August 28, 2003, Brian Colella filed a *pro se* verified improper practice petition, docketed as BCB-2354-03, against the New York City Fire Department (“FDNY” or “Department”) and the Office of Labor Relations (“OLR”) (collectively “City”). Petitioner alleges that the City violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(a)(1), (2), (3), (4) and (5) when it altered a transportation policy,

interfered with union instructions not to sign the transportation agreement, coerced electricians to sign the transportation agreement, and denied him overtime. In addition, Petitioner alleges corrupt use of funds, abuse of authority, mismanagement, and violations of FDNY directives, grievance determinations, and the Freedom of Information Law. On October 27, 2003, Petitioner filed a second *pro se* verified improper practice petition, docketed as BCB-2363-03, against the City. In the second improper practice petition, Petitioner alleges that the City violated NYCCBL § 12-306(a)(1), (2), (3), and (4) when OLR obstructed the grievance process and FDNY subjected his unit to a hostile work environment, treated him in a disparate manner, decimated the bargaining unit, failed to promote him, falsified documents, fabricated charges, and terminated his employment. Petitioner also alleges violations of FDNY policies, retaliation for Equal Employment Opportunity (“EEO”) complaints and whistle blowing, denial of due process, illegal hiring of his supervisor, obstruction of justice, and misdemeanors. Petitioner subsequently retained counsel.

The City argues that several claims are untimely, that Petitioner lacks standing to allege violations of NYCCBL §12-306(a)(4) and (5), and that Petitioner failed to establish that the transportation policy violated NYCCBL § 12-306(a)(2) since the City can regulate the use of Department vehicles. Further, the City argues that it did not violate NYCCBL § 12-306(a)(1) and (3) when it assigned overtime or disciplined Petitioner because it had legitimate business reasons for its actions: Petitioner was not entitled to overtime, and Petitioner’s misconduct warranted discipline.

The Board finds that the City violated NYCCBL § 12-306(a)(1) and (3) by denying Petitioner overtime from April 29 to June 24, 2003, and by terminating his employment on June 24, 2003, because the City did not establish a legitimate business reason to rebut Petitioner’s *prima facie* case that his supervisors’ actions were motivated by his union activity. This Board dismisses the

remaining claims as either untimely, beyond our jurisdiction, or for lack of standing.

BACKGROUND

A hearing was held over eight days regarding whether the City committed an improper practice by denying Colella overtime after April 29, 2003, and by terminating him on June 24, 2003.¹ The Trial Examiner found that the totality of the record established the relevant facts as follows.

In July 1989, Colella was hired as an Electrician in FDNY's Building Maintenance Division ("BMD"). BMD employs electricians, carpenters, plumbers and motor vehicle operators who have designated reporting locations, where they receive assignments to FDNY facilities throughout the City. Colella, along with all other eligible electricians in BMD, was a member of Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO ("Union").

Historical Background

The bulk of the testimony concerned events that occurred prior to April 27, 2003, the date on which the statute of limitations period began for the first of Colella's improper practice petitions. This evidence was presented in order to establish anti-union animus. Facts relating to prior events are offered solely as background information and are not themselves the basis of claims properly before this Board.²

¹ Testimony was heard from Colella, Electrician John Fabbriante, Supervisor of Electricians Dominick Moretti, Supervisor of Mechanics Jeong Yung, Assistant Commissioner of Facilities Joseph Mastropietro, and Assistant Commissioner of the Bureau of Investigations and Trials James Drury. To the extent the Trial Examiner has made credibility findings, as set forth herein, this Board, upon review of the record, hereby adopts them.

² Colella's termination on June 24, 2003, is based on three sets of charges relating to conduct dating back to February 24, 2000. Suspensions resulting from the first two sets of charges were the subject of a prior Board decision, *Colella*, Decision No. B-49-2001, in which the Board dismissed

Colella filed his first grievance on November 5, 1993, regarding the distribution of new Department vehicles.³ According to Colella, then Supervisor of Electricians Anthony Bianchino told him that “Your little letter that’s going around is not going to do anything but just piss off a lot of people” and that “If you go through with this grievance, we’re going to take away your Department vehicle, make you report to the shop. Do you really want to do this?”⁴ (Tr. 64.)⁵ According to Colella, disciplinary charges were filed against him on November 15, 1993, for not being present at his scheduled work location although he was present, a disciplinary conference was held, and he no longer received as much overtime as other electricians.

Colella asserts that, in 1997, the Assistant Commissioner of Support Services told Mastropietro, then Director of Building Maintenance, that Colella, Fabbriante, and four other employees were “characters.”⁶ (Tr. 25.) Mastropietro did not recall if the Assistant Commissioner of Support Services referred to Colella as a “character.” (*Id.*)

the improper practice petition in its entirety.

³ In addition to filing grievances and improper practice petitions, Colella has filed complaints with the Department of Investigation, the Mayor’s Office, the Public Advocate, City Council members, a Congressman, the Queens District Attorney’s Office, OLR, and FDNY “top brass.” (Second Pet. ¶ 16.)

⁴ According to Colella, the only outcome of the grievance was Shop Steward Al Somma’s notifying the electricians that the Union said there was no basis to the grievance.

⁵ References to the transcript are abbreviated as “Tr.” Exhibits are indicated by “Ex.” Similarly, citations to the improper practice petition docketed as BCB-2354-03 is abbreviated as “First Pet.” The improper practice petition docketed as BCB-2363-03 is “Second Pet.” Answers are abbreviated as “Ans.” and Replies as “Rep.”

⁶ Fabbriante’s testimony regarding alleged discrimination against him is not summarized in the background as the treatment of Fabbriante is not the subject of these improper practice petitions.

On June 11, 1998, Colella filed a grievance against Shop Steward Somma.⁷ According to Colella, he had written a letter to Mastropietro regarding Somma's statements to Colella's co-workers, and Somma came to Colella's job site on June 8, 1998, to tell him he "hate[d] fucking letter writers" and that Colella's days on Staten Island were "finished." (Tr. 137.) On June 26, 1998, Mastropietro and then Supervisor of Mechanics John Scupelliti were at Colella's work location on Staten Island when he arrived. According to Colella, Mastropietro insinuated that Colella was late, told him he was now reporting to Long Island City, and said, "You want to write letters and grievances? Fine." (Tr. 95.) Mastropietro did not specifically testify about this conversation. According to Colella, the other BMD employees who, like Colella, lived in Staten Island were allowed to report to Staten Island. Colella filed a grievance regarding the change in his reporting location the same day.

On July 6, 1998, Colella filed a "portal to portal" grievance saying he was denied one hour of overtime on June 29, 1998. (Tr. 443.) Colella sought payment for picking up his Department vehicle in Staten Island at 6:30 a.m. and driving to his reporting location in Long Island City for the start of his shift at 7:30 a.m.⁸

⁷ The grievance was denied at Step I on June 14, 1998, since it was not signed by the Shop Steward. Colella filed at Step II on July 2, 1998, and at Step III on August 11, 1998. OLR denied the grievance on September 30, 1998, for failure to allege a contract violation. The Union declined to seek arbitration on October 13, 1998.

⁸ Colella filed at Step II on July 7, 1998, and at Step III on August 11, 1998. OLR scheduled a conference and, on July 7, 1999, denied the grievance on the grounds that Colella had been told to report directly to his new reporting location at 7:30 a.m. and had not been told to pick up a Department vehicle prior to his regular start time. OLR stated that he was not entitled to additional compensation because he was not on Department time when he chose to pick up a Department vehicle to complete his commute. The Union declined Colella's request for arbitration on August 24, 1999. However, on December 10, 1999, Colella was paid one hour of overtime for the June 29, 1998, commute.

On September 10, 1999, Colella, Fabbicante, and Electricians Michael Kazmierczak and Kenneth Dowling filed a Step III grievance with OLR alleging out of title work.⁹

Colella testified that on February 17, 2000, Dowling told him of a meeting that occurred the previous day at Seaview, a FDNY facility on Staten Island, during which provisional Supervisor of Carpenters Danny Wallen and provisional Supervisor of Electricians Jimmy Campbell stated “we’re out to get Brian [Colella]. We’re going to get him. He’s not going to be able to work overtime anymore. When he works overtime we’re going to be watching him. We’re coming out to get him.” (Tr. 67.) Colella also heard of Wallen and Campbell’s statements from plumbers Joe Berardi and Frankie Crecco and carpenter Tony Giordano, who further said, “watch your ass.” (Tr. 222.)

On February 24, 2000, Colella did not show up to his assigned work location at Meserole Avenue. According to Colella, Frank DelGuadio, his acting supervisor on that date, and Mastropietro sent him to work at a facility at Meserole Street, “an unfamiliar location that doesn’t exist,” and that DelGuadio later signed a statement that he provided Colella with directions to Meserole Avenue, when he did not.¹⁰ (Tr. 471.) Colella eventually arrived at the 58th Street location and spoke to Mastropietro, who informed him via telephone that he should bring his vehicle to BMD headquarters at the end of the day and would be reporting there until further orders. According to the City, Mastropietro told Colella that he wanted to “monitor you and watch you more closely,” and Colella made two disrespectful and threatening remarks to Mastropietro in response:

⁹ On January 24, 2000, OLR denied the group grievance because several of the claims should have been submitted individually at Step I and other claims were vague.

¹⁰ On July 26, 2001, Colella and DelGuadio argued about the February 24, 2000, incident. According to Colella’s journal entry on that date, “Frank [DelGuadio] said ‘I never lied. Danny [Wallen] and Joe [Mastropietro] changed it around to fit the situation.’” (Colella Ex. 3 at 247-248.)

“Why don’t you come here and pick up my van yourself?” and “Why don’t you be a man about it and come here and tell me face to face.” (City Ex. 9A.) According to the City, Colella then called in sick, left 58th Street at approximately 11:30 a.m., and went to the Seaview location in Staten Island instead of bringing his vehicle to BMD headquarters as requested.

On February 28, 2000, according to Colella, his Department vehicle was missing when he arrived at work. He later learned that it was at BMD headquarters. According to Colella, he recorded this in the logbook, which Joe Berardi then altered by crossing out Colella’s signature next to the sign-in time of 7:30 a.m. and replacing it with his own signature. According to Colella, Berardi was not disciplined for this. During a meeting that Colella initiated with Mastropietro that day, Colella asked, “Do you realize how many thousand of dollars and how much time the Department put into [Seaview]?” (First Pet. Rep. ¶ 23.) According to Colella, Mastropietro’s reply was, “Don’t you threaten me. If you ever threaten me, I will have you suspended.” (*Id.*)

On February 29, 2000, Mastropietro sent a memorandum to the Bureau of Investigative Trials and Hearings (“BITS”) alleging dereliction of duty, insubordination, and threats on the part of Colella, related to the incident on February 24, 2000.¹¹

¹¹ BITS employees promulgate disciplinary charges, conduct Step I disciplinary conferences, and present charges to the hearing officer at Step II disciplinary hearings. According to Mastropietro, BMD supervisors write up their observations of an incident that may be subject to discipline and submit it to Mastropietro, who reviews the observations and determines if the issue should be forwarded to BITS or should only be added to the employee’s file. According to Mastropietro, he forwards information to BITS on all employees under his supervision who are under investigation, unless it is a minor infraction or a new employee, in which case he would hold a supervisory conference. Mastropietro testified that he referred incidents involving Colella to BITS because Colella had already been given several supervisory conferences and because BITS directed him to no longer give Colella conferences and instead to send documentation of any misconduct to BITS to review. Mastropietro did not provide Colella a copy of his memoranda to BITS but did place copies in Colella’s file, which Colella could look at any time.

On March 1, 2000, Colella was suspended, effective immediately until March 30, 2000, as a result of the events of February 24, 2000. According to Colella, he asked Bianchino why he was suspended and Bianchino responded, "I don't know. Call Gary Lane [a Union official] and ask him." (Tr. 284-285.) Colella testified that Bianchino later said, "Joe is pissed off at you for writing grievances and filing letters" and that FDNY Fire Marshall Louis Garcia said, "boy, these guys [the Assistant Commissioner of Support Services and Mastropietro] have got it out for you." (Tr. 70.)

On March 2, 2000, Bianchino noticed that two "hockey puck" locks had been removed from Colella's Department vehicle. (City Ex. 9B.) Mastropietro had Colella's Department vehicle inspected, found unauthorized modifications, and submitted a memorandum to BITS recounting these issues. According to Colella, other employees regularly lacked locks on their vehicles, and no one else was brought up on disciplinary charges for missing locks.

On March 10, 2000, Colella submitted a Step I grievance to Mastropietro alleging wrongful disciplinary action, related to the March 1, 2000 suspension.¹²

On March 31, 2000, the day Colella was scheduled to return from his suspension, he called in sick. On April 10, 2000, Colella submitted an incomplete Civilian Medical Documentation Form for his absence on March 31, 2000, along with a doctor's note, written in Spanish, from a physician

¹² Colella submitted a Step II grievance to FDNY on April 5, 2000, and submitted a Step III grievance to OLR on May 1, 2000. On May 31, 2000, Colella submitted a letter to Union Representative Joseph Vicari requesting a Step IV hearing because OLR had not responded. On July 18, 2000, OLR requested additional information about the grievance. In a written response, on August 4, 2000, Colella alleged that FDNY violated the guidelines for civilian discipline, that it failed to provide him with a supervisory conference, that it failed to warn of conduct that might merit discipline, that it violated Title B, § 75 of the New York Civil Service Law by failing to provide formal charges, that it retaliated against Colella for whistle blowing and filing grievances, and that it committed wrongful disciplinary action. On April 14, 2003, Colella resubmitted the Step II grievance, along with another Step II grievance filed May 20, 2000, to FDNY pursuant to their request on February 11, 2003.

in the Dominican Republic. Mastropietro submitted a memorandum to BITS on April 21, 2000, requesting that BITS verify the authenticity of the doctor's note. Colella denies that the doctor's note was fraudulent and alleges that FDNY policy, which was enforced only for some individuals, did not require a doctor's note for a one day absence.

