

Detectives Endowment Ass'n, 79 OCB 40 (BCB 2007)

[Decision No. B-40-2007] (IP) (Docket No. BCB-2553-06).

Summary of Decision: The Union alleges that the City violated NYCCBL § 12-306(a)(1) and (3), by retaliating against a member for exercise of protected union activity, by denying him promotion despite a positive recommendation, restricting his ability to work overtime, revoking his Internet privileges and departmental cell phone, and by making him walk a foot patrol. The Board found that the restriction on overtime had taken place prior to any protected activity, and that the failure to promote and the change to the member's regular day off were not proven to have been motivated by anti-union animus. The Board found that the content of the interim performance evaluation and other actions complained of were motivated by anti-union animus. ***(Official decision follows.)***

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

In the Matter of the Improper Practice Petition

-between-

**DETECTIVES ENDOWMENT ASSOCIATION and VINCENT
SORRENTINO,**

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On June 6, 2006, the Detectives Endowment Association ("Union") and Vincent Sorrentino filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD") alleging that the City violated NYCCBL § 12-306(a)(1) and (3)

by retaliating against Sorrentino's protected union activity by: denying him promotion, despite a positive recommendation and evaluation; restricting his ability to earn overtime, requiring that such overtime be accrued only for duties related to his assignment; removing his Internet privileges and revoking his NYPD-issued cell phone; and by making him walk a foot patrol on a daily basis, which no other officers of his grade and rank had been required to do. The City in response has argued that the overtime restriction preceded any protected union activity by Sorrentino, claims its other actions were not motivated by any anti-union animus, or would have been taken in any event based on legitimate business purposes. After a hearing, the Board finds that the Union has failed to carry its burden of proving that the denial of promotion and restriction of overtime accrual were caused by anti-union animus, and that the City has established a legitimate business reason for the change in Sorrentino's regular days off. We further find that the City has failed to rebut the Union's evidence that the scores and comments on the interim performance evaluation, revocation of Internet and cell phone privileges, and the assignment to walk a foot post, were the result of anti-union animus. Accordingly, we dismiss the petition in part, and grant the petition in part.

BACKGROUND

After three days of hearings in this matter, the Trial Examiner found that the totality of the record established the relevant facts to be as follows.

The Counter Terrorism Division ("CTD") is a sub-command of the NYPD's Counter Terrorism Bureau, and is headquartered in Brooklyn. CTD is divided into several units with different functions. The Training Unit provides counter-terrorism training both within the NYPD and to private organizations. The Threats Reduction Infrastructure Protection ("TRIPS") Unit works with both private and public entities to improve security. The TRIPS Unit is further subdivided into

teams, which address questions relating to designated areas of expertise: Explosives, Utilities, Facilities, Transportation, and Chemical, Biological, Radioactive and Nuclear. The Threat Assessment Group (“TAG”) performs analyses of terrorist attacks and trends worldwide. Finally, the Special Projects Group coordinates with other NYPD divisions in planning security for events.

The primary means by which CTD supervisors are able to ascertain the results of the staff’s work, and what steps they have taken, is the “case folder” (also called a “case file” by some employees). A case folder consists of documentation of all efforts made by the individual CTD employee assigned to a matter, including NYPD Detective Division 5 Investigative Reports (“DD5s”), memoranda summarizing telephone calls, site surveys and memoranda detailing techniques used to study infrastructure or technology. Lieutenant Patrick Devlin, who commands TRIPS, testified that keeping a detailed and clear case file is “extremely” important because it provides a summary of the detective’s assignments and duties, and allows supervision to understand without speaking to the detective in question the current state of the security posture of the various facilities with which they work, as well as providing a method by which the progress and difficulties confronted by the individual detective can be assessed. (Tr. 536.) Devlin later described case files as “the baseline, the building block, the first step that everyone has to maintain at TRIPS.” (Tr. 545.)

At CTD, security concerns have led to a decision to not employ cleaning staff or maintenance workers; accordingly, CTD staff do much of the work that would normally be done by such workers. CTD staff are able to earn overtime for such work, which is termed “programmatic” overtime to distinguish it from “operational” overtime, which is overtime related to the assignment of the employee. Programmatic overtime also includes special projects in the field which do not relate to the employee’s assignment. According to Deputy Inspector Joseph Cordes, who was responsible for

personnel matters at CTD, programmatic overtime is supposed to be equalized among all the detectives and officers at CTD. In order to do that, a baseline is set, an amount of overtime above which accruals are examined. According to Sorrentino, that baseline was 35 hours per month. As Cordes testified, overtime in excess of that baseline (or “cap” as Sorrentino termed it) may be justified if needed for the employee’s assignment or other operational need, and if so, no issue arises.

Detective Vincent Sorrentino had almost fifteen years service within the NYPD prior to his joining CTD in November 2004. In his pre-CTD service, Sorrentino had received awards and commendations from the beginning of his career with the NYPD through the end of 2004, when he was named detective of the month for his work in apprehending a serial killer. Sorrentino’s combination of a military background with expertise in communications, a teaching license and his years in law enforcement made him an attractive candidate for transfer to CTD, and suited him particularly, he believed, to work in the communications division within TRIPS. His initial assignment at CTD, however, was with the Explosives Team, where his duties focused on researching technology relating to blast effects, field testing new technology, completing reports on the methodology on past terrorist attacks, and making recommendations as to new programs and training related to explosives. Sorrentino testified that he lacked background in explosives, but tried to educate himself on the subject through library books and internet research, as well as requesting more formal training.

Sorrentino’s performance evaluation for the period May 16, 2004 through May 15, 2005 awarded him an overall score of 4.5 out of a possible 5 points, and was signed by the rater on July 15, 2005. His rater, Sergeant Donna DeNatale, described him as displaying “tremendous drive and initiative” and further characterized him as “an asset to this unit as well as to the Department.” (City

Exhibit 2). Sergeant DeNatale was not Sorrentino's primary supervisor during the rating period, however; she was at that time the supervisor of the Utilities Team. DeNatale testified that she based her evaluation of Sorrentino on discussions with the supervisors with whom he worked during the ratings period, although she acknowledged that she may not have been able to speak with Mogil, Sorrentino's direct supervisor, who was subject to military duties. DeNatale also testified that she observed Sorrentino's work about CTD, and that he was frequently volunteering to work overtime performing tasks that others did not, describing him as the "go to" guy. Sergeant DeNatale's rating was subsequently approved by Devlin with the simple endorsement: "accurate and complete, concur." Cordes testified that he found this evaluation to be improperly prepared in that DeNatale was not Sorrentino's supervisor, and that he was surprised that Devlin approved it.¹

Devlin testified that he found that Sorrentino's performance while on the Explosives Team lacking in that Sorrentino had failed to comply with required standards for maintaining and documenting case files, and documenting his efforts and his findings. This specific criticism of Sorrentino's performance while on the Explosives Team was also expressed by DeNatale, with respect to Sorrentino's subsequent tenure with the Utilities Team. Similarly, Deputy Inspector Joseph Cordes also testified that he was told in April or May of 2005 by Devlin and Mogil—who did not testify—that Sorrentino was not eager to learn about the subject area of his assignment, and that he was not performing well.

¹Devlin also testified that his approval of DeNatale's positive performance evaluation of Sorrentino reflected his opinion of Sorrentino's performance after the reassignment, which took place subsequent to the rating period, which ended in May, 2005. Devlin stated that he "perhaps" treated Sorrentino's initial enthusiasm for his work with telecommunications while on the Utilities Team as "indicative of his annual performance," which he described as an "administrative oversight." (Tr. 550.)

On May 23, 2005, Sorrentino was reassigned to the Utilities Team. According to a memorandum from Devlin, in charge of the TRIP Section, that decision to reassign Sorrentino resulted from a review Devlin conducted earlier in May 2005 with Sorrentino's then-supervisor, Sergeant Arthur Mogil, which resulted in two findings, that "Detective Sorrentino struggles with his assigned area of responsibility (explosive effects mitigation)" and that he had "not documented any information relative to applications of technologies in the field of explosives mitigation." (City Exhibit 6) (the "June 21 Memorandum"). According to the June 21 Memorandum, Sorrentino's response to these criticisms was that he lacked interest and experience in the area of explosives. The June 21 Memorandum attributed the move to the Utilities Team on three factors: Sorrentino's lack of interest in his present assignment, his "poor documentation of his efforts" and a vacancy on the Utilities Team. Notably, the June Memorandum was not, on its face, contemporary with the transfer, but bears the date June 21, 2006. Devlin testified that the later date—which places the drafting of the memorandum after the filing of the instant improper practice petition—was a typographical error. Sorrentino denied having had the conversation with Devlin recorded in the June 21 Memorandum, and testified that Devlin simply informed him that he was being reassigned.

In July 2005, DeNatale prepared a recommendation that Sorrentino be promoted. Sorrentino himself delivered the recommendation to Cordes himself, instead of it being forwarded through the chain of command. Cordes also testified that it was "very unusual" for DeNatale to be recommending Sorrentino for promotion, and, in view of Sorrentino's performance history, stated that he felt that DeNatale had not evaluated him properly. DeNatale testified that it was not unusual for such recommendations not to be acted on.

In this time period, Sorrentino continued performing significant amounts of overtime. By

his own testimony, in July and August, he exceeded what he described as the 35 hour monthly overtime “cap.” As a result of this, Sorrentino testified, he was approached by Lieutenant Scadaro, who was at the time the “administrative lieutenant.” Scadaro approached Sorrentino in September 2005 and asked him to agree to work less overtime in September. He agreed, working only 28 hours of overtime that month. Cordes testified that he had, in the summer, noted Sorrentino’s working what he deemed excessive amounts of programmatic overtime.

After Sorrentino’s transfer to the Utilities Team, he was under DeNatale’s direct supervision until her transfer in October 2005 to the administrative component of CTD. Sergeant Larry Francis was brought in to replace her. During the period before her transfer, DeNatale noted that Sorrentino’s difficulties with case files continued. However, Sorrentino’s other supervisors testified that his work overall improved after the reassignment, at least through October 2005. Devlin testified that, between the reassignment and October 2005, “he was performing admirably.” (Tr. 551.)

After October 2005, according to his new supervisor Sergeant Larry Francis, while Sorrentino’s work overall was “good” his case files “could have been better.” (Tr. 420, 421). Francis testified that on two or three occasions he alerted Sorrentino to the need to improve his record of his activities maintained in his case files.

Between October 2005 and January 2006, Devlin testified, Sorrentino’s performance “started to taper off.” (Tr. 552.) By this, Devlin testified, he meant that Sorrentino’s case files again began to grow less detailed, and Sorrentino began to be distracted from his own primary assignment by work for other teams. Devlin formed this conclusion from his routine review of Sorrentino’s case folders. Devlin also testified that during this period, Sorrentino received excessive programmatic

overtime, as he determined in reviewing the Overtime Receiving Log. He further noted that Sorrentino was lacking in his ability to understand how to assess the security of a facility.

While a member of the Utilities Team, Sorrentino availed himself of several training opportunities, including an August 2005 Incident Response to Terrorist Bombs course, a five day training course conducted by the Federal Emergency Management Agency in October 2005, and a joint Regional Infrastructure Protection Course sponsored by the NYPD and the Department of Homeland Security. Devlin (who also attended the conference) commended Sorrentino for showing initiative in seeking to attend this particular conference.