On April 10, 2000, Colella filed a Step I grievance with Mastropietro, requesting compensation for four hours of overtime and three hours of "straight time" worked on February 29 and March 1, 2000.¹³ (Colella Ex. 2 at 35.) According to Colella, immediately after he gave the grievance to Mastropietro, Bianchino told him that Mastropietro "is so fucking hot, you could light a cigar off his face." (Tr. 72.)

On April 11, 2000, Colella arrived at BMD headquarters at 8:30 a.m. According to the City, he was late, and Bianchino told him that he had previously been informed that he must now report to BMD headquarters in Long Island City, instead of Seaview, and that his time would be "docked" if he failed to report to headquarters at 7:30 a.m. (Second Pet. Ans. Ex. 2 at 6.) Colella testified that Bianchino had given him permission the previous day to arrive at headquarters at 8:30 a.m. According to Colella, he signed in at Seaview at 7:30 a.m., and was therefore on time, according to practice and the December 1999 determination of his "portal to portal" overtime grievance, which paid him for driving a Department vehicle. (Tr. 443.) According to Colella, Mastropietro sent a letter to the timekeeper to change Colella's records to make it appear as if he arrived late, though during that entire hour he was in the Department vehicle.

At 10:50 a.m. on April 11, 2000, Bianchino noticed that Colella was not in his assigned work

¹³ Mastropietro denied the grievance the following day, April 11, 2000, because no overtime was assigned on February 29, 2000, and Colella had been notified that he was suspended effective March 1, 2000.

location. When Bianchino paged Colella, Colella called and said that he was in his vehicle doing paperwork. Bianchino ordered Colella to return to his assigned location. Mastropietro discovered Colella still in his Department vehicle at 11:45 a.m. Subsequently, Mastropietro submitted a memorandum to BITS regarding this incident requesting Colella's immediate suspension.

On April 12, 2000, Mastropietro submitted a memorandum to BITS concerning Colella's disregard for direction regarding his new reporting time and location. In the memorandum, Mastropietro requests "accelerated efforts to penalize" Colella "to the fullest extent possible" and recommends Colella's immediate suspension. (City Ex. 9D.) According to Mastropietro, centralized reporting locations had been implemented for efficiency. Mastropietro also testified that Colella had problems with authority and supervision and that other electricians, who usually work in teams, did not want to work with Colella because he would not follow policy and procedure.

On April 26, 2000, Colella asked Bianchino, "how come you're not letting me work overtime? You know, where is mine?," after finding out that DelGuadio, the electrician with the most overtime in the unit, was working overtime that day. (Tr. 99.) According to Colella, Bianchino said "Frank DelGuadio doesn't write letters or grievances." (*Id.*)

From May 3, 2000, through June 1, 2000, Colella was suspended due to the events of April 11, 2000. On May 4, 2000, Colella filed a Step I grievance with Mastropietro alleging that his suspension was in violation of the collective bargaining agreement.¹⁴

¹⁴ Colella filed a Step II grievance with FDNY on May 20, 2000, filed a Step III grievance with OLR on June 6, 2000, and requested that the Union bring a Step IV grievance in a letter dated June 16, 2000, because he had not yet received a response. In a letter dated July 18, 2000, OLR requested more information from Colella regarding his grievance, and Colella provided this on August 4, 2000. On April 14, 2003, Colella resubmitted the Step II grievance, along with another Step II grievance filed April 5, 2000, to FDNY pursuant to their request on February 11, 2003.

On June 2, 2000, when Colella returned from his second suspension, he had a meeting with Mastropietro. According to Colella, Mastropietro said, “I felt you disrespected me. That’s why you were suspended.” (Tr. 99.) When Colella asked about reverting back to reporting at Staten Island, Mastropietro said “No, I want to keep an eye on you.” (*Id.*)

On June 1 and 19, 2000, BITS issued the following charges against Colella:¹⁵

1. Failure to Obey an Order, on February 24, 2000
2. Conduct Unbecoming, on February 24, 2000
3. Theft of Department Property, on March 1, 2000
4. Falsification of Medical Documentation, on April 10, 2000
5. Failure to Obey an Order, on April 11, 2000

On August 17, 2000, Colella filed an improper practice petition with the Office of Collective Bargaining (“OCB”) against the FDNY, docketed at BCB-2146-00. The petition alleged that the Department wrongfully suspended Colella in March 2000 and May 2000 and served him with formal charges on June 1, 2000, in retaliation for his filing grievances on March 10 and April 10, 2000. The Board issued a decision on December 18, 2001, dismissing the petition. The Board found that claims regarding the March 2000 suspension were untimely and that the allegations of fact were insufficient to suggest that the May 2000 suspension was motivated by Colella’s grievances in 1993, 1998, and April 2000. *Colella*, Decision No. B-49-2001 at 8.

On October 13, 2000, Colella testified at OCB on behalf of Fabbriante, who had filed several improper practice petitions against FDNY.

According to Colella, Supervisor Bernie Gellman came to talk to him about “things” on

¹⁵ While the documentary evidence indicates that Colella was not formally served with the June 2000 charges until the Step I Grievance Conference, on January 9, 2002, Colella was served prior to filing the improper practice petition in August 2000. *See Colella*, Decision No. B-49-2001 at 4.

October 26, 2000, and said, “Joe [Mastropietro] and Danny [Wallen] are so pissed off at you that you’re filing grievances that it is killing them.” (Tr. 90.) Supervisor of Painters Nick Perreca told Colella on November 2, 2000, “watch your ass, they’re coming after you.” (Tr. 380.) Scupelliti told him March 12, 2001, that Mastropietro and Wallen are “pissed off” because Colella is filing so many grievances. (Tr. 378.) According to Colella, that same day Bianchino told him that “as long as you guys are going to write stuff about me on the time sheets I want you out of here now. If you stop writing I don’t care what you do. You might even get some overtime.”¹⁶ (Colella Ex. 3 at 261.)

On March 22, 2001, Colella reported five hours of overtime. The following day, after Bianchino questioned him about the overtime claim, Colella told Bianchino that he had been in an accident. Bianchino directed Colella to the FDNY Accident Claims unit to complete an accident report. When Lieutenant Parra of the Accident Claims unit searched the New York State (“NYS”) Department of Motor Vehicles database she discovered that Colella did not have a NYS license and had surrendered it to the State of Pennsylvania. When she asked Colella to produce his Pennsylvania license, he informed her that he did not have it with him.

On March 23, 2001, Mastropietro submitted a memorandum to BITS recommending Colella’s immediate termination as a result of the events of March 22. Mastropietro testified that he recommended termination because of Colella’s history of problems completing work and following orders and because he had already tried progressive discipline, including supervisory conferences. According to Mastropietro, employees were not normally disciplined for their involvement in accidents, but Colella was brought up on charges because he did not follow

¹⁶ Colella would put remarks in the notes section of his time sheet, including the remark “not offered overtime,” and that this practice would “piss off” Bianchino. (Tr. 101.)

procedures by leaving the scene of the accident, failing to fill out an accident report, and only notifying supervisors of the accident when attempting to get overtime resulting from the accident.¹⁷ According to Mastropietro, a suspended license is not usually referred to BITS because the employee is unaware of the lapsed license, but Colella's transgression warranted discipline because he had surrendered his license and, therefore, was aware that he did not have a valid license. Mastropietro denied having forwarded memoranda to BITS because Colella filed grievances and an improper practice petition.

From March 26, 2001, through April 24, 2001, Colella was suspended due to the events of March 22, 2001.¹⁸

According to Colella, on May 1, 2001, he had a conversation with Bianchino regarding interviews and resumes during which Bianchino said, "Joe [Mastropietro] hates grievance writers. How could you possibly expect to get an interview for promotion of supervisor electrician." (Tr. 300.) Colella testified that he was never interviewed for a promotion with Mastropietro.

On May 9, 2001, Colella had a conversation with Perreca regarding his suspension. According to Colella, Perreca told him that he witnessed a conversation between Mastropietro and Bianchino, in which Mastropietro said, "Tony, what do you want me to do with this suspension? I can have it quashed," and Bianchino said, "Fuck Brian. He writes grievances. Have him

¹⁷ According to Fabbriante, Moretti has been in three car accidents, and no disciplinary action has been taken. According to Mastropietro, he was aware that Moretti was involved in two accidents involving company vehicles and believed that two accident reports were filed. According to Yung, there was only one accident report on file, for April 16, 2001.

¹⁸ According to Colella, he submitted a grievance regarding inequitable distribution of overtime "a matter of weeks" before this third suspension; however, there is no documentation of this grievance in the record. (Tr. 407.)

suspended.” (Tr. 113.)

Colella alleges that on May 14, 2001, Bianchino told him, “if you keep putting remarks on my time sheet, how can you ever expect to get overtime?” (Tr. 101.)

According to Colella, on May 16, 2001, Scupelliti stated, while looking directly at Colella, that “if anyone ever dropped a dime on me, I’d put two in the back of his head.” (Tr. 101-102.)

On or about June 5, 2001, Yung was promoted to Supervisor of Mechanics, to whom the Supervisor of Electricians reports. Yung testified that his supervisor, Mastropietro, instructed him that overtime that is not pre-approved or requested by a supervisor, such as “portal to portal” overtime for returning late to a sign-in location, should not be approved.

On June 5, 2001, Colella heard that Bianchino was complaining about grievances filed and then punched a wall so hard that he “broke his hand.” (Tr. 107.) The news “spread like wildfire via phone and pages.” (Tr. 288.)

According to Colella, June 25, 2001, was one of several occasions when Bianchino “got right in [his] face,” and threatened him. (Tr. 108.) Bianchino stood “nose to nose” with him, followed him, and eventually said “You better watch your back, pal” and “You don’t want to get hurt. Right? Do you pal? Do you want to get hurt?” (Tr. 108.)

On July 23, 2001, Moretti replaced Bianchino as Supervisor of Electricians.¹⁹ Moretti is also a member of the Union. According to Colella and Fabbicante, Yung told Colella and others that Moretti was hired to “clean up house and go after the grievance writers, the letter writers....” (Tr.

¹⁹ Colella and Fabbicante allege that Moretti had been fired from the New York City Health and Hospitals Corporation for misconduct similar to what Moretti did to them. Colella further alleges that notice of the position was not properly posted and should not have been placed in the New York Times. According to Colella, he applied for the position, but neither he nor any of the employees who passed the promotion test were interviewed.

110.) Yung testified that he did not recall saying that Moretti came to BMD to “clean house” or that Mastropietro was “out to get them.” (Tr. 951-952.) Mastropietro and Moretti also denied that Moretti was hired to get rid of the “characters.” Mastropietro denies directing any of his subordinates to take action against Colella, including preventing Colella from receiving overtime, because Colella filed grievances. According to Colella, around that time, Mastropietro told the electricians that they could “quit or transfer out.” (Second Pet. ¶ 20.)

According to Colella, on July 25, 2001, Nick DeMonte informed Colella that he saw Moretti throw away Colella’s overtime sheet without submitting it. Colella testified that he did not get paid for his overtime, while others who worked with him on the same project for the same hours, did. According to Colella, he submitted a grievance requesting overtime pay on the same day and received payment in September 2001, “a couple of days” before his fourth suspension. (Tr. 417.)

On August 13, 2001, BITS served Colella with the following charges, dated August 2, 2001:²⁰

1. Engaged in Conduct Tending to Bring the Department into Disrepute, on March 22, 2001.
2. Conduct Unbecoming, on March 22, 2001.
3. Failure to Report an Accident From Use of a Department Vehicle, on March 22, 2001.

According to Colella, on August 23, 2001, Perreca told him and six or seven other BMD employees that Mastropietro and Union Representative Vicari, while golfing, had discussed ways to have Colella fired.

²⁰ There was also a fourth charge, alleging conduct unbecoming on March 1 and 20 and September 6, 12, 13, and 17, 2001, which was subsequently withdrawn by FDNY. This charge is not in the record. According to Colella, the charge pertained to making notations on time sheets from March to September 2001, even though he was not directed to cease making notations on time sheets until November 15, 2001. According to Colella, other unit employees made notations on their time sheets regarding whether or not they were given overtime both before and after the November 2001 directive to Colella, and they were not disciplined.

According to Colella, on September 6, 2001, he had a conversation with Moretti regarding Dowling, whom Moretti had recently made to report to BMD headquarters, rather than Brooklyn, where he had previously been reporting.²¹ According to Colella, Moretti said he did this because he wanted to “hurt him [Dowling] in his wallet” and, told Colella, “if you want to get hit in the wallet, too, keep writing grievances, keep writing letters and I’ll punish you to the shop too.” (Tr. 419-420.) Moretti did not specifically testify regarding this conversation.

On September 12, 2001, Colella went to Brooklyn for a settlement conference and learned, upon arrival, that it was postponed as a result of the terrorist attacks. Colella was assigned to work in the Bronx that day and drove through Manhattan, passing near the World Trade Center site, in order to return home to Staten Island. According to Colella, on September 14, 2001, he received a phone call from DeMonte, who told Colella that he heard that Colella was being suspended again and also told Colella that “management” threatened DeMonte that if he continued “hanging around those characters,” he would also be subject to discipline. (Tr. 115-116.)

On September 18, 2001, Moretti delivered notice to Colella at his home, that he was suspended for 30 days and charged with misrepresentation of administrative leave to attend the settlement conference and for operating a department vehicle in an unauthorized location, the vicinity of the World Trade Center, on September 12, 2001.²² According to Colella, numerous

²¹ According to Colella, Moretti had informed the members of the unit that they could report at 8:00 a.m., instead of at 7:30 a.m., Dowling reported at 8:00 a.m. the following day and was told by Moretti that he now had to report to BMD headquarters.