On January 5, 2006, Devlin, along with Francis and the other four sergeants assigned at that time to the TRIPS section had a meeting at which they discussed the performance of TRIPS personnel. According to Devlin, he had been asked by Cordes to identify “low performers,” or employees who were lacking in the skills needed to properly perform their job functions. Cordes testified that he had instructed Devlin to make this assessment, pursuant to instructions from the commanding officer, Inspector O’Neill, who wanted an overall assessment of staff’s performance. In particular, O’Neill wanted to ascertain if staff were properly deployed within the division, in order to maximize the productivity of the Division. After much discussion, three individuals were identified as “low performers”: Sorrentino, another detective, and a police officer recently assigned to CTD.

When informed of the identity of the “low performers,” Cordes instructed Devlin to meet with them, and to find out if they were happy at CTD, to let them know if they were not, a transfer would be facilitated. Cordes explained that he gave this instruction because CTD “is very different than a typical NYPD assignment,” and that many employees had “transferred out because they didn’t

feel like they were a cop; they didn't like it." (Tr. 236.) If they wanted to remain at CTD, Cordes told Devlin, they should be offered mentoring and training. They should also be informed that their performance would be monitored by their lieutenant and sergeant for the next few months.

On January 6, according to Sorrentino, he was approached by Sergeant Francis and told that Devlin wanted to meet with him in the CTD library to discuss his future endeavors within CTD. Sorrentino testified that he met with Devlin and Francis "that day" and then modified the date to January 11. As he described it, Sorrentino was told by Devlin that:

all the bosses, the back room bosses, think that I'm a slacker and I'm not keeping up to par with my work and that I was to receive no more overtime in regards to the other responsibilities that I had within the command....I was to do no more overtime in regards to cleaning up the facility.

And I had told him that I'm not a quitter and if you're asking me to pick up my work, my research work in regard to these facilities, I would try to pick it up a little bit more for him being that I didn't know where he wanted me to take it from, that I was doing—that I thought I was doing a good job in regards to my facilities.

(Tr. 54-56.)

Sorrentino further testified that Devlin told him at this conference that Sorrentino would receive an forward-looking interim rating in six months and that if he did not improve that negative interim evaluation would be followed by an administrative transfer. Sorrentino further testified that this would "put a red flag on my folder" and adversely impact his career. When asked why he believed Devlin and Francis took these actions, he stated that "I think I would have to say that it had to do with overtime," explaining his working more overtime than permitted. (TR. 61.)

According to Devlin and Francis, a meeting like that described by Sorrentino took place on January 6. At that meeting, Devlin testified, he told Sorrentino that his work was lacking in that he

had been evaluated as possessing a poor understanding of the security survey process, lacked initiative in improving his performance, and had demonstrated poor case management with reference to documenting his efforts. According to Devlin, Sorrentino was “adversarial and defiant, in terms of saying that his work was up to standard.” (Tr. 569.) Sorrentino further stated that he was doing everything that his supervisors asked of him, to which they replied that he had to be “more self-initiated.” (*Id.*) Sorrentino expressed his belief that he was being singled out for his overtime usage.

Shortly after meeting with Cordes regarding the “low performers,” Devlin had a second meeting with him regarding Sorrentino, at which Cordes instructed him that “all of his overtime had nothing to do with his tour or TRIPS,” that limitations would be placed on Sorrentino’s overtime. Cordes testified that he told Devlin that Sorrentino was not approved for programmatic overtime, and that any operational overtime he was given must be approved by both Francis and Devlin, and that they would have to notify Cordes of such approval, to ensure that all overtime was related to his specific duties. Although the other two “low performers” were restricted to operational overtime only for one month, neither had been working significant amounts of programmatic overtime, Cordes testified, and so no further restriction was imposed on them.

Asked why that instruction was given, Devlin answered:

Apparently Inspector Cordes felt that I had not done due diligence in authorizing overtime in the past, being that Detective Sorrentino had an inordinate amount of programmatic overtime and he felt that perhaps he should do that from now on.

(Tr. 571.)

On January 11, according to Devlin and Francis, a second meeting between them and Sorrentino took place. At that meeting, Devlin and Francis told Sorrentino that he would be subject to an interim evaluation, and any overtime he worked had to be approved by Cordes. Devlin told

Sorrentino, he testified, that the interim evaluation would be for the period that he had worked under Francis, in order to “give him a fair representation of how his performance began slipping.” (Tr. 570.) Thereafter, Francis testified, Sorrentino’s work improved for a two week period; his case files became more detailed, and he seemed to be more engaged. However, after this brief period, Sorrentino’s case files began to be only occasionally updated, and the entries less detailed. In this period, Francis met with Sorrentino approximately once a week to guide Sorrentino and discuss his concerns, such as the fall-off in Sorrentino’s case files after the upswing in January.

On January 19, Sorrentino and Francis met again, after Sorrentino had made a request for operational overtime and it had been denied. According to Sorrentino, Francis advised him to go to the Union; according to Francis, Sorrentino told him that he intended to go to the Union and complain about the restriction on his ability to earn overtime. On or about January 23, Sorrentino contacted Union alternate delegate Gus Cechini and met with Treasurer Paul DiGiacomo to discuss the overtime restrictions imposed on him on January 11.

DiGiacomo and Cordes both testified that they discussed Sorrentino in January, 2006. According to DiGiacomo, Cordes called him after Sorrentino had complained to him, and DiGiacomo tried to resolve the situation of treatment of detectives in general, who had been complaining and asked Cordes to “tone it down a little.” (Tr. 135.) Cordes replied that Sorrentino was “a piece of shit worker, and that these detectives were sitting in a tub of butter, meaning it was a very easy detail type thing.” (Tr. 135-136.)

Cordes’s recollection of the conversation was different. According to his testimony, Cordes had, at the request of Union delegate Rob Conte (through Inspector O’Neill), called to facilitate Sorrentino’s transfer to the Detective Squad at Brooklyn South Homicide, and had been told by

Lieutenant Cassazza that Sorrentino had a reputation as a “dump job,” that is, an unproductive member during an investigation who would only look to make overtime. Cordes denied having described Sorrentino in the earthy language claimed by DiGiacomo, and suggested that DiGiacomo had misattributed Cassazza’s sentiment to him. Cordes further denied having used the expression “tub of butter” to describe CTD, although he was familiar with the expression.

According to Sorrentino, he received no overtime—whether operational or programmatic—from January 11, 2006 through his departure from CTD in May. Cordes confirmed that he received no notification of requested overtime for Sorrentino of either kind subsequent to his meetings with Devlin and Francis. Sorrentino likewise testified, as did DeNatale, that the supervisors at CTD treated Sorrentino in a hostile or cold manner from this time through his departure. DeNatale, who testified that she was aware of Sorrentino’s not receiving any overtime in this period, found a slot for February 9, 2006 to work the Field Operations Desk, and asked Sorrentino whether if he would work that overtime if she could obtain it for him. According to DeNatale, Sorrentino replied “yes, I would love to,” and she confirmed with him that she was required to go to Cordes to authorize the overtime. As Sorrentino testified, the overtime work DeNatale offered him was maintenance and paperwork, and did not involve his assignment to the Utilities Team.

DeNatale testified that she went to see Cordes, who could not stop to speak with her, and asked him in the hall if she could give the opening at the Field Operations Desk to Sorrentino. Cordes replied, she testified, “Anyone else but Detective Sorrentino.” According to DeNatale, when she then asked why Sorrentino could not have the assignment, Cordes replied, “he went to the union.” (Tr. 373.) DeNatale testified that she then informed Cordes that she was a delegate for the

Sergeants Benevolent Association, and Cordes walked away from her. DeNatale reported the matter to Union delegate Conte. Cordes denied making this remark to Denatale, although he admitted discussing her request for Sorrentino to take the overtime shift. Cordes then stated that he was unsure if he even knew if Sorrentino had gone to the Union by this time, only to acknowledge that this conversation took place after his discussion with DiGiacomo. In March, a similar incident occurred in which Cordes called Cechni a “double agent” referring to the perceived conflict between his role as a Union delegate and a member of CTD.

On February 20, Sorrentino’s “regular days off,” or RDOs, were changed from Saturday and Sunday to Sunday and Monday. As far as Sorrentino was aware, no similar change was made to the RDOs of any other member of CTD at that time. However, testimony for the City established that at least two other officers did receive similar schedule changes several days prior to this change. One effect of this change was that Francis now supervised Sorrentino all five weekly workdays, instead of four. Francis attributed this change to Sorrentino’s low performance.

On or about February 23, Sorrentino received a copy of an interim evaluation conducted by Francis and approved by Devlin for the period from October 24, 2005 through January 10, 2006. (City Exhibit 4). Francis testified that this interim evaluation was the first such that he had ever prepared. In the evaluation, Sorrentino’s scores in the various categories are either “3” or “0” (for categories that are not applicable). Francis noted repeatedly on cross-examination that these rankings were “satisfactory,” but then noted that he gave Sorrentino straight “3s” in order to “put a fire under him” and induce him to “produce more.” Francis also testified that Sorrentino was “average” and denied that he was incompetent.

On cross-examination, Francis vacillated on the meaning of these scores, saying that

Sorrentino's report writing was sub-standard, and thus rated a "3," while his ethics and integrity which were satisfactory likewise merited a "3." Francis simply failed to answer when asked if Sorrentino's "3" in professional responsibility was the lowest score in that area that Francis had ever awarded. Francis did admit that Sorrentino's "3" in memorization skills were the lowest ever recorded at CTD. Francis testified that Sorrentino's "3" in attire stemmed from his wearing sweat suits, and stated that Sorrentino also wore jeans and t-shirts, which were not the CTD uniform. Francis equivocated as to whether other employees dressed in a similar fashion, first stating "I guess so" which he then changed to "no." (Tr. 463.) Francis repeatedly could not point to specific changes in Sorrentino's performance in these various categories between DeNatale's evaluation and the interim evaluation, nor between Sorrentino and other employees.

Notably, Francis testified that Sorrentino's work in the evaluation period was "great at the time" except for his failure to document those efforts. (Tr. 465.) Francis immediately backed away from that assessment, referring to Sorrentino having "a lot of problems with case folders." (Tr. 466.) Pressed for further specification as to whether Sorrentino's work was "good" or merely "standard," Francis again stated that Sorrentino "did a good job at what he did operationally wise. Case folder wise, his work was below standard." (*Id.*)

Francis's specific comments on the interim performance evaluation were scrutinized on cross-examination as well; although he wrote that Sorrentino had "strained relationships with peers," he testified that he meant by that Devlin and Cordes. Francis then added himself to the list of those with whom Sorrentino had a strained relationship, although he had a mere five minutes before described him as a "great guy" who did "good work." (Tr. 502, 498.) Francis acknowledged that he had commented adversely on Sorrentino's interviewing skills, but that Sorrentino had received

a letter of commendation from AT & T for his work with them, and that other letters had been received commending him.

Moreover, Francis testified, certain of the adverse comments were added not by him, but by Devlin. These comments included adding that Sorrentino “had difficulty overcoming organizational blocks,” and that his improved performance was at “sporadic and irregular intervals.” Devlin agreed that he had recommended that these changes be made.