²² The suspension and charges were withdrawn on July 30, 2002, and Colella was paid his salary for the days he was suspended. According to Colella, he submitted a grievance regarding non-payment of overtime prior to the suspension. While there is no evidence in the record that, prior to the September 2001 suspension, Colella had filed a grievance since June 2000, Mastropietro testified that there were many grievances around 2001 by senior electricians regarding overtime.

tradesmen went down to the World Trade Center site even though they had been directed not to by their supervisors, and no one else in the downtown area at that time was brought up on charges or suspended. Colella testified that he was the only one who was brought up on charges. According to Colella, on September 18, 2001, Berardi recounted to Colella a conversation that he had that week with Moretti, regarding Colella's suspension recommendation where Moretti yelled; "What does he think? I'm fucking stupid?" Who the fuck does this grievance writer think he is?" (Tr. 116-117.)

In October 2001, several new electricians were hired. According to Mastropietro, these new electricians were given more overtime than the senior members of the unit because there were many high priority projects to be completed, the senior electricians were refusing overtime, and the new electricians had "no problem working overtime."²³ (Tr. 1089-1090.)

On October 23, 2001, Yung held a supervisory conference with Colella directing that his overtime for October 19, 2001, was not authorized, that he was not using the proper weekly time report form, that he should only do paperwork a few minutes daily, and that he does not get paid for

Mastropietro further testified that these grievances were regarding "portal to portal" commuting overtime and not actual working overtime.

²³ According to Moretti, the senior electricians began refusing overtime because "they had issues with the new men, they had issues with the department, they had issues with me." (Tr. 1129-1130.) According to Moretti, the senior electricians did not like the idea that Moretti was hired and this was manifested in their refusal to take overtime, making it difficult to complete work, and in their harassment of him by "sending letters" and making fun of him because he had worked at Home Depot. (Tr. 1131-1132.) According to Moretti, because the employees refused to work overtime, he, Yung, George Georgievski, one of Moretti's supervisors, and Vito Lasorsa, a maintenance man, began to work in the place of the electricians, and Moretti had to hire three or four men from the New York City Health and Hospitals Corporation to fill in on overtime for three weekends. Moretti testified that he did not retaliate against the unit employees because of their refusal to work overtime. Colella acknowledged that he did not get along well with Moretti and that this may be a major reason for the discipline, lack of overtime, and termination.

traveling in the Department vehicle after 3:00 p.m.²⁴ Yung drafted a memorandum to Colella to memorialize the conference which indicated that “further similar conduct on your part may necessitate disciplinary action against you.” (Colella Ex. 2 at 54.) Colella wrote “signed under protest” and “not allowed representation when asked for” on the memorandum. (*Id.*)

On November 15, 2001, Moretti held a supervisory conference with Colella to direct that time sheets indicate the arrival and departure times at assigned work locations, not at his sign-in location; to reiterate that he is not entitled to representation at a Supervisor’s Conference as initially informed by Yung on October 23, 2001; and to direct him not to make comments on the weekly time sheets unrelated to the work described but to use “other appropriate means to relay messages.”²⁵ (Colella Ex. 20.) Colella understood “other appropriate means” to mean writing letters and memoranda to payroll and timekeeping. Moretti drafted a memorandum to Colella to memorialize the conference which indicated that “further similar conduct on your part may necessitate disciplinary action against you.” (*Id.*) Colella wrote “signed under protest,” “not offered representation,” and “asked for representation and was told no!” on the memorandum. (*Id.*)

On November 20, 2001, Colella, Fabbriante, Somma, Dowling, DeMonte, Berardi, Ray Manetta and Prentiss Leary submitted a Step III grievance alleging inequitable distribution of

²⁴ Moretti testified that employees are not entitled to overtime pay for completing paperwork or driving a Department vehicle outside of their regular shift, 7:30 a.m. to 3 p.m. Employees are allowed one hour, from 2 p.m. to 3 p.m., to return from their work location to their reporting location. If they get stuck in traffic and arrive after 3 p.m., they are not paid overtime unless they call for and receive authorization.

²⁵ Colella testified that he would frequently note on his time sheet that he was not offered overtime that week. According to Mastropietro, employees cannot directly contact timekeepers regarding their time sheets but can go through their supervisors. If there is a difference of opinion between the management and the employee, the employee can file a grievance.

overtime.

On November 28, 2001, Colella filed a Step I grievance with Moretti, alleging that he was denied Union representation at several supervisory conferences and that he did not receive overtime compensation for driving a Department vehicle back to Staten Island and doing paperwork.²⁶

According to Colella, on December 1, 2001, Yung told some of the tradesmen in BMD, who were threatening to transfer out of FDNY because of the poor working environment, to “hang in there. They’re only after the electricians, the grievance writers, the letter writers.” (Tr. 118.)

According to Colella, on December 10, 2001, Moretti told him to file a grievance regarding some paperwork Colella felt was incorrect and, when Colella said, “we’ve been filing grievances and nothing happens around this place, nobody answers them,” Moretti asked, “what does that tell you?” then laughed. (Tr. 120-121.)

On December 20, 2001, Colella, Fabbriante, Kazmierczak, Dowling, Leary, Berardi, Somma, DeMonte, Manetta, and Stephen Lalino filed a Step III grievance with OLR, alleging inequitable distribution of overtime.²⁷

According to Moretti’s overtime records, Colella was offered 158 ½ hours of overtime

²⁶ There was no decision at Step I. On December 11, 2001, the grievance was filed at Step II. On December 30, 2001, the grievance was filed at Step III with OLR. OLR denied the grievance on July 17, 2002, the Union sought arbitration on August 2, 2002, and OLR filed a petition on November 27, 2002, challenging the arbitrability of the portion of the grievance relating to denial of Union representation. *Local Union No. 3, Int’l Bhd. of Electrical Workers*, Decision No. B-17-2003 at 2. On April 23, 2003, one month before Colella was terminated, the Board denied the request for arbitration as to the denial of Union representation at supervisory conferences. *Id.* at 6. The grievance was subsequently resolved.

²⁷ OLR acknowledged receipt of the grievance on January 4, 2002. The grievance was dismissed in a letter, dated July 17, 2002, because assignment of overtime is a management right and Mayoral Executive Order No. 94-3 does not provide substantive rights for employees. The grievance proceeded to arbitration and was denied by an Arbitrator on January 18, 2006.

between July and December 2001, actually worked 63 hours, and refused 95 ½ hours of overtime.²⁸ Moretti calculated these totals based on data previously recorded on grid sheets.

On January 9, 2002, a Step I Grievance Conference was held regarding the June 2000 charges, the August 2001 charges, and the September 2001 charges, which were subsequently withdrawn. Following the conference, Colella signed out at BITS at 12:55 p.m. On his time sheet, Colella reported that his assignment, “hearing downtown,” ended at 3:15 p.m. (Tr. 912.) He applied for overtime for the 15 minutes from 3:00-3:15 p.m. From 12:55 p.m. to 3:15 p.m., Colella met with his attorney, ate lunch, and drove his Department vehicle to his sign out location. Moretti documented the incident, and Mastropietro submitted it to BITS.

On January 14, 2002, Colella submitted a Step I grievance to Moretti, alleging that Moretti changed the existing policy on overtime and failed to offer Colella the same overtime as other electricians in the unit.²⁹

According to Colella, on January 23, 2002, Phil Crisi recounted a conversation that he had with the Assistant Commissioner of Support Services regarding Crisi’s decision to go down to the World Trade Center site against his supervisor’s instruction. According to Colella, Crisi said that the Assistant Commissioner of Support Services said “Don’t worry Phil. We know who the good guys are and who the letter writers and the complainers are. You’re not going to get written up.”

²⁸ According to Moretti, after he was hired in 2001, he spoke to Colella about overtime, and Colella said that he didn’t like to work the weekends, which is when most overtime was offered.

²⁹ Colella filed a Step II grievance with FDNY on January 28, 2002. Colella filed a Step III grievance with OLR on February 10, 2002, and received a letter in response on July 17, 2002, dismissing the grievance because assigning overtime is a management right and because Mayoral Executive Order No. 94-3 does not provide substantive rights for employees. The grievance proceeded to arbitration along with the group grievance filed on December 20, 2001, and was dismissed by an Arbitrator on January 18, 2006.

(Tr. 121.) According to Colella, he “would have heard about it” if Crisi had ever been written up. (*Id.*)

On January 29, 2002, Colella’s driver’s license was suspended. FDNY informed Colella, who said that he would go to the Department of Motor Vehicles on the morning of January 31, 2002, to address the license issue. On January 31, 2002, at 9:50 a.m., Colella called from outside his assigned work location to say that the license issue had been resolved. According to the City, Colella had not signed in or reported to his supervisor and was not observed at his assigned work location until 11:20 a.m. In his time records, Colella reported that he had commenced his workday at 9:00 a.m. and requested leave from 7:30 a.m. to 9:00 a.m. His leave request was denied, and Mastropietro determined that three hours and forty-five minutes should be deducted from Colella’s annual leave balance. Moretti informed Mastropietro of the incident, and Mastropietro sent Moretti’s documentation of the incident to BITS.

According to Colella, on February 1, 2002, he asked Moretti, over the phone, “how come there’s some guys parking back in their firehouses? Why do I still have to be parking in Brooklyn?” (Tr. 124.) According to Colella, Moretti responded, “other guys aren’t writing letters and grievances.” (Tr. 124-125.) According to Colella, he asked, “how come you’re retaliated against me and discriminating against me?” and Moretti said, “other guys don’t write letters and grievances, so they’re allowed to go back to their firehouses.” (Tr. 125.) Moretti did not specifically testify about this conversation. Rather, Moretti testified that he did not retaliate against Colella for filing grievances.

According to Colella, on February 6, 2002, he was with Berardi, whom Moretti allowed to report to Seaview, when Moretti told Berardi, “I’ll take care of you, Joe. Don’t worry about it. You

don't file grievances.” (Tr. 125.)

According to Colella, on February 20, 2002, DeMonte told everyone in the Brooklyn reporting location, including Colella, that even though Harding was caught sleeping in his car, Yung said he was not going to write him up because he didn't want to “get involved . . . and besides, he is not a grievance writer or a letter writer.” (Tr. 126-127.)

On February 21, 2002, Colella sent a letter to FDNY's Commissioner listing his supervisors and requesting protection under the “whistleblower statute,” due to “the on going ‘illegal retaliation’ and other problems” in BMD. (Second Pet. Rep. Ex. 4.) On the same day, Colella filed a Step I grievance with Moretti, alleging that he was not compensated for overtime worked on January 30, January 31, and February 2, 2002.³⁰

On February 26, 2002, Colella filed an overtime compensation grievance with Moretti.³¹

On February 27, 2002, Colella sent another application regarding leave from 7:30 a.m. to 9:00 a.m. on January 31, 2002, to the FDNY timekeeper.

On February 28, 2002, Mastropietro submitted a memorandum to BITS alleging that Colella ignored the chain of command by directly contacting the timekeeper and recommended appropriate disciplinary measures.³² Mastropietro stated that Colella “has been warned several times to stop

³⁰ On February 28, 2002, Colella filed a Step II grievance with FDNY. On July 15, 2002, Colella received a response stating that the complaint fails to meet the definition of a grievance and suggested Colella contact payroll. On March 12, 2002, Colella filed a Step III grievance with OLR.

³¹ Moretti responded on March 5, 2002, indicating that the complaint did not meet the definition of a grievance. Colella alleges that the complaint was resolved in his favor and that he was paid.

³² According to Moretti, he received several requests from the FDNY timekeeper in February, March, April and May 2002, that Colella stop contacting her directly with timekeeping and leave inquiries, and instead follow the prescribed procedures of submitting time sheets to Moretti.

going to the timekeeper as well.” (City Ex. 10C.)

According to Colella, on March 1, 2002, Lasorsa told him that “Dominick [Moretti] doesn’t like you because you write grievances and it makes him look bad.” (Tr. 128.) Also in March 2002, according to Colella, plumber Vincent Fiore told him, “I got enough problems of my own. I don’t want my little world disturbed because of your fucking grievance.” (Tr. 1137-1138.) According to Colella, on June 1, 2002, Steve Lalino said that “Tony Bianchino always said you’re a great mechanic,” Colella asked, “well, why did he have me suspended,” and Lalino said, “consider that payback.” (Tr. 103.)

On June 6, 2002, Colella filed a Step I grievance with Moretti, alleging that he falsified documents, violated guidelines and codes of conduct and that he retaliated against Colella.³³

On June 20, 2002, Mastropietro sent a memorandum to BITS indicating that Colella continues to directly contact employees in payroll and timekeeping, bypassing his supervisors.³⁴

According to Colella, in July 2002, Moretti said to Somma, “this guy is filing so many fucking grievances, you know, and he wonders why he doesn’t get any overtime.” (Tr. 89.) According to Colella, on July 8, 2002, John Donahue, a stationary engineer, recounted to Colella a conversation that he had with Mastropietro regarding promotional opportunities in which

According to Moretti, Colella continued to submit directly to the timekeeper, at which point Moretti discussed the situation with Mastropietro.

³³ On June 20, 2002, Colella filed a Step II grievance with FDNY. On July 8, 2002, Colella filed at Step III with OLR. On July 9, 2002, Colella sent this grievance directly to OLR’s Commissioner, along with a letter stating that the grievance procedure has been “limited or suspended” for him and asking for assistance in the resolution of this and nine outstanding Step III grievances. (Colella Ex. 2 at 90.)

³⁴ As evidence, Mastropietro attached memoranda from Colella, dated February 27, March 17, March 29, April 19, and May 8, 2002.