Sorrentino’s appeal of the interim evaluation, lodged on March 2, 2006, was unsuccessful. Also on March 2, Sorrentino testified, he encountered Cordes in a men’s room at CTD, and without any prior words exchanged between them, Cordes, looking at Sorrentino in the mirror, called him an “asshole.” (Tr. 85.) Cordes said nothing further; Sorrentino did not reply. Sorrentino notified Francis, DeNatale, Conte, and Lieutenant Korr, the Integrity Control Officer. Cordes denied the incident.

According to Devlin and Francis, on March 14, they reviewed Sorrentino’s case files again. They found, as memorialized by Devlin in two separate memoranda, “that Detective Sorrentino had not documented any activity (meeting, phone call, site visit, etc.) since January 26, 2006. When asked for an explanation, Det. Sorrentino could not explain his lack of activity.” (City Ex. 5, 10.) Sorrentino did not contradict or rebut this testimony, nor was any evidence to the contrary adduced.

On March 14, 2006, Sorrentino found that his computer no longer had Internet access. After a co-worker volunteered to find out what happened to his Internet access, Sorrentino “sat around for about half an hour by my desk making believe like I was doing something” and then was informed that his Internet privileges had been removed under Cordes’s instructions.

Cordes, when asked, stated that the decision to remove Sorrentino’s Internet access was

Devlin's, and that Cordes had told Devlin that "it was in his discretion, if it was his opinion that it was not being properly used, to take it away." (Tr. 278-279.) While he at one point declined to characterize such removal as "discipline," Cordes also stated that if "the Internet is being used for improper purposes or inappropriately in violation of departmental guidelines, then you would – someone could possibly be disciplined for that or have their access restricted." (Tr. 166.)

As Cordes and Devlin both testified, Devlin determined that Sorrentino was frequently going online to view Yankee memorabilia sites, and Cordes agreed that if Sorrentino was using the Internet for non-departmental purposes, his Internet access should be revoked. Cordes defined proper usage of the departmental access to the Internet as for departmental work, and unequivocally agreed that use of the Internet for fantasy football, selling of one's home or other personal use constituted use for improper purpose. Cordes testified candidly that he himself, as well as many others at CTD, had used the Internet for personal interests, that is, for improper purposes. Francis, however, corroborated Cordes's account that Sorrentino had his Internet privileges revoked for "abuse of the Internet." (Tr. 519.) Devlin and Francis both admitted to use of the Internet for personal reasons, including checking personal e-mail and reading various periodicals. Devlin insisted that the only ground for the removal was the lack of business related usage, and not the personal usage. Devlin's memorandum to this effect states that "[i]t was determined that, due to Det. Sorrentino's lack of documentation and unwillingness to make the slightest attempt at improving his performance, that Detective Sorrentino's Internet service be restricted from his assigned work space." (City Ex. 10.)

Also on March 14, Sorrentino's departmental cell phone was taken from him. According to Cordes, such removal could be done "as part of discipline." (Tr. 167.) Francis was unable to identify a reason why the cell phone was removed. Devlin testified that the cell phone was

reassigned because he thought that another member of CTD could make more productive use of it, not because Sorrentino was making inappropriate or unauthorized phone calls. His memorandum regarding revocation of the cell phone states that “[i]t was determined that, due to Det. Sorrentino’s lack of documentation and unwillingness to make the slightest attempt at improving his performance, that Detective Sorrentino’s assigned Department cell phone be removed and reassigned to another, more productive and active member of TRIPS.” (City Ex. 10.)

Also on March 14, 2006, Sorrentino was assigned to a “Perimeter Security Post,” which both the City and the Union aptly characterized as a “foot post.” In this post, Sorrentino was required to walk the perimeter between the dead end street and the parking lot at CTD’s location, an unmarked building. A small booth had been occupied by a predecessor intermittently, and, according to DeNatale, one of her administrative staff had been assigned this post as a punishment because the chief saw her driving in her personal car one day. The offender, who had been rendered visibly upset by this punishment, was allowed back in after one day. Sorrentino himself was aware of another individual who had been assigned a similar post after a conflict with a supervisor.

Francis did not think that a detective of Sorrentino’s experience and skills belonged on the foot post, but then characterized it as an appropriate assignment. Moreover, as noted above, Francis testified that in this period Sorrentino’s work was good, with the exception of his case folders, and stated that his understanding of Sorrentino’s assignment was that Sorrentino was “waiting for his transfer.” (Tr. 480.) When reminded of his prior testimony that he had spoken to Sorrentino to encourage him that he could get back inside, Francis first admitted “I think I am speaking too fast,” and then described the question as “a little above my pay grade,” and stated that the pending transfer was not the reason for the assignment to the foot post. (Tr. 480-481.) He then stated that “the post

had to be manned.” (Tr. 481.) Confronted with his prior testimony a second time, he amended his answer, stating that the post “can be manned.” (Tr. 482.) Francis was then asked if manning that post was necessary for security reasons; upon answering that it was, he then admitted that it had only been intermittently staffed, was not staffed when Sorrentino was not there, and the area was subject to camera surveillance in any event.

Despite these wavering explanations, Francis persisted in saying that assignment to the foot post was not punitive in nature. Francis acknowledged that of the three “low performers” only Sorrentino had been assigned to a foot post, deprived of cell phone privileges and of Internet access. Cechini corroborated this testimony, and went further, stating that no other CTD employee had ever been subject to such restrictions, and the loss of all overtime. Cordes, like Francis, testified that walking a uniform foot post at CTD was not punitive, but was part of one’s assignment. As memorialized by Devlin, however, this assignment was “due to Det. Sorrentino’s lack of documentation and unwillingness to make the slightest attempt at improving his performance.” (City Ex. 5.)

In May 2006, Sorrentino was transferred out of CTD to the Detective Squad at the 66th Precinct in Brooklyn.