Mastropietro told Donahue, “I won’t hire you because you’re a union activist.” (Tr. 129-130.)

On July 23, 2002, Colella sent Moretti a letter regarding overtime work he did on July 20, 2002, complaining about safety hazards on the job, Moretti’s lack of experience, and the difficulties resulting from having him work with the employees hired in or around October 2001.³⁵

On July 24, 2002, he filed a complaint with FDNY’s EEO office against Moretti and Mastropietro.³⁶ According to Colella, Moretti refused to accept Colella’s account for his time even though Colella told him it was personal and confidential, and Colella, to demonstrate that he was at the EEO office, eventually gave Moretti the EEO letter he received, addressed to Moretti, that contained FDNY’s anti-retaliation policy. According to Colella, after he filed the EEO complaint, he was harassed and retaliated against in that he was no longer given overtime, brought up on charges, and reassigned by Moretti to work in the uppermost part of the Bronx.³⁷ According to Colella, he had to drive from Staten Island to Brooklyn to sign in, then drive to the Bronx to complete his assignment. According to Colella, Moretti also reassigned Fabbriante, DeMonte,

³⁵ Colella faxed a copy of this letter to FDNY’s Commissioner on July 24, 2002.

³⁶ According to Colella, he filed a follow up EEO complaint on September 7, 2002, regarding “stepped up” harassment, retaliation and discrimination. (Second Pet. ¶ 15.) According to Colella, the EEO office responded that “being threatened, harassed and retaliated against is not our scope of work” and that it would pass along the complaint. (Tr. 437.) Colella alleges that the EEO office did not pass along the complaint. According to Colella, he filed a case with the New York City Commission on Human Rights.

³⁷ Specifically, Colella alleges that on July 26, 2002, Moretti called Colella to ask if he wanted overtime and when Colella said “yes,” Moretti laughed and then hung up. (Tr. 133.) According to Colella, later the same day Moretti had his secretary beep Colella to inform him that another employee got the overtime Colella wanted. Although Moretti did not refer to Colella’s EEO case in their phone conversation, Colella alleges that this was a result of his filing the EEO complaint. Similarly, he alleges that the notification he received from BITS on August 13, 2002, recommending his termination was in retaliation for filing the EEO complaint.

Dowling and Kazmierczak to other locations.

According to Colella, in July 2002, sway bar kits, which are added to a vehicle's suspension to stabilize it, were ordered to be installed on all of BMD employees' vans during their next scheduled preventative maintenance appointment. According to Colella, on July 25, 2002, he was getting preventative maintenance on his van, he asked Moretti if he could also have the sway bar kits installed, and Moretti refused on the grounds that he did not need it. According to Colella, Perreca told him that Wallen said, to everyone at BMD headquarters, "you tell that fucking grievance writer that I'll have him suspended if he complains about it."³⁸ (Tr. 132.) Colella submitted a handwritten letter to Moretti on July 25, 2002, recounting the events of that day. According to Colella, he never received a sway bar kit, and others did.

On August 13, 2002, FDNY served the Notice of Determination from the January 9, 2002, Step I Grievance Conference concerning the June 2000 and August 2001 charges on Colella. The Conference Leader determined that the June 2000 and the August 2001 charges would likely be upheld in a formal evidentiary hearing and recommended termination.

On September 13, 2002, Colella filed a Step I grievance with Moretti regarding overtime he alleges he was not compensated for on August 14, 2002.³⁹ Colella indicated on the grievance forms that he had sent an inquiry about the overtime to Moretti on August 30, 2002.

On September 17, 2002, Moretti assigned Colella and DeMonte, to do overtime work at an

³⁸ Colella's diary entry for that date includes "pissed off at me for wanting the additional suspension kit for my truck." (Colella Ex. 3 at 250.) There was no direct reference to grievances or letters in the diary for that date.

³⁹ Colella filed a Step II grievance with FDNY on September 21, 2002, and a Step III grievance with OLR on October 7, 2002. The grievance did not proceed to arbitration.

EMS facility on Staten Island. Moretti testified that he found DeMonte doing the assigned work and Colella installing a light, which he had not been requested to install, elsewhere on the premises. Moretti directed Colella to return to his assigned work. According to Colella, the job assignment had been completed, and the electricians were on a break. According to Moretti, the assigned job was not complete. On March 5, 2003, DeMonte signed a letter stating that he and Colella performed their required assignment on that date. Mastropietro testified that this incident was one of the many reasons he did not give Colella overtime.

On October 29, 2002, Colella submitted a letter to FDNY's Commissioner on behalf of the "tradesmen" of BMD, requesting a meeting with him to discuss ten issues related to "mismanagement, misconduct, collusion and retaliation by management." (Second Pet. Rep. Ex. 4.)

On November 8, 2002, Colella wrote Moretti a letter, copied to Mastropietro, Drury, and an EEO Commissioner, criticizing Moretti.

On November 22, 2002, the Board issued an interim decision, in which it dismissed in part the Union and City's motions to dismiss Fabbicante's five consolidated cases. *Fabbicante*, Decision No. B-39-2002 at 22. The evidence, including testimony from Colella, established a *prima facie* case that the Union breached its duty of fair representation and that FDNY discriminated and retaliated against Fabbicante from 1994 to 1998. *Id.* at 15.

On December 5, 2002, Moretti requested that Colella come to his office to fill out an Emergency Notification Information Form that FDNY had previously requested employees to complete. When Moretti handed Colella the form, Colella responded, "I want to see your form." (Second Pet. Ans. Ex. 2 at 14.) Colella also asked, "What are you hiding?" (*Id.*) Moretti repeatedly

requested that Colella leave, but he would not. Moretti testified that Wallen eventually got Colella to leave the office, though Colella did return and gave Moretti a sealed envelope with the form inside to submit directly to the department collecting this information.

On December 6, 2002, Colella filed a Step I grievance with Moretti, alleging that Moretti falsified paperwork, docked him pay for one day, November 12, 2002, and had committed many misdemeanors.⁴⁰

On December 9, 2002, Mastropietro submitted memoranda to BITS from other supervisors explaining Colella's "disruptive and insubordinate behavior" on December 5, 2002. (City Ex. 10E.)

On December 10, 2002, BITS issued and served the following charges against Colella:

1. Falsify Official Fire Department Documents, on January 9, 2002
2. Absence Without Leave, on January 9, 2002
3. Falsify Official Fire Department Documents, on January 31, 2002
4. Failure to Obey Orders, on February 27, 2002, March 17, 2002, March 29, 2002, April 11, 2002, and May 8, 2002

On December 11, 2002, Colella sent Moretti a letter reiterating for the fifth time his request for the electrician's work locations for several days in 2002, the November 2002 overtime totals, Moretti's overtime totals for 2001 and 2002, and a current list of BMD beeper numbers.

On December 13, 2002, Mastropietro submitted a memorandum to BITS, summarizing memoranda from Moretti received on December 11, 2002, regarding the events of September 17, 2002, of November 21, 2002 (insubordinate behavior) and of November 22, 2002 (last minute notification of appointment.) In his memorandum, Mastropietro recommended Colella's

⁴⁰ Colella filed a Step II grievance with FDNY on December 13, 2002 and received a letter in response on the same day, dismissing the complaint. Colella filed a Step III grievance form with OLR on December 24, 2002, accompanied by a letter addressed to OLR's Commissioner, appealing the Step II dismissal.

termination.

On December 19, 2002, BITS served Colella with three additional charges, dated December 17, 2002:

1. Insubordinate- Failure to Obey Orders, on December 5, 2002
2. Engage in Disorderly or Disruptive Behavior, on December 5, 2002
3. Neglect to Perform Assigned Duties, on September 17, 2002

On the same day, Moretti wrote a memorandum to Colella regarding appropriate departure times from the reporting and sign-out locations and instructing him not to contact the timekeeper directly.

On December 23, 2002, a Step I Grievance Conference was conducted regarding the December 2002 charges.

On December 27, 2002, Colella filed a Step I grievance with Moretti, alleging Moretti denied Colella's overtime for December 3, 2002, (twenty minutes in excess of Colella's regularly scheduled tour) and December 5, 2002 (one and a half hours in excess of Colella's regularly scheduled tour).⁴¹ The department policy at the time allowed employees from 2:00 p.m. to 3:00 p.m. to get from their assignment location to their reporting location, where they pick up their personal vehicle. According to Moretti and Yung, if an employee arrived after 3:00 p.m., he would not get "portal to portal" overtime for that period, unless there was prior authorization or an emergency.

According to Moretti's overtime records, Colella was offered 291 ½ hours of overtime in 2002, actually worked 159 ¾ hours, and refused 131 ¾ hours of overtime.

⁴¹ Colella filed a Step II grievance with FDNY on January 3, 2003 and a Step III grievance with OLR on January 14, 2003. On January 23, 2003, FDNY sent a letter indicating that a Step II grievance conference was scheduled for February 11, 2003. On March 24, 2003, FDNY sent a letter to Colella informing him that the FDNY payroll office had processed his overtime request and that the complaint was, therefore, closed. FDNY's letter was copied to Mastropietro and Moretti, among others.

On February 7, 2003, the Notice of Determination of the Step I Grievance Conference concerning the December 2002 charges was served on Colella. The Conference Leader determined that these charges would likely be sustained at a formal evidentiary hearing and recommended termination.

On February 26, 2003, Colella, Fabbriante, DeMonte, Kazmierczak, Lalino and Manetta submitted a Step III group grievance to OLR alleging denial of overtime pay, inequitable overtime distribution, retaliation, harassment and intimidation.

On March 6, 2003, Colella submitted a Step I grievance to Moretti, alleging that he was not compensated for overtime worked on February 10, 2003.⁴²

On March 10, 2003, Mastropietro issued a memorandum stating that Department vehicles were to be left at FDNY facilities overnight and that those locations where the vehicles are assigned are now also the employees' reporting location. According to Colella, he now had to keep his truck in Brooklyn, and this created a hardship because he had to pay bridge tolls. According to Colella, Somma could still pick up his Department vehicle in Staten Island, where he lived.

According to Colella, on March 11, 2003, he called Moretti and asked why he did not get overtime. Colella testified that Moretti said, "Brian, you're to blame," and Colella replied, "You're telling me you're not giving me overtime because I'm writing grievances and letters?"⁴³ (Tr. 93.)

According to Colella, Moretti then said "Brian, write it up however you want." (*Id.*)

⁴² On March 13, 2003, Colella submitted a Step II grievance to FDNY and received a letter dated March 27, 2003, informing Colella that the payroll office was processing the overtime and, therefore, the complaint was closed. The letter was copied to Mastropietro and Moretti, among others.

⁴³ In his diary, Colella indicated that his response was "So what you're telling me is, you don't like me so you're not giving me overtime."

On March 14, 2003, Colella submitted a Step I grievance to Moretti, alleging that he was not compensated for overtime worked on February 20, 21, 24, 25, 26 and 28, 2003.⁴⁴

On March 17, 2003, Colella submitted a Step I grievance to Moretti, alleging that the new vehicle policy, outlined in Mastropietro's memorandum dated March 10, 2003, violates FDNY policy, the applicable collective bargaining agreement, and the past practice of permitting Department vehicles to be parked a reasonable distance from the employee's residence.⁴⁵ According to Colella, after he filed the grievance Perreca said, "they [management] don't know what to do" and "Brian, watch your ass. They're coming after you." (Tr. 90-91.)

On March 18, 2003, Colella submitted a Step I grievance to Moretti, alleging that FDNY had taken wrongful disciplinary action in serving Colella with the December 2002 charges.⁴⁶

On March 19, 2003, Colella submitted a Step I grievance to Moretti, alleging inequitable distribution of overtime.⁴⁷ He also sent a copy of this grievance to the Commissioner for the

⁴⁴ On March 24, 2003, Colella submitted a Step II grievance at FDNY and received a letter, dated March 31, 2003, indicating that the payroll office was processing the overtime for the grieved for days and, therefore, that the complaint was closed. The letter was copied to Mastropietro and Moretti, among others.

⁴⁵ On March 20, 2003, Colella submitted a Step II grievance to FDNY and received a letter in response on March 31, 2003, dismissing the complaint because it does not meet the definition of a grievance. On April 18, 2003, Colella submitted a Step III grievance to OLR. According to Colella, he initially filed the grievance individually, but eventually, Fabbriante, Dowling, Somma and Berardi joined in the grievance. To Colella's knowledge, none of them were disciplined.

⁴⁶ On March 21, 2003, Colella submitted a Step II grievance to FDNY. He received a letter from FDNY on May 2, 2003, dismissing his complaint because the process "was handled in accordance with appropriate contractual provisions." (Colella Ex. 2 at 163.)

⁴⁷ On March 25, 2003, Colella submitted a Step II grievance to FDNY. He received a letter, dismissing the complaint, in response on March 31, 2003, because assigning overtime is a management right under the NYCCBL and that the Mayoral Order on overtime does not create any substantive rights for employees. On April 18, 2003, Colella submitted a Step III grievance to OLR.

Department of Investigation to add to his file and “for further protection under the City’s Whistleblower law.” (Colella Ex. 2 at 186.)

On April 3, 2003, Colella submitted a Step I grievance to Moretti, alleging that he was not compensated for overtime worked March 3 through March 7 and March 10 and 11, 2003.⁴⁸

On April 11, 2003, Colella submitted a Step II grievance to FDNY alleging wrongful discipline for the charges that precipitated his March 2000 suspension.⁴⁹

On April 12, 2003, Colella submitted a Step II grievance to FDNY alleging wrongful discipline for the charges that precipitated his May 2000 suspension.

On April 16, 2003, BITS issued a Notice scheduling Colella’s Step II Grievance Conference regarding the disciplinary charges for April 25, 2003.