POSITIONS OF THE PARTIES

Union’s Position

The Union argues that the restriction of Sorrentino’s overtime, the change of his RDO from weekends, the interim performance evaluation, his placement on a foot patrol post and removal of his department cell phone and Internet privileges would not have occurred but for the

exercise of his rights guaranteed under § 12-306(a) (1) and (3).² These actions, taken after Sorrentino contacted his Union, demonstrate anti-union animus on the part of Cordes, Devlin and the NYPD.

Moreover, Cordes's statement to DeNatale, and his similar statement to Cechini, provide further direct evidence that Sorrentino was punished because of his resort to his Union and to further chill other members from having recourse to it.

Additionally, the Union argues, the City has failed to establish any legitimate business reason to support the challenged adverse employment acts. Thus, the interim performance evaluation purports to describe a sharp drop from Sorrentino's prior performance, but when pressed, no such drop could be described by the rater, Sergeant Francis, in most of the categories. Indeed, Francis admitted to issuing such low scores deliberately, allegedly to "light a fire" under Sorrentino, even as to areas where his performance was unobjectionable.

The Union argues that the "misuse" of the Internet of which Sorrentino was accused was endemic at CTD, and that even Cordes and Devlin admitted that they were guilty of similar "misuse." Similarly, with respect to the removal of Sorrentino's cell phone, no reason other than vindictiveness can be gleaned from the record. The foot post was known to be punitive in nature, and a supervisor, Sergeant DeNatale came forward and testified that it was so used at CTD.

² NYCCBL § 12-306(a) provides, in pertinent part:

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

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

Accordingly, the Union claims, it has carried its burden of proof and the improper practice charge should be sustained.

City's Position

The City contends that most of the alleged improper practices in this case antedate the sole instance of protected activity, Sorrentino's seeking the assistance of his Union on January 23, 2006. In view of this fact, the City argues, those acts cannot be held to have been motivated by anti-union animus. Additionally, the City asserts that the assignment of overtime is a management right, and thus cannot be the basis for an improper practice claim, pursuant to NYCCBL § 12-307(b).³

The City further contends that the subsequent acts asserted to have constituted retaliation have not been shown to constitute violations of NYCCBL § 12-306(a)(3). The City argues that Petitioner failed to prove a *prima facie* claim against NYPD for interference with Petitioner's rights protected by NYCCBL § 12-305, or for discrimination and retaliation for union activity. Rather, the subsequent acts of which the Union complains were the result of, or consistent with, the chain of events set in motion well before the protected activity took place, and therefore the Union has failed to establish the existence of anti-union animus.

Even were the Union deemed to have established a *prima facie* claim against NYPD for interference, discrimination and/or retaliation, NYPD had a legitimate business reason for each act it took with respect to Sorrentino, and therefore cannot be deemed to have committed an improper practice, pursuant to NYCCBL § 12-307(b).

³ NYCCBL § 12-307(b) provides, in pertinent part:

It is the right of the city, or any other public employer, acting through its agencies, . . . to maintain the efficiency of governmental operations, . . . and exercise complete control and discretion over its organization

DISCUSSION

In this case, the key question is whether the various adverse employment actions complained of by Sorrentino were taken in retaliation for his protected activity. Because some of the acts alleged to have been retaliatory in nature occurred and others were pursuant to determinations made, prior to any protected activity, we find that such determinations cannot form the basis for an improper practice charge. With respect to the complained of actions that were independent of such prior determinations, we find that the Union has established its case as to all but the change in RDO, which the City has established a legitimate business reason for. Accordingly, we dismiss the petition in part and grant the petition in part.

As has been the case for two decades, in resolving a claim that actions constitute invidious discrimination proscribed by the NYCCBL, this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, Decision No. B-51-87.

To establish a cause of action under this test, petitioners must demonstrate that:

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

Collella, Decision B-27-2007 at 53; *quoting Bowman*, Decision No. B-51-87 at 18-19; *see also Fabbicante*, Decision No. B-30-2003 at 30-31 (citing additional cases).

Where a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer "may attempt to refute the petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action

complained of even in the absence of protected conduct.” *Howe*, Decision B-19-2007 at 11, *citing Local 237, City Employees Union*, Decision No. B-24-2006.

In the instant case, Sorrentino told Francis on January 19, 2006 that he intended to seek the assistance of the Union in remedying his claim that he was being inappropriately denied overtime and actually sought such assistance from his Union on January 23. The City has admitted receiving knowledge of this action, and has further admitted that it constitutes protected activity. Therefore, the first prong of the *Bowman-Salamanca* test has been established. *See, e.g., Howe*, Decision B-32-2006 at 21; *Patrolmen’s Benevolent Ass’n*, Decision B-16-2007.

However, here a significant component of the Union’s *prima facie* case has not been established. Many of the adverse actions cannot be persuasively shown to have been retaliatory in nature simply because they *antedated* the protected activity, let alone any knowledge on the part of management thereof. *See, e.g., City Empl. Union, Local 237*, Decision B-12-2002 at 8 (no *prima facie* case made out where management’s knowledge of protected activity could not be shown to have reached decision-maker prior to allegedly retaliatory act); *Wilson v. New York City Housing Auth.*, 2007 U.S. Dist. LEXIS 25258 at *30 (S.D.N.Y. April 2, 2007) (“Where the decision to take adverse employment action is reached prior to a plaintiff’s protected activity, the causal connection necessary to link the adverse action to that protected activity is lacking”). Thus, none of the actions prior to, at a minimum, January 19, 2006 can support any inference of anti-union animus, and thus cannot be used to support a claimed violation of the NYCCBL.

As a result, we find that the restrictions on Sorrentino’s ability to earn programmatic overtime, the decision that he be subject to an interim evaluation, and management’s disregard of DeNatale’s recommendation that he be promoted, have not been shown to have any causal

connection to Sorrentino's protected activity.