On April 18, 2003, Colella submitted a Step III grievance to OLR, accompanied by a letter to OLR’s Commissioner, alerting him that he had submitted approximately fifteen Step III grievances that had not yet been responded to.

On April 23, 2003, employees were notified, via a memorandum from Mastropietro, that effective April 30, 2003, tradesmen were to be given the choice of two options to commute to their assignments throughout the City. The first option was for an employee to take a Department vehicle home and commute to their assigned work location on their own time. The second option was that the employee could commute to their assigned work location using their personal vehicle or mass

⁴⁸ On April 7, 2003, Colella submitted a Step II grievance to FDNY, and received a letter in response on April 22, 2003, informing Colella that payroll was processing his overtime for payment and that, therefore, the complaint was closed. The letter was copied to Mastropietro and Moretti, among others.

⁴⁹ On April 30, 2003, FDNY sent a letter to Colella indicating that his grievance was time barred and complaint dismissed.

transit. Both options required employees to arrive at their assignment at the beginning of their tours at 7:30 a.m. and sign out at 3 p.m. BMD employees would still drive Department vehicles during their regularly scheduled tour of duty. Employees that made no selection would be assigned the second option and required to return their Department vehicles. Colella did not make a selection.⁵⁰ According to Colella, Somma informed him that Vicari said this policy change affected the terms and conditions of his employment and that he should not sign the form.

According to Colella, other employees, including Somma, Berardi, Manetta, Giordano, Jerry Geisler, and Moretti, blamed Colella for this new policy. Colella alleges that this change in policy also meant that FDNY took away personal lockers and kicked BMD tradesmen out of buildings specifically constructed for them. According to the City, FDNY has never issued lockers to the trade personnel.

On April 24, 2003, Colella submitted a Step I grievance to Moretti, alleging that FDNY was in violation of several of its written policies, including those related to retaliation against Union members.⁵¹

On April 25, 2003, the Step II Grievance Conference was conducted by FDNY's Bureau of Legal Affairs on the June 2000, August 2001, and December 2002 charges against Colella.

According to Colella, Moretti told the new electricians that they would not be offered overtime unless they signed the transportation options agreement. According to Colella, Moretti

⁵⁰ According to Colella, before he had refused to sign the agreement, he had worked 32 hours of overtime in 2003.

⁵¹ On April 30, Colella submitted a Step II grievance to FDNY and received a letter in response on May 1, 2003, informing Colella that his complaint did not meet the definition of a grievance and, therefore, the complaint was dismissed. On May 12, 2003, Colella submitted a Step III grievance to OLR.

said, “You see guys like Brian [Colella], John [Fabbriante] and Nick [DeMonte], they will never get overtime again because they refused to sign that agreement.” (First Pet. ¶ 20.) According to Moretti, who did not testify regarding this specific alleged remark, he did not deny overtime to those who did not sign the agreement.

On April 26, 2003, Colella filed internal Union charges against Moretti and six electricians for signing a waiver regarding terms and conditions of employment against Union instructions.⁵²

Lastly, as background information in support of Petitioner’s allegations of disparate treatment, Colella and Fabbriante claim their colleagues – including four co-signers of their Step III grievances – and supervisors engaged in misconduct from the 1980s through 2004 for which charges were not brought:⁵³ arriving late regularly; not signing or falsifying the log book, known as “the book of lies”; parking on side walks and other unauthorized areas; leaving vehicle doors open; ripping white boards and phones from walls; removing BMD lettering from Department vans; removing an E-Z pass in order to drive a Department vehicle home to New Jersey; misusing gas cards; stealing tools, conduit, and air conditioners; sleeping on the job; and being absent without leave to take care of personal matters such as going to the mall, taking kids to school, securing permits for private jobs, working on home improvements or side jobs, getting a personal vehicle inspected, and getting a hair cut. According to Colella and Fabbriante, management was aware of

⁵² The Union gave notice to Moretti on May 5, 2003, that a hearing would be held on May 22, 2003. On July 2, 2003, the Union found Moretti and the other electricians not guilty.

⁵³ According to Fabbriante, three other Step III co-signers have been disciplined: Kazmierczak was brought up on charges; DeMonte was forced to leave the agency due to the work environment; and Dowling, was on leave and constructively discharged. According to Fabbriante, Giordano and Geisler also filed grievances, both were brought up on charges, and Giordano was terminated.

many of these instances. Mastropietro testified that he is aware of allegations that some entries in the log book are false and has pulled the log books and sent them to BITS to investigate. He was not aware of an employee pulling a phone off a wall. Mastropietro and Moretti testified that they never heard of an employee who regularly came in at 10 a.m. after taking his children to school. According to Yung, there is no documentation that employees tore out an EZ Pass, or removed signs from a Department vehicle, or ripped off a white board.

Facts in the Relevant Time Period

On May 18, 2003, Colella was offered an overtime assignment. According to Colella, this was the only day he was offered overtime between April 27, 2003, when the statute of limitations period began on his first improper practice petition, and June 24, 2003, when he was terminated. According to Colella, Berardi and Somma received overtime during this same time period. On this day, according to Colella, Moretti met him at the work location without Colella's "gang" box, containing his clothing and tools, which management was now responsible for ensuring was provided at work locations. (Tr. 788.) Colella alleges that he could not do the work without these materials and was told to go home. According to Moretti, he denied Colella overtime because Colella had come to the overtime location dressed in shorts and sneakers and without the pocket tools he was instructed to bring.

On June 5, 2003, Colella, Fabbriante, Kazmierczak, DeMonte, Berardi, Somma, and Leary filed a Step III group grievance with OLR, alleging that they were not paid the proper overtime rate for all hours worked in excess of seven hours a day.

On June 6, 2003, Colella filed a Step I grievance with Moretti, alleging that he was not compensated for overtime worked on May 18, 2003, and that Moretti has not offered Colella any

overtime since that day, despite the fact that other electricians were offered 24 hours of overtime each weekend, additional overtime during the week, and 36 hours of overtime over Memorial Day weekend. The grievance also alleged that Colella had approximately 32 hours of overtime for the year and that this was retaliatory.⁵⁴

On June 19, 2003, a Step II Disciplinary Grievance Determination was issued by the Bureau of Legal Affairs. The Step II Hearing Officer upheld the charges from June 2000, August 2001, and December 2002, and concluded termination was the appropriate penalty.

On June 20, 2003, FDNY's Commissioner signed a Commissioner's Decision concurring with the Step II Disciplinary Grievance Determination and terminating Colella effective June 24, 2003.⁵⁵ The same day, Moretti assigned Colella to change the light bulbs, and ballasts and wipe the lenses at the EMS station in Brooklyn. According to Moretti, when he arrived at the location, Colella was in the TV room, and none of the work had been completed. According to Moretti, Colella was not responding to his questions, had a dumbfounded look on his face, and eventually took out a piece of paper and wrote that he wanted representation because this incident would lead to disciplinary charges. According to Moretti, the chief at the station was present and told Moretti that all Colella does is "walk around and do nothing." (Tr. 1172.) Moretti called Mastropietro immediately and wrote a memorandum documenting the events. Moretti testified that it is possible that Colella's truck and tools were not delivered but that he believed that the materials necessary to the job were there because the EMS division supplies their own bulbs.

⁵⁴ On June 11, 2003, Colella filed a Step II grievance with FDNY, and on July 6, 2003, Colella filed a Step III grievance with OLR.

⁵⁵ According to Drury, neither BITS nor BMD supervisors can suspend or terminate BMD employees; the determination is made by FDNY's Commissioner.

On June 24, 2003, Colella's last day of employment at FDNY, Mastropietro submitted a memorandum to BITS, outlining the events of June 20, 2003. According to Colella, he had accrued only 32 hours of overtime at the time of his termination.

Improper Practice Petitions

On August 28, 2003, Colella filed an improper practice petition, docketed as BCB-2354-03, regarding the new transportation policy and inequitable distribution of overtime. On October 27, 2003, Colella filed an improper practice petition, docketed as BCB-2363-03, regarding his termination. Petitioner seeks a return to the status quo, including, returning the tradesmen to their facilities, reissuing lockers, returning Department vehicles, paying for time spent driving Department vehicles, and paying time and a half for driving Department vehicles before and after regularly scheduled tours of duty. He also seeks reinstatement, a promotion to Supervisor of Electricians retroactive to 1997, the expungement of all negative memorandum from his personnel file, the withdrawal of the June 2000, August 2001, October 2001, and December 2002 charges and resulting penalties, the destruction of all documents regarding those charges and any proceeding resulting from them, and compensation for pay and benefits lost as a result of those charges.

In addition, Petitioner seeks several changes in FDNY operations including an investigation into FDNY spending, the instigation of training classes, the assignment of starting locations in order of seniority, the adherence to policies regarding the equitable distribution of overtime, and institution of an open overtime chart. Petitioner seeks removal and replacement of BMD management staff, in order to end the hostile work environment. Petitioner seeks a cease and desist order, the posting of the Notice of Decision, a retraction of slanderous statements in FDNY's bulletin, publication of a formal written apology and acknowledgment of wrongdoing in FDNY's bulletin, and compensation

for out-of-pocket expenses incurred by him and other tradesmen. Petitioner seeks that the City and FDNY recognize his efforts to raise the bar concerning quality of life and award him the highest award a civilian can receive in pursuit of these goals.

Other Proceedings

On October 30, 2003, the Board decided *Fabbricante*, Decision No. B-30-2003. The Board found that, between 1994 and 1998, the Union breached its duty of fair representation to Fabbricante and FDNY retaliated and discriminated against Fabbricante because of his filing grievances and improper practice petitions. *Id.* at 2. Rejecting the City’s argument that the discord between Fabbricante and his supervisors was based solely on personal animosity, Board found that “the uncontroverted evidence shows that [the Assistant Commissioner of Support Services] and Mastropietro, agents of FDNY, engaged in retaliatory and discriminatory conduct themselves and were aware of and failed to take action to stop the improperly motivated conduct of [Fabbricante’s] immediate supervisors.” *Id.* at 32.

On January 18, 2006, an Arbitrator issued an opinion and award (“2006 Award”) dismissing the inequitable distribution overtime group grievance filed on December 20, 2001, and Colella’s failure to equalize overtime grievance filed January 14, 2002. She found no grievable right to the equitable distribution of overtime. She noted that “the acrimony within the division was apparent.” (2006 Award at 8.) Accepting the testimony of Moretti and Mastropietro as credible, she determined that the “rancor” toward Moretti “translated into a lack of cooperation on the part of some of the men in the division” and that “Moretti attempted to distribute the overtime equitably” from August to December 2001. (*Id.* at 8-9.) She found that “[t]here was nothing in the record to suggest that Moretti discriminated against Colella.” (*Id.* at 9.)

On January 22, 2007, another Arbitrator issued an opinion and award (“2007 Award”) finding that the City wrongfully issued three 30-day suspensions and wrongfully discharged Colella.⁵⁶ The Arbitrator found that the June 2000 charges were not proven. Specifically, she found that, on February 24, 2000, Colella was not given proper directions to Meserole Avenue and was incorrectly directed to Meserole Street. His comment to Mastropietro to be a man and tell him face to face was inappropriate, but not a threat. BITS did not take Colella’s version of events into consideration. There was no proof that Colella failed to obey an order regarding his reporting time and location on April 11, 2000, or that it was Colella who removed the locks from his vehicle. The Arbitrator found that someone had torn the date off the doctor’s note before it was submitted to BITS. Although “it was strange for the Grievant not to have been able to return to the United States because of a sunburn,” she found that there was no proof that the doctor’s note for March 31, 2000, was false. (2007 Award at 18.) The August 2001 charges were also not proven. The Arbitrator determined that an incident, not an accident, occurred on March 22, 2001, that Colella did not fail to report an accident, that he did not leave the scene without filing an accident report, and that he had a valid license at the time, albeit one from Pennsylvania. Regarding the December 2002 charges, the Arbitrator was not convinced that Colella was repeatedly told not to contact the time keeper and noted that the first time Moretti put this instruction in writing was nine days after Colella was charged with contacting the timekeeper. Colella was not absent without leave on January 9, 2002, and, while he should not have requested 15 minutes of overtime on that date for conferring with his attorneys, the action did not rise to the level of falsifying his time sheet. The supervisor should have asked for an explanation, and the sign out time should have been changed to 3 p.m. He did not

⁵⁶ The parties agreed to incorporate the arbitration transcript and exhibits into the record.

falsify his time sheet on January 31, 2002, and should not have been charged with 3¾ hours of annual leave. The Arbitrator found that Colella acted improperly on December 5, 2002, when he failed to comply with Moretti's reasonable request to submit an emergency notification form. While Colella improperly installed a light during an overtime assignment on September 17, 2002, there was no proof that the overtime assignment was not completed. The Arbitrator reasoned that, while Colella must follow reasonable orders without getting into confrontations and grieve later, management had to engage in progressive discipline:

There was no doubt from the record that Grievant had problems with a number of supervisors and co-workers; that he was an employee who stood up to supervisors and made sure that he received what he believed was rightfully his. However, though he might have been a difficult employee, the City still had an obligation to try to change his behavior, which it did not even attempt to do. In fact, in the opinion of this Arbitrator the record was convincing that supervisors simply wrote the Grievant off and piled violations on top of violations looking for any possible reason to issue discipline in order to reach the level of termination.

(*Id.* at 39.) The Arbitrator found Mastropietro's and much of Moretti's testimony "unconvincing, contradictory and evasive." (*Id.*) While Colella "acted inappropriately in several of his actions, including letters to supervisors and accusations," he was not charged with those actions, and only 2½ of the seven December 2002 charges that led to his termination were proven: insubordination and disorderly/disruptive behavior when requested to complete an Emergency Notification Form and unauthorized installation of a light during an overtime assignment. (*Id.*) The Arbitrator noted that those "incidents should have resulted in supervisory conferences, not suspensions/discharge." (*Id.* at 43.) She reinstated Colella to his former position "with full back pay, less any interim earnings and with full seniority and full benefits" and ordered that the suspensions and discharge be removed from his personnel file. (*Id.* at 44.)