As to the acts taking place subsequent to Sorrentino's decision to seek the assistance of his Union, we find that management became aware of that decision by January 19, the date on which, as both Francis and Sorrentino testified, Sorrentino made Francis aware of his decision to seek such assistance, whether or not Francis in fact advised him to do so. Thus, the adverse actions testified to have taken place subsequent to January 19 must be scrutinized to determine whether they have been sufficiently linked to anti-union animus.

In establishing a *prima facie* case, we have repeatedly held that:

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.

Collella, Decision B-27-2007 at 54.

In the instant case, the decision to provide Sorrentino with an interim evaluation was made no later than January 11, and so, as stated above, cannot be shown to have been the result of anti-union animus. We therefore disregard the testimony that such interim performance evaluations generally only were done for candidates for promotion, and not to other admitted "low performers." However, the decision to conduct an interim evaluation is distinct from the contents of that appraisal,

and, as we have repeatedly held, where the negative contents of a performance appraisal are shown to be the result of anti-union animus, they may form the basis of a remediable improper practice claim. *See, e.g., District Council 37, L. 376*, Decision No. B-12-2006 at 16-17; *District Council 37*, Decision No. B-24-2007 at 8. The Union has established that Sorrentino received the evaluation in February, 2006. Here, as in *Collella*, the “timing of events is suspicious,” in that the evaluation was rendered a month after Sorrentino informed Francis that he was seeking Union assistance. *Id.* at 54.

Moreover, the contents of the evaluation were radically different from that performed by DeNatale in July, and approved by Devlin, who also approved the starkly more harsh interim evaluation. Francis’s equivocations and evasive testimony with respect to the lower rankings in the interim evaluation in various specific areas in which no discernible change could be pointed to between the evaluations, and his eventual concession that, other than his paperwork, Sorrentino was a “great guy” doing “good work” are highly indicative of a sense of wrongdoing on Francis’s part. This indirect evidence further gains strength from the fact that Francis admitted that he had never provided so stringent an evaluation across the board to any other employee at CTD. Here, as in *District Council 37, L. 376*, Decision No. B-12-2006 at 16-17, evidence of unprecedented across-the-board ratings that are only justified in relation to one or two performance areas, and unconvincing explanations for such a rating, establishes a *prima facie* case.

Similarly, Cordes’s rejection of DeNatale’s request to assign Sorrentino overtime on February 9 is likewise close in time to the time by which Cordes himself admitted discussing Sorrentino’s status with DiGiacomo. Additionally, DeNatale’s credible testimony linking the denial of her request that Sorrentino be assigned overtime to his protected activity, combined with Cordes’s “double agent” remark to Cechini, provides direct evidence of anti-union animus. DeNatale’s

testimony was especially credible in that she acknowledged Sorrentino's difficulties with case files, and also testified that there was nothing unusual in a supervisor's neither commenting nor acting upon an unsolicited request for promotion. Additionally, DeNatale is a disinterested witness, as she was on retirement leave at the time of the hearing, and her testimony gained some indirect support from that of Cechini. Accordingly, we credit her testimony over Cordes's denial. Combined with the closeness in time between protected activity and allegedly retaliatory fact, we find this testimony establishes a *prima facie* case to have been established.

The change of Sorrentino's RDOs was likewise unusual, according to his unrebutted testimony, and followed a bare eleven days after the denial of overtime, which was accompanied by an explicit statement of anti-union animus. Viewed in the context of these events, we find that sufficient evidence has been adduced to create a *prima facie* case that this alteration was a further step in a campaign of retaliation against Sorrentino.

The events of March 14, in which Sorrentino suffered (1) the loss of Internet access; (2) the taking of his departmentally issued cell phone; and (3) the assignment of Sorrentino to a foot post which for the bulk of the time is unmanned are likewise suspicious, in view of their simultaneous occurrence, and their place in a series of adverse employment actions by CTD from February on. The unrebutted testimony that the assignment to the foot post had previously been used for punitive purposes, the fact that it was normally unmanned, and the redundant nature of the assignment (as the area to be patrolled was under video surveillance) likewise provide sufficient additional causal linkage to make out a *prima facie* case. Likewise, the deprivation of Sorrentino of a cell phone and Internet access on the same day suggests a continued course of punitive behavior.

Where, as here, a petitioner alleges sufficient facts concerning the first two elements of the

Salamanca-Bowman test to make out a *prima facie* case, the employer may choose to attempt to refute the petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *Howe*, Decision B-32-2006 at 20-21, citing *Local 237, City Employees Union*, Decision No. B-24-2006. In the instant case, the City has endeavored to do both.

With respect to the denial of DeNatale's request to Cordes that Sorrentino be permitted to work programmatic overtime on February 9, the City has pointed out that Sorrentino's programmatic overtime had been restricted just weeks prior to his seeking the assistance of his Union. Moreover, even the other "low performers" who did not have Sorrentino's history of excessive programmatic overtime had similarly had their programmatic overtime restricted for approximately a month. Therefore, even though Cordes's response to DeNatale clearly establishes his anti-union animus, the refusal of programmatic overtime to Sorrentino within one month of his restriction from such overtime was entirely consistent with, and taken pursuant to, a legitimate business decision that antedated the protected activity. Accordingly, the City has succeeded in rebutting the causation prong of the Union's *prima faie* case, and the Union has failed to establish that this act constituted an improper practice. As no other request for operational overtime on Sorrentino's part can be gleaned from the record, no such restriction can be found to exist, whether tied to Sorrentino's protected activity or not.

We reach a similar conclusion as to the change in RDO. We note that the City was able to establish other, contemporaneous shift changes of the same kind. Moreover, Francis testified that the result of the change was to bring Sorrentino under Francis's supervision for all five work days each week. In view of Sorrentino's difficulties, and of the fact that Sorrentino's evaluation by

DeNatale had led to glossing over his difficulties, in Devlin's perspective, we find that this reason persuasive and sufficient to rebut the Union's *prima facie* showing.

We reach a different result, however, as to the contents of the interim performance evaluation prepared by Francis and approved by Devlin. Francis testified that his purpose in rating Sorrentino "satisfactory" across the Board was "to light a fire" under him, and Devlin has testified that his comments were intended to capture Sorrentino's deficiencies of poorly memorializing his work, and that the purpose of the interim evaluation was to give Sorrentino an understanding of what he had done wrong in his first months under Francis's supervision. Certainly, each of the supervisors who testified – Cordes, Devlin, Francis and DeNatale – agreed that Sorrentino did not appropriately memorialize his work. Nor was the testimony of Devlin and Francis that, as of March, his case folders recorded no activity rebutted. In short, the credible evidence establishes that Sorrentino did not comply with certain legitimate performance requirements of the supervisors of CTD.

However, the contents of the interim performance evaluation go well beyond the demonstrable defects in Sorrentino's performance, faulting him for behavior that Francis conceded on cross-examination was unobjectionable, and as to which he could not articulate any distinction between Sorrentino and other members who scored higher than the across-the-board "3s" Francis assigned Sorrentino. Moreover, Francis ranking of Sorrentino varied dramatically from his testimony on cross-examination that Sorrentino was "a great guy doing good work."

We are concerned by Francis's inability to articulate grounds for the lower numerical scores across the board other than a desire to "light a fire" under Sorrentino, which suggest that Francis did not individually consider the areas as to which he was grading Sorrentino. Moreover, the proximity in timing to Sorrentino's resort to the Union for aid, Cordes's statement to DeNatale that Sorrentino

should be penalized for his going to the Union, and Francis's radically revised, across the board lower scores in areas, such as integrity, unrelated to Sorrentino's established difficulties in keeping records, is highly probative that the scores that anti-union animus caused, at a minimum, the lower numerical scores on the interim evaluation. Where, 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." *Collella*, Decision B-27-2007 at 61; *quoting 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). As we have previously held, where performance evaluations are used as a method of punishing protected activity, an improper practice under the NYCCBL has been established. *District Council 37, L. 376*, Decision No. B-12-2006 at 16-17; *District Council 37*, Decision No. B-24-2007 at 8. We find that such is the case here.

With respect to the foot post, the deprivation of Internet access, and the revocation of Sorrentino's cell phone, the City has not only failed to rebut the showing of anti-union animus; the testimony of the various managerial personnel in question establishes the punitive nature of these acts. DeNatale's testimony that the foot post assignment had previously been used as a punishment is credible, and persuasive. Francis's admission that no other employees were so deprived, and his evident discomfort with Sorrentino's assignment, for which he could find no operational or training reason, as well as Cordes's evasive testimony seeking to deny that there was a punitive element, at a minimum, to these decisions, make clear that their testimony that such an assignment and such limitation of access were standard and just "part of the assignment" are spurious.

In view of the fact that Sorrentino was in the process of transferring out of CTD, we reject Devlin's proffered explanation that he was trying to secure compliance with the legitimate business

requirement that Sorrentino record his efforts. Taken in conjunction with Francis's shifting and contradictory testimony, and the lack of candor in Cordes's testimony, we find that the procedural irregularities, temporal proximity to Cordes's statement that Sorrentino's protected activity warranted disparate treatment, and unconvincing justifications offered by the City's witnesses support a finding of pretext. *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.")

As a remedy for the two violations of NYCCBL § 12-306(a)(1) and (3), we order that NYPD supervisors cease and desist from retaliating against Sorrentino and other unit members for protected activity. We order that NYPD post the attached notice to employees on all bulletin boards where notices to employees are customarily posted..

ORDER

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

ORDERED, that the improper practice petition, docketed as BCB-2553-06, filed by the Detectives Endowment Association and Vincent Sorrentino be, and the same hereby are, granted as to claims that the City violated NYCCBL § 12-306(a)(1) and (3) by assigning improperly low scores in the interim performance evaluation, denying him access to Internet service and removing his department-issued cell phone and making him walk a foot patrol in retaliation for his protected activity, and dismissed to all other claims;

ORDERED, that NYPD expunge the interim performance evaluation issued on or about February 23, 2006;

that NYPD cease and desist from retaliation against Sorrentino and other staff at CTD in retaliation for union activity; and

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

Dated: New York, New York
December 4, 2007

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

GEORGE NICOLAU
MEMBER

GABRIELLE SEMEL
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
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 *Detectives Endowment Association*,
Decision No. B-40-2007 (Docket No. BCB-2553-06):**

**The New York City Police Department committed an improper practice when,
in retaliation for union activity, it improperly lowered Vincent Sorrentino's scores in an
interim evaluation issued on or about February 23, 2006, and on or about March 14, 2006:
revoked his internet access and departmental cell phone, and assigned him to walk a foot
patrol post.**

It is hereby:

ORDERED, that the improper practice petition, docketed as BCB-2553-06 filed by the Detectives Endowment Association is granted as to claims that the City violated NYCCBL § 12-306(a)(1) and (3) by improperly lowering Vincent Sorrentino's scores in an interim evaluation issued on or about February 23, 2006, and on or about March 14, 2006, revoking his internet access and departmental cell phone, and assigning him to walk a foot patrol post and dismissed to all other claims;

ORDERED, that the interim performance evaluation of Vincent Sorrentino issued on or about February 23, 2006 be expunged from Sorrentino's personnel file and/or any other departmental file or records concerning Sorrentino; and

ORDERED, that NYPD cease and desist from retaliating against Sorrentino and any other CTD employee for protected union activity.

New York City Police 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.