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner argues that FDNY violated NYCCBL § 12-306(a)(1) by denying access to and obstructing the grievance process, subjecting his division to a hostile work environment, and terminating him.⁵⁷ Petitioner alleges that FDNY interfered with NYCCBL § 12-305 rights by implementing the transportation policy on April 30, 2003, and by coercing employees to sign the transportation agreement with the threat of loss of overtime.

Petitioner argues that FDNY violated NYCCBL § 12-306(a)(2) by denying access to the grievance process. Petitioner further claims that FDNY interfered with the Union representative and his instructions not to sign any agreement stating that employees would not be paid for driving

⁵⁷ NYCCBL § 12-306 provides, in relevant 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 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 as defined in subdivision d of section 12-311 of this chapter.

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 . . .

Department vehicles.

Petitioner argues that FDNY violated NYCCBL § 12-306(a)(1) and (3) by denying access to and obstructing the grievance process, condoning threats, and terminating him.⁵⁸ Petitioner further contends that FDNY retaliated against him by not offering him overtime opportunities after he followed the Union's instructions not to sign the transportation agreement. Colella alleges that his termination was due to discrimination and retaliation, motivated by his filing grievances, testifying on behalf of Fabbriante in the OCB case, filing complaints with the EEO office, reporting waste and abuse of department funds, organizing 50 tradesmen, and having the tradesmen submit claims for failure to pay overtime and benefits. He claims that the termination was based on charges alleging conduct that is condoned for other employees.

According to Petitioner, the same management found to have violated the NYCCBL in *Fabbriante*, Decision No. B-30-2003, continued their illegal conduct against Colella as they had against Fabbriante. Management denied him wages and overtime, caused him to file further grievances, retaliated against him for doing so, and terminated him.

Petitioner asserts that he established the first element of the *Salamanca* test. His supervisors and directors knew of his extensive grievance and improper practice filing. The timing of the grievances and the favorable outcomes coincide significantly with the dates of Colella's charges, suspensions, and terminations.

⁵⁸ Although the *pro se* improper practice petition could be read to assert that the City retaliated against Colella in violation of NYCCBL § 12-306(a)(1) and (3) by implementing the transportation policy and taking away Colella's truck first, the parties narrowed the issues in this case at a pre-hearing conference, at which Petitioner was represented by counsel. This is reflected in the notice of hearing and Petitioner's post-hearing brief, which focuses only on whether the denial of overtime after April 29, 2003, and Colella's termination on June 24, 2003, were discriminatory.

Petitioner asserts that his protected activity was a motivating factor in FDNY's illegal actions. Each of his three suspensions were shortly after he filed or won a grievance. The first two suspensions occurred prior to receiving notification of the reasons behind them. In addition, Colella was written up six days after filing an improper practice petition. Petitioner cites numerous incidents from 1998 to 2003 in which other FDNY employees and supervisors told him that management was angry that he wrote letters and filed grievances and that he should watch his back as they were out to get him by suspending him or denying him overtime. He also cites incidents in which FDNY employees were told that they would not be disciplined because they were not letter writers or grievance writers and an employee was told that he would be disciplined if he continued to hang around Colella and Fabbriante. Colella also asserted that Mastropietro and Moretti told other employees that they could blame Colella for losing their trucks.

Petitioner asserts that he established the second element of the *Salamanca* test because management had a pattern and practice of differential treatment. The City did not present any evidence to challenge Petitioner's claims of retaliation, discrimination, and disparate treatment motivated by antipathy toward his filing grievances and improper practice petitions, to refute that his supervisors were annoyed by his attempts to file grievances regarding the equalization of overtime and failure to promote, or rebut evidence that management's animus was due to Colella's continued pursuit of grievances and improper practice petitions.

According to Colella, he was subjected to differential treatment. Management maintained a pattern and practice of violating its rules and regulations, including FDNY's Civilian Code of Conduct, and selectively applied its rules or made up rules to punish employees who filed grievances. Petitioner asserts that FDNY did not post the OCB Notice, as ordered by the Board in

Fabbricante, Decision No. B-30-2003, and did not cease and desist from retaliating against *Fabbricante*. Other employees were given the vehicle suspension kit *Colella* was denied. Employees on management's "hit list" had to travel long distances to work locations, but others did not. *Colella* was disciplined for being in Manhattan on September 12, 2001, but *Crisi* and carpenter *Frank DiTomasso*, who were also there, were not disciplined. *Colella* and *Fabbricante* were denied overtime for weekend work in April 2003, but the employees who worked with them were given overtime. According to *Fabbricante*, five other employees who also filed grievances were brought up on charges.

Petitioner alleges that no disciplinary action was taken against several Department employees and supervisors engaged in misconduct, including *inter alia*: not having "hockey puck" locks on the doors of their vans; not filing accident reports; being absent without leave to harass *Colella*; assaulting and threatening *Fabbricante*; sending *Fabbricante* on jobs but not bringing the materials or equipment; denying *Fabbricante* overtime; holding *Fabbricante*'s pay stubs; and delaying his inquiry forms. Management knew that many employees did not sign the log book, arrived late, or were absent without leave to do personal business during business time. Petitioner asserts that these employees got the bulk of the overtime and do not write grievances to avoid drawing attention to their lying, cheating, theft of time and benefits, and efforts to cover for each other. Petitioner asserts that *Moretti*, *Mastropietro*, *Bianchino*, *Gellman*, *Campbell*, *DelGuadio*, and *Manetta* opposed filing grievances and did not follow the rules. Management enabled the abuses by rewarding cronyism and punished honest employees, like *Colella* and *Fabbricante*, who refused to go along with the abuses.

Petitioner argues that BITS was *Mastropietro*'s "cat's paw" because *Mastropietro* needed the imprimatur of BITS and used its internal processes to accomplish his discriminatory intent.

According to Petitioner, BITS did not investigate the matter, acted on management's false and manipulated information, did not question Colella, and did not allow him a fair opportunity to examine the charges and documentation against him, present his facts and documentation, cross-examine witnesses, or present his own witnesses. A BITS hearing is akin to settlement conference in court in that there are no witnesses, no record, and no discovery. An employee can be suspended the same day that a manager proffers charges, prior to the service of the charges or the conference. BITS did not interview Colella or ask him for the names of witnesses who might contradict management's statements. Mastropietro did not provide BITS with Colella's grievances or improper practice petitions. In the absence of due process checks and balances and any investigation of alleged discrimination, retaliation, and illegal animus, BITS is manipulated to accomplish the illegal objectives of management. Mastropietro sent documents to BITS regarding Colella even though he knew that OCB found him guilty of discriminating against Fabbriante. Management had actual notice that its discriminatory treatment and retaliation of Colella was illegal. Petitioner argues that BITS acted with deliberate indifference to OCB's findings regarding Fabbriante and rubber stamped Mastropietro's demands that Colella be suspended and terminated.

Petitioner argues that FDNY violated NYCCBL § 12-306(a)(4) by not bargaining over the imposed policy changes of April 30, 2003, and by avoiding its duty to bargain by decimating the bargaining unit through the creation of a hostile work environment for senior employees.

Petitioner argues in that FDNY violated NYCCBL § 12-306(a)(5) by denying access to and obstructing the grievance process and by terminating him. Colella further asserts that the changes of April 30, 2003, represent unilateral changes in the condition of employment.

Petitioner argues that OLR violated NYCCBL § 12-306(a)(1), (2), and (3) by obstructing the

grievance process, ignoring his calls and letters, and failing to act on his grievances.

In sum, Colella alleges abuses and economic loss since February 2000. Like Fabbriante, he was targeted by being denied overtime and overtime pay, was forced to grieve those losses, and then suspended and terminated for filing grievances and improper practice petitions. Colella and Fabbriante's testimony was not rebutted or denied under oath. Management's behavior and anti-grievance animus paralleled that demonstrated in *Fabbriante*, Decision No. B-30-2003, and continued despite the Board's cease and desist orders. Management could not tolerate honest employees, who did not accept the abuses of their supervisors and colleagues, or grievances that shed light on those abuses. Management controlled BITS, doctored records, falsified letters, created false witness statements, and lied to upper management to ensure that their illegal plans were fulfilled. Petitioner argues that he should be reinstated, with full back pay, and made whole for all economic loss.⁵⁹

City's Position

According to the City, the transportation policy claims and the claims of disparate treatment and retaliation by filing disciplinary charges must be dismissed as untimely. BMD trade personnel were notified of the change in transportation policy on April 23, 2003. However, Petitioner did not file BCB-2354-03 until August 28, 2003, more than four months later. Similarly, the disciplinary charges that resulted in Petitioner's termination were filed in June 2000, August 2001, and December 2002. The Step II determination upholding the recommended penalty of termination was issued on June 19, 2003, and Petitioner was terminated effective June 24, 2003. Yet, Petitioner did not file

⁵⁹ The post-hearing briefs were filed before the Arbitrator reinstated Colella and awarded him back pay.

BCB-2363-03 until October 27, 2003. Further, the Board's decision in *Colella*, Decision No. B-49-2001, operates as *res judicata* regarding the June 2000 charges.

The City argues that Petitioner has not shown that NYCCBL 12-306(a)(1) was independently violated, as Petitioner has not demonstrated that Respondents interfered with the exercise of his NYCCBL § 12-305 rights.

The City argues that the NYCCBL § 12-306(a)(2) claim must be dismissed as FDNY exercised its managerial right to regulate the use of Department vehicles. According to the City, Petitioner's claims are conclusory, speculative, and unsupported by the evidence. The City asserts that giving the employees two options for commuting to their assignments was not domination or interference. A claim of retaliation does not establish interference or domination. There was no evidence that FDNY interfered with the formation or administration of the Union, improperly supported its activities to any extent, or favored Local 3 or any other union.

The City argues that it did not violate NYCCBL § 12-306(a)(3), and derivatively, § 12-306(a)(1), when FDNY exercised its managerial rights to discipline Colella for numerous incidents of misconduct and to assign overtime. According to the City, only conjecture links the disciplinary actions and Colella's filing of grievances. Prior to the March 2000 suspension, he had not filed a grievance since July 1998. Colella filed close to 30 grievances since 1993, yet he was only disciplined after specific instances of misconduct unrelated to the filing of grievances. The mere filing of charges, which is done by BITS rather than BMD supervisors, is not evidence of anti-union animus and did not violate protected grievance rights. The City contends that, under Petitioner's rationale, employees could file grievances as a mechanism to avoid discipline.

The City argues that, assuming *arguendo* that his supervisors disliked Colella for filing

grievances, the City did not violate the NYCCBL because it had a legitimate business reason for filing charges and imposing discipline against Colella. According to the City, Colella engaged in a continuous pattern of misconduct, defiance, insubordination, and subversion of authority despite progressive discipline in the form of two 30-day suspensions. He blamed others instead of taking responsibility for the misconduct with which he was charged. The City claims that he did not merely assert his rights as a Union member, but conveyed to his supervisors and the Department that he would do as he pleased and not follow orders or directives. The City asserts that Colella cannot be managed or supervised. Since he is in a position in which he is on his own without constant supervision, FDNY must trust that he will go where he is sent and accurately report his location, hours, and work performed. In the absence of a change in his behavior following oral and written warnings and disciplinary suspensions, his discipline is not retaliation but merely good workplace management. Further, the ultimate determination regarding whether to proffer charges is made by Assistant Commissioner Drury of BITS, a unit completely independent from BMD that reviews documents from various FDNY departments requesting investigations and the preferral of charges against employees. Therefore, even if Colella establishes a *prima facie case* that his union activity was a motivating factor in his discipline and subsequent termination, there is no violation of the NYCCBL because he would have been disciplined and terminated in the absence of union activity.

According to the City, Colella's allegations that FDNY employees were conspiring against him and that supervisors were not disciplined for flagrant violations of FDNY rules, New York Civil Service Law, and the Administrative Code reflect his perception of reality, but are not supported by the evidence. Colella was not a victim who had been singled out. Rather, the testimony established that Colella was unable to get along with his supervisors or co-workers. While Colella blames

Moretti for retaliation against him, Moretti was hired eight years after Colella started filing grievances, and Colella was suspended twice before Moretti was hired. The City asserts that Fabbriante's testimony regarding supervisors' misconduct should be given little or no weight since Fabbriante, who has his own legal claims pending against the City, has an interest in presenting management in a negative light, is one of Colella's best friends, and was not a direct witness to any of the incidents resulting in Colella's termination.

The City argues that it had a legitimate business reason for the manner in which it distributed overtime since Colella has no entitlement to overtime under the NYCCBL. The assignment of overtime is a management right pursuant to NYCCBL § 12-307(b).⁶⁰ Colella was not a victim of disparate treatment because he was not assigned overtime upon his request. According to the City, Colella was afforded greater overtime rights than his co-workers and supervisors because his grievance for denial of overtime was processed at all steps of the grievance process. The City cites the 2006 Award denying overtime grievances. The City also cites Mastropietro and Moretti's testimony that the electricians refused overtime in retaliation for Moretti's having been hired from outside of FDNY and that Moretti canvassed, gave overtime, and kept a record.

The City argues that the NYCCBL § 12-306(a)(4) claim must be dismissed since Petitioner lacks standing to allege that the City has unlawfully refused to bargain with the Union. NYCCBL § 12-306(a)(4) creates a duty to bargain that runs between the employer and the Union. It may not be asserted by an individual employee. To the extent that Petitioner alleges that the Department

⁶⁰ NYCCBL § 12-307(b) provides in the relevant part: "It is the right of the city, or any other public employer, acting through its agencies, to . . . take disciplinary action . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . ."

failed to bargain over an alleged reduction in overtime opportunities, the City asserts that such claim must be dismissed because overtime is a management right under NYCCBL § 12-307(b).

Similarly, the City argues that the NYCCBL § 12-306(a)(5) claim must be dismissed since Petitioner lacks standing to allege that the City has unilaterally changed a mandatory subject of bargaining during negotiations. An employer's duty to maintain the *status quo* under NYCCBL § 12-306(a)(5) extends to the Union, not to an individual bargaining unit member.

DISCUSSION

An improper practice charge must be filed no later than four months from the date the disputed action occurred. NYCCBL § 12-306(e); § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"); *Griffiths*, Decision No. B-3-99 at 11-13.⁶¹ Factual allegations that occur outside of the four month limitations period are considered only as background information that may illuminate the context and motivations underlying actions that form the basis of timely claims under the NYCCBL, but

⁶¹ NYCCBL § 12-306(e) provides, in relevant part:

A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

OCB Rule § 1-07(b)(4) provides:

One or more public employees or any public employee organization acting on their behalf or a public employer may file a petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

cannot be themselves treated as remediable violations of the NYCCBL. *See District Council 37*, Decision No. B-33-2006 at 24; *Howe*, Decision No. B-32-2006 at 16; *Patrolmen's Benevolent Ass'n*, Decision No. B-10-2006 at 13.

The improper practice petition docketed as BCB-2354-03 was filed on August 28, 2003, Accordingly, claims relating to events that occurred on or after April 27, 2003, are timely.⁶² The issuance of a notice regarding the change in transportation policy, disseminated to employees on April 23, 2003, does not start the limitations period, as the four months do not begin to run until after the policy was actually implemented. *See District Council 37, AFSCME*, Decision No. B-61-91 at 8 (“A party may choose to await performance of an action and file an improper practice charge within four months after the intended action is implemented . . .”) Since the changes in transportation policy were not implemented until April 30, 2003, Petitioner’s claims that the transportation policy, and the resulting denial of Department vehicles, lockers, and access to BMD buildings, violated NYCCBL § 12-306(a)(1), (4), and (5) are timely. Petitioner’s claims that the City violated NYCCBL § 12-306(a)(3) by denying him overtime between April 29 and June 24, 2003, in retaliation for following his Union’s advice are also timely.

The record indicates that the Union instructed Colella and other electricians not to sign the transportation agreement and that six electricians did sign the agreement prior to April 26, 2003. Accordingly, Petitioner’s claims that the City violated NYCCBL § 12-306(a)(1) and (2) by

⁶² OCB Rule § 1-12(f) provides, in relevant part:

In computing any period of time prescribed or allowed by these rules, or by order or direction, the day of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday or legal holiday, in which event the period shall run to the next business day.

interfering with the Union's instructions and by coercing the six electricians into signing the transportation agreement are untimely. In addition, the petition's assertions that the NYCCBL was violated by corrupt use of Department funds, abuse of authority, mismanagement, and misconduct prior to April 27, 2003, and by the 2000 and 2001 suspensions in retaliation for reporting those abuses are untimely.

The second improper practice petition, docketed as BCB-2363-03, was filed on October 27, 2003. Claims pertaining to disputed actions that occurred on or after June 24, 2003, are timely.⁶³ Therefore, Petitioner's claim that the City violated NYCCBL § 12-306(a)(1) and (3) by terminating his employment on June 24, 2003, is timely. Concomitantly, Petitioner's claims concerning disputed actions before June 24, 2003, are untimely. Accordingly, Petitioner's allegations that OLR violated NYCCBL § 12-306(a)(1), (2), and (3) by obstructing the grievance process and FDNY violated NYCCBL § 12-306(a)(1), (2), (3), and (4) by subjecting his unit to a hostile work environment, treating him in a disparate manner, decimating the bargaining unit, failing to promote Petitioner, falsifying documents, and fabricating charges against him are dismissed.

In addition to alleged violations of the NYCCBL, Petitioner includes in the first petition claims asserting that (1) the transportation policy is invalid as violative of FDNY policy, directives, and grievance determinations, (2) the unequal distribution of overtime likewise violated a FDNY directive, and (3) Mastropietro was guilty of repeated violations of the Freedom of Information Law (N.Y. Public Officers Law Art. 6, § 84, *et seq.*) over a period of years. Similarly, in the second petition, Petitioner claims that the City violated FDNY policies, retaliated against him for his EEO

⁶³ Pursuant to OCB Rule § 1-12(f), the four month period to challenge actions on June 24, 2003, began on June 25 and concluded on Saturday, October 25, and Petitioner had until Monday, October 27, to file his petition.

complaints and “whistleblowing,” denied him due process, hired Moretti illegally, obstructed justice, and committed misdemeanors. This Board, however, is one of limited jurisdiction, and, as we have previously noted, “any claim under a statutory scheme other than the NYCCBL which Petitioner may have . . . is also unavailing in this improper practice proceeding . . . unless such a claim would otherwise constitute an improper practice.” *Edwards*, Decision No. B-35-2000 at 10-11; *see also James-Reid*, Decision No. B-29-2006 at 15. As this Board lacks jurisdiction over alleged violations of statutes and laws other than the NYCCBL, we will not entertain such claims. *See Edwards*, Decision No. B-35-2000 at 10-11; *see also Green*, Decision No. B-34-2000 at 9. Similarly, claimed violations of FDNY policy, directives, or contract interpretations, which may be properly grieved, are not subject to this Board’s jurisdiction. *See* N.Y. Civil Service Law Article 14 § 205.5(d); *see also Smith*, Decision No. B-22-2000 at 7; *Local 237, Int’l Bhd. of Teamsters*, Decision No. B-31-98 at 7. Accordingly, all such claims are dismissed.

Further, Petitioner does not have standing to assert a unilateral change in terms and conditions of employment. This Board has consistently held that “while an individual public employee may generally commence an improper practice proceeding, the duty to refrain from making unilateral changes to established terms and conditions of employment exists only between a labor organization and a public employer.” *Howe*, Decision No. B-32-2006 at 25 (citing, *inter alia*, *McAllan*, Decision No. B-15-83 at 15, and *Robinson*, Decision B-43-2002); *see also Edwards*, Decision No. B-35-2000 at 10. Accordingly, Petitioner’s claims that City violated NYCCBL § 12-306(a)(4) and (5), and derivatively § 12-306(a)(1), by implementing the transportation policy are dismissed.

Thus, the only claims properly before this Board are whether the City violated NYCCBL §

12-306(a)(1) and (3) by denying Colella overtime between April 29 and June 24, 2003, and by terminating his employment on June 24, 2003. To determine if an employer's action constitutes retaliation in violation of NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny such as *State of New York*, 36 PERB ¶ 4521 (2003). Under that test, adopted by this Board in *Bowman*, Decision No. B-51-87, a petitioner must establish a *prima facie* case by demonstrating that:

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

Bowman, Decision No. B-51-87 at 18-19; *see Lamberti*, Decision No. B-21-2006 at 15-16; *see also Fabbriante*, Decision No. B-30-2003 at 30-31.

Where "a petitioner adduces sufficient proof of these two elements, and thus makes out a *prima facie* case, the employer may attempt to refute this showing on one or both elements or demonstrate that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *District Council 37, AFSCME*, Decision No. B-33-2006 at 25 (citing *City Employees Union, Local 237, Int'l Bhd. of Teamsters*, Decision No. B-24-2006 at 18-19).

In this matter, we find that Petitioner has established a *prima facie* case that FDNY violated NYCCBL § 12- 306(a)(1) and (3) by terminating him on June 24, 2003. As this Board has consistently held, the filing and processing of grievances constitutes protected activity under the NYCCBL, and an employer's participation in those proceedings is sufficient to establish its knowledge of the employee's protected activity. *See City Employees Union, Local 237*, Decision

No. B-3-2006 at 11; *Civil Serv. Bar Ass'n*, Decision No. B-24-2003 at 12; *Doctor's Council*, Decision No. B-12-97 at 10. Colella filed 30 grievances and several improper practice petitions and, further, testified in Fabbriante's improper practice proceeding; it is uncontested that his supervisors, who sought his discipline, were aware of his protected union activity. Thus, we find that Petitioner has established the first prong of the *prima facie* case required by the *Salamanca* test.

Based on the totality of the record, we find that Petitioner has also established the causation prong of the *prima facie* case. As we have previously explained, ordinarily "the existence of retaliatory or anti-union animus must be proven indirectly, through the use of circumstantial evidence, absent an outright admission." *Soc. Servs. Employees Union*, Decision No. B-35-2006 at 15 (citing *Burton*, Decision No. B-15-2006 at 25-26, and *City Employees Union, Local 237*, Decision No. B-13-2001 at 9). This Board's willingness to accept indirect evidence of wrongful intent "does not, however, permit the [petitioner] to carry [his] burden of proof through mere assertion." *Id.* (citing *Local 983, District Council 37*, Decision No. B-15-2001 at 6). Rather, allegations of improper motivation must be based on specific, probative facts. *Id.* (citing *Lieutenants Benevolent Ass'n*, Decision No. B-49-98 at 6). As part of his evidentiary showing, "the petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence." *Communication Workers of Am., Local 1180*, Decision No. B-20-2006 at 14.

Here, the timing of events is suspicious. A number of Mastropietro's memoranda to BITS were sent only a few days after Colella had filed a grievance. For example, one day after Colella's April 2000 grievance, Mastropietro sought Colella's immediate suspension and, the following day, he requested "accelerated efforts to penalize" Colella "to the fullest extent possible." (City Ex. 9D.)

In February 2002, Mastropietro sent a memorandum to BITS two days after Colella filed a grievance. In December 2003, Mastropietro submitted a memorandum three days after Colella filed a grievance. While temporal proximity alone does not suffice to establish the causation prong of the *prima facie* case, here, as in *Social Services Employees Union, Local 371*, Decision No. B-35-2006 at 16, the “repeated, suspicious, temporal proximity” between use of the grievance process and the retaliatory action is consistent with other facts supporting a finding of improper motivation. Taken as a whole, such evidence provides support that Mastropietro’s actions were in retaliation for Colella’s filing grievances.

In the instant case, Colella’s testimony consists of recounting second and third hand statements told to him by colleagues and supervisors, his perception of the motivation of his supervisors’ actions, and particular statements made directly to him, which, if credible, form the basis of a finding of anti-union animus. We recognize that the testimony provided by Colella is filtered through the lense of his strongly held conviction that he is a target and a victim and, though heartfelt, may be exaggerated and is not particularly probative. With respect to the hearsay statements recounted to Colella by others, such comments lack indicia of reliability and are uncorroborated by the alleged auditors who reported them to Colella. Accordingly, we decline to give weight to such unreliable hearsay accounts. *See, e.g., Jones v. Maples*, No. 131739/93, 1999 N.Y. Misc. LEXIS 605, at *9-10 (Sup. Ct. N.Y. Co. 1999) (citing *Fisch on New York Evidence* (2d Ed.) § 758 and 2 Strong, *McCormack on Evidence* (4th Ed.) § 324.1). Having done so, we focus on Colella’s testimony concerning specific objectionable statements made directly to him by his supervisors that reflect anti-union animus.

We acknowledge that Colella's union activity occurred over a decade and that, as described below, his supervisors' hostility to his filing of grievances also extended throughout this period. There are numerous instances in which supervisors expressed their displeasure with Colella's filing grievances and their willingness to retaliate.⁶⁴ As early as 1993, Bianchino, who was Colella's immediate supervisor at the time of several of the incidents upon which his termination is allegedly based, told Colella that his first grievance would "just piss off a lot of people" and that his supervisors would punish him by taking away his Department vehicle or changing his reporting location if he went through with the grievance.⁶⁵ (Tr. 64.) In 1998, two weeks after Colella filed his second grievance, Mastropietro changed Colella's reporting location and stated, "You want to write letters and grievances? Fine." (Tr. 95.) In 2000, Bianchino told Colella that another electrician was receiving overtime because he did not write letters or grievances. Within two months of becoming Colella's immediate supervisor in 2001, Moretti told Colella that if he kept writing letters and grievances, Moretti would punish him by making him report to a location further from his home. In 2002, closer in time to Colella's termination, Moretti told him that other employees were allowed to return to their original reporting location because they did not write letters and grievances.

Although two of Colella's supervisors were produced as witnesses on behalf of the City, they did not deny making the specific comments attributed to them by Colella or offer an alternative

⁶⁴ As stated above, facts occurring outside of the four month limitations period may illuminate the motivations for actions that are the basis of timely claims. *See, e.g., District Council 37, Decision No. B-33-2006 at 28.*

⁶⁵ Bianchino, who left FDNY in 2001, did not testify in this proceeding.

version of the conversations.⁶⁶ This failure to adduce testimony contravening Colella's account from the very witnesses whose actions are at issue, and who were present to be asked, is telling, and we find that it enhances the credibility of Colella's account. *See, e.g., Schwartz v. New York City Dep't of Educ.*, 22 A.D.3d 672, 673 (2d Dep't 2005); *Brown v. Village Mobil Serv. Station, Inc.*, 167 A.D.2d 158, 159 (1st Dep't 1990). These uncontested, very specific statements by supervisors made directly to Colella are a sufficient basis for a *prima facie* case. Accordingly, we reject the City's contention that Petitioner has set forth nothing but conjecture to establish the second prong of the *Salamanca* test and find that he has carried his burden of proof.

This distinguishes the instant case from *Colella*, Decision No. B-49-2001, where this Board found a lack of sufficient factual allegations to establish a *prima facie* case that the May 2000 suspension was improperly motivated. The uncontested facts in the record at hand were not pled in the earlier case and provide critical support for the conclusion that union activity was a motive in the decision to forward to BITS allegations of misconduct that formed the basis for the June 2000, August 2001, and December 2002 charges upon which Colella was terminated in 2003. For example, in addition to the uncontested evidence of expressed anti-union animus stated above, Colella won his 1998 "portal to portal" grievance seeking overtime for commuting in a Department vehicle, less than three months before the March 2000 suspension. Although Colella's non-union activity, such as filing EEO complaints, writing "whistleblowing" letters to FDNY's Commissioner and other City officials, and sending criticizing letters to Moretti, might have also contributed to the acrimonious working relationship within BMD, there is sufficient evidence in the record that

⁶⁶ Mastropietro and Moretti offered only general denials of any improper motivation on their part.

Colella's union activity was at a minimum one of the motivating factors behind his supervisors' actions.

Since evidence adduced by Petitioner has established a *prima facie* case of discrimination and retaliation, the burden of going forward shifts to the City to either rebut the *prima facie* case or to establish that its actions were motivated by a legitimate business reason. *District Council 37, Local 768*, Decision No. B-15-1999 at 17. The City claims that it had such a legitimate business reason for terminating Colella, misconduct by Colella, as specified in the charges that led to his termination. In cases involving mixed or dual motive, this Board has found that "even if it is established that a desire to frustrate union activity is a motivating factor, the employer is nevertheless held to have complied with the NYCCBL where it is proven that the action complained of would have occurred in any event and for valid reasons." *Communications Workers of Am., Local 1180*, Decision No. B-17-89 at 17 (quoting *Local One, Amalgamated Lithographers of Am. v. NLRB*, 729 F.2d 172, 175 (2nd Cir. 1984)). The City asserts that, even assuming that Colella's supervisors disliked him for filing grievances, Colella would still have been terminated because of the misconduct for which the disciplinary charges were filed.

We find that the City has not met its burden of establishing a legitimate business reason for its actions. The record as a whole – which includes the arbitration transcript and exhibits that were incorporated at the agreement of the parties – does not indicate that Colella would have been terminated in the absence of his protected conduct.

We are required to afford preclusive effect to the factual findings and conclusion set forth in the 2007 Award. In *Matter of Guimarales*, 68 N.Y.2d 989, 991 (1986), the Court of Appeals noted that the Unemployment Insurance Appeal Board and an Administrative Law Judge, "although

bound by the arbitrator's factual findings regarding claimant's conduct and his conclusion of insubordination, were free to make their independent additional factual findings and form their own independent conclusion as to whether such conduct constituted 'misconduct' for purposes of unemployment insurance." *See also Sam v. Metro-North Commuter R.R.*, 287 A.D.2d 378, 379-380 (1st Dep't 2001); *Pisano v. New York City Bd. of Educ.*, No. 47423/97, 2002 N.Y. Misc. LEXIS 186, at *4 (Sup. Ct. Kings Co. March 8, 2002). Similarly, we are bound by the Arbitrator's factual findings regarding whether Colella engaged in the misconduct with which he was charged and her conclusion that Colella was wrongfully suspended and terminated. We are free to, and do, make additional findings of fact on other issues and reach our own independent determination as to whether FDNY violated the NYCCBL when it terminated Colella.

The Arbitrator found that the City did not prove that Colella was guilty of most of the fifteen charges against him and that the two and a half charges of misconduct that were proven – insubordination and disorderly/disruptive behavior when refusing to submit an Emergency Notification Form and unauthorized installation of a light during an overtime assignment – “should have resulted in supervisory conferences, not suspensions/discharge.” (2007 Award at 43.) Accordingly, we cannot and do not accept the City's position that the same charges of misconduct by Colella that were the subject of the arbitration would have resulted in Colella's termination absent any discriminatory motive.

While the facts and conclusion of the 2007 Award do not absolutely preclude the City from establishing a legitimate business reason, they undermine the City's assertion that Colella's misconduct was the cause for his termination and cast doubt on the credibility of Moretti and Mastropietro's denial of a retaliatory motive. The Arbitrator found Mastropietro's testimony and

much of Moretti's testimony concerning the same events that underpin this decision "unconvincing, contradictory and evasive." (*Id.* at 39.)

Against this backdrop, we do not find credible Moretti and Mastropietro's testimony that they were not motivated by anti-union animus when they documented alleged misconduct and forwarded it to BITS seeking Colella's termination. In the face of days of testimony from Colella alleging numerous detailed statements of anti-union animus, Mastropietro and Moretti offered no specific denials of these statements despite a full and fair opportunity to do so. In addition, there was considerable direct evidence that Colella's grievances, particularly those seeking "portal to portal" overtime pay for commuting between his work location and his reporting location outside of his regular shift, angered his supervisors.⁶⁷ All of these factors, in conjunction with the Arbitrator's finding that Mastropietro and Moretti lacked credibility in testifying regarding the very events at issue in this case, significantly undercut the City's proffered legitimate business reason. Under these circumstances, we find that Mastropietro and Moretti's testimony cannot be relied upon to rebut the *prima facie* case.

Procedural irregularities in Colella's discipline further undermine the City's denial of improper of motivation. *See District Council 37*, Decision No. B-12-2006 at 17 (finding that "irregularities and inconsistencies with established practice" supported an inference of disparate treatment). For example, Colella first received written notification not to directly contact the timekeeper on December 19, 2002, nine days after he was formally charged with disobeying this order and over nine months after Mastropietro first forwarded a memorandum to BITS alleging that

⁶⁷ We note that this Board has previously found that Mastropietro engaged in retaliatory conduct because an employee filed grievances. *See Fabbicante*, Decision No. B-30-2003 at 32.

Colella had ignored the chain of command by disregarding this directive. Similarly, the Arbitrator found that the date on Colella's doctor's note was torn off before it was forwarded to BITS and that no other employees were suspended for not having locks on their vehicles. As the Arbitrator noted, "the Department piled on charges against this Grievant without attempting to explain the perceived improper behavior and the way in which the Grievant could change to comply with the Department's requirements." (2007 Award at 35-36).

We find that the weight of the uncontested evidence of anti-union animus, the lack of proof that Colella engaged in most of the charged misconduct, the questionable credibility of Mastropietro and Moretti's testimony, and these procedural irregularities, in total, support a finding that Colella's alleged misconduct was not the reason his supervisors forwarded numerous memoranda to BITS seeking his termination. *See District Council 37, AFSCME*, Decision No. B-33-2006 at 35 (noting that "when a public employer offers, as a legitimate business defense, a reason that is unsupported by or inconsistent with the record, the defense will not be credited by this Board.").

When, as here, "a petitioner has established a credible *prima facie* case and there is sufficient evidence to find that the employer's asserted justification is false, we may conclude that the employer engaged in unlawful activity." *Soc. Servs. Employees Union, Local 371*, Decision No. B-35-2006 at 20; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-148 (2000) ("[A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.") (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case,

suffice to show intentional discrimination.”)). Since the City has failed to establish a legitimate business reason to rebut Petitioner’s *prima facie* case, we find that FDNY violated NYCCBL § 12-306(a)(1) and (3) by terminating Colella.

Turning to the allegation that FDNY violated NYCCBL § 12-306(a)(1) and (3) by denying Colella overtime between April 29 and June 24, 2003, in retaliation for following his Union’s advice not to sign the transportation agreement, we find that Petitioner has established a *prima facie* case. Again, Petitioner established the first prong of the *Salamanca* test. His supervisors were aware not only that he refused to sign the transportation agreement, but also that he claimed his refusal was instructed by the Union. Colella’s assertion that the Union instructed employees not to sign is contained in his internal Union complaint against Moretti and the other electricians who signed, which the Union forwarded to Moretti on May 5. Moretti was responsible for the distribution of overtime during the relevant two month period in 2003.

Petitioner also set forth facts to support the second prong of the *Salamanca* test. Petitioner had worked 32 hours of overtime by April 29, 2003, and still had the same amount of overtime at the time of his termination, on June 24, 2003. He was offered overtime on May 18, 2003, but was sent home for lack of tools. Petitioner asserted that other electricians were being offered 24 hours of overtime on weekends during this period and 36 hours of overtime over Memorial Day weekend. As stated above, there are direct and un rebutted statements of anti-union animus that support that Colella’s union activity was a motivating factor in his supervisors’ actions. His supervisors had repeatedly expressed their dissatisfaction with his filing of his grievances and their willingness to use a variety of means, such as assigning an inconvenient reporting location or not assigning overtime, to retaliate against Colella.

The City has failed to establish a legitimate business reason to refute Petitioner's *prima facie* case. The City offered no testimony or documentation to dispute or even explain Petitioner's allegation that he was offered overtime on only one day in the relevant time period. FDNY maintains records of overtime, and the City produced annual records of overtime earned by other BMD employees in 2003. Moretti's 2003 annual overtime tally, which tracked how much overtime was offered, refused, and worked, did not include Colella because he had been terminated. However, the City could have and chose not to offer the grid sheets upon which the annual tally was calculated, for the relevant time period. Although, as Moretti credibly testified and the 2006 Award noted, senior electricians, including Colella, refused to work overtime in the later half of 2001, the City did not offer any evidence that Colella had been offered and refused overtime between April 29 and June 24, 2003. "An unfavorable inference may be drawn when, as in this case, a party fails to produce evidence which is within its control and which it is naturally expected to produce." *Seward Park Hous. Corp. v. Cohen*, 287 A.D.2d 157, 168 (1st Dep't 2001) (following, *inter alia*, *Ausch v. St. Paul Fire & Marine Ins. Co.*, 125 A.D.2d 43 (2d Dep't 1987)); *Fieldbridge Assoc. LLC v. Stephens*, No. 75349/2006, 2007 N.Y. Misc. LEXIS 440, at *6 (Civil Ct. Kings Co. Jan. 25, 2007). Instead, the City asserts that the assignment of overtime is a managerial right. However, the Board has recognized that an employer cannot exercise its managerial rights in a manner that violates the NYCCBL. *See District Council 37, AFSCME*, Decision No. 13-98 at 17; *see also Unif. Firefighters Ass'n of Greater New York*, Decision No. B-4-87 at 4-5. Under these circumstances, where the City has failed to offer testimony or documentation supporting a legitimate business reason to refute Petitioner's *prima facie* case, we find that the City violated NYCCBL § 12-306(a)(1) and (3) by denying Colella overtime between April 29 and June 24, 2003.

As a remedy for the two violations of NYCCBL § 12-306(a)(1) and (3), we order that BMD supervisors cease and desist from referring allegations of misconduct to BITS and denying overtime because of Colella's union activity. We order that FDNY post the attached notice to employees on all bulletin boards where notices to employees are customarily posted. As Petitioner has already been awarded back pay less any interim earnings by the 2007 Award, a further economic remedy for Colella's improperly motivated termination would be duplicative and is, therefore, inappropriate. Similarly, the Arbitrator already awarded the removal of the suspensions and discharge from Colella's personnel file, and further action in this regard is unwarranted.

Petitioner has not established entitlement to damages for lost overtime. The record does not support any claim that Petitioner had a contractual or statutory right to overtime. Rather, the record shows that employees are not required to accept overtime and, indeed, Colella has a history of refusing overtime. Under the circumstances, no rational basis exists for making any such finding with an acceptable degree of certainty. Accordingly, back pay is not warranted for FDNY's failure to assign Colella overtime from April 29 to June 24, 2003 – the period at issue here. However, we order that prospectively Colella be given the opportunity to work overtime assignments on the basis of non-discriminatory criteria and without regard to his protected union activity.

The following requested remedies that could be interpreted as relating to the termination and denial of overtime between April 29 and June 24, 2003, are denied as they are overly broad and/or not customarily awarded: the destruction of all documents pertaining to the four 2000 to 2002 disciplinary charges and to any proceedings resulting from those charges, the removal and replacement of BMD management staff, the reimbursement of out-of-pocket expenses, the adhesion to unspecified policies regarding the equitable distribution of overtime, the institution of an open

overtime chart, an acknowledgment of wrongdoing, and a formal apology in the FDNY bulletin. We decline to deviate from our practice not to award such remedies. We do not address the remaining requested remedies that pertain to Petitioner's claims that are untimely, beyond our jurisdiction, or for which he lacks standing.

ORDER

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

ORDERED, that the improper practice petitions, docketed as BCB-2354-03 and BCB-2363-03, filed by Brian Colella be, and the same hereby are, granted as to claims that the City violated NYCCBL § 12-306(a)(1) and (3) by terminating his employment and by denying him overtime between April 29 and June 24, 2003, and dismissed to all other claims;

ORDERED, that FDNY cease and desist from referring allegations of misconduct to the Bureau of Investigations and Trials and denying overtime because of Colella's union activity; and

ORDERED, that FDNY post the attached Notice to All Employees on all bulletin boards where notices to employees are customarily posted.

Dated: June 18, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

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

We hereby notify that in the matter of *Colella*, Decision No. B-27-2007 (Docket Nos. BCB-2354-03 and BCB-2363-03):

The New York City Fire Department committed an improper practice when, in retaliation for union activity, it denied Brian Colella overtime between April 29 and June 24, 2003, and terminated his employment on June 24, 2003.

It is hereby:

ORDERED, that the improper practice petitions, docketed as BCB-2354-03 and BCB-2363-03, filed by Brian Colella be, and the same hereby are, granted as to claims that the City violated NYCCBL § 12-306(a)(1) and (3) by denying him overtime between April 29 and June 24, 2003, and by terminating his employment and dismissed to all other claims; and

ORDERED, that FDNY cease and desist from denying Brian Colella overtime and referring allegations of misconduct to the Bureau of Investigations and Trials because of Brian Colella's union activity.

New York City Fire Department

Dated:

(Posted By)

(Title)

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