UFA, 8 OCB2d 3 (BCB 2015)

(IP) (Docket No. BCB-3028-12 & BCB-3057-12)

Summary of Decision: The UFA alleged that the FDNY violated NYCCBL § 12-306(a)(1) and (3) when an FDNY battalion chief directed the reassignment, on two separate occasions, of Union members on "light duty" status. The UFA asserted that these reassignments were retaliatory because the members availed themselves of the light duty benefit, consulted with Union officials, and filed an improper practice petition against Respondents. The UFA further alleged that the FDNY chief interfered with employee rights by disparaging the Union and attempting to negotiate with an individual member. Respondents argued that the assignment of light duty placements is a managerial right, being on light duty status is not protected activity, and there is no causal link between the alleged protected activities and the reassignments. Respondents contended that, even if the UFA established a *prima facie* case, the FDNY had legitimate business reasons for the transfers and the UFA has failed to establish an independent violation of NYCCBL § 12-306(a)(1). The Board held that the first reassignment of Firefighters was not retaliatory but the second reassignment violated NYCCBL § 12-306(a)(3). It further held that the FDNY battalion chief's statements were inherently destructive of employee rights. Accordingly, the petitions were granted, in part, and denied, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

The Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO ("UFA" or "Union")

filed verified improper practice petitions on July 2, 2012, and November 28, 2012, against the City of New York ("City") and the New York City Fire Department ("FDNY" or "Department").[1] Petitioners allege that the FDNY violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when an FDNY battalion chief directed the reassignment, on two separate occasions, of Union members on "light duty" status. The UFA asserts that these actions were taken in retaliation for the members availing themselves of the light duty benefit, consulting with Union officials after the first set of transfers, and for the Union's filing of petitions against Respondents. The UFA further alleges that the FDNY battalion chief interfered with employee rights by disparaging the Union and attempting to negotiate with an individual Union member.[2] Respondents argue that the UFA has failed to state a *prima facie* case because assignment of light duty placements is a managerial right, being on light duty status is not protected activity, and the UFA has not demonstrated a causal link between the alleged protected activities and the reassignments. Respondents contend that, even if the UFA establishes a *prima facie* case, the FDNY had legitimate business reasons for the reassignments. Respondents further assert that the UFA has failed to establish an independent violation of NYCCBL § 12-306(a)(1). The Board holds that the first reassignment of Firefighters was not retaliatory but the second reassignment violated NYCCBL § 12-306(a)(3). It further holds that the FDNY battalion chief's statements were inherently destructive of employee rights. Accordingly, the petitions were granted, in part, and denied, in part.

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[1] The petitions were consolidated for purposes of the hearing and this Decision and Order.

[2] The UFA also alleged a violation of NYCCBL § 12-306(a)(4) but withdrew the claim after the hearings concluded.

BACKGROUND

The Trial Examiner held a hearing over eight days and found that the totality of the record established the following relevant facts.

The UFA represents FDNY employees in the Firefighter title. The UFA and the FDNY are parties to an August 1, 2008 to July 31, 2010 collective bargaining agreement, which is currently in *status quo* pursuant to NYCCBL § 12-311(d) ("Agreement"). The FDNY is comprised of divisions, which are broken down into smaller branches called battalions. Each division consists of between five and eight battalions. Battalions are further broken down into firehouses including, but not limited to, engine companies and ladder companies. This matter primarily involves certain firefighters assigned to Ladder Company 39 ("Ladder 39"), which is located in the Bronx. Ladder 39 is part of the 15th Battalion and the 7th Division.

FDNY Order PA/ID-2007 memorializes the FDNY's light duty policy ("Light Duty Policy"). The Light Duty Policy states, in pertinent part: "This Light Duty Policy is promulgated in order to better manage, direct and assist those members who, due to injury or illness, are unable to perform their full duty functions of firefighting or fire investigation, but are able to perform other tasks." (City Ex. 1) It provides that the:

> Standard Light Duty work schedule is five eight-hour tours per week. Variations from the standard light duty schedule will be permitted for personnel in some light duty positions where they will better meet the needs of the Department. Bureau heads may forward written requests for such variations to the Chief of Department for consideration.

(*Id.*) The Light Duty Policy further provides that the FDNY Bureau of Personnel's Light Duty Desk ("LDD") is responsible for coordinating and controlling light duty assignments. According to the Light Duty Policy, assignments are made by "determining the needs of each Bureau, Division and Unit, and matching these needs with the skills and abilities of the light duty member,

as well as the expected duration of the light duty status." (*Id.*) The Light Duty Policy states that:

> Roster Staffing Overtime (RSOT) for light duty firefighters shall be administered as per PA/ID 1-90. Light duty personnel may be permitted to work overtime (other than RSOT) only with written authorization by the Chief of Department. The officer/supervisor requesting approval for light duty overtime shall forward written request to the Chief of Department stating circumstance(s) that necessitate such overtime. Approval may be requested for positions/titles rather than for individual occurrences.

(*Id.*)[3] During the hearing, however, Union witnesses provided unrebutted testimony that certain Light Duty Policy guidelines are routinely disregarded. For example, the Ladder 39 Firefighters testified that light duty assignments are sought and granted without contact with the LDD. More often, they are obtained by contacting an FDNY official who can offer the Firefighter a light duty spot. In addition, notwithstanding that the standard light duty work schedule is five eight-hour tours per week, it is undisputed that Firefighters on light duty status commonly work 24-hour tours of duty ("24-hour mutuals" or "24s") in lieu of the standard light duty work schedule. When a Firefighter works a 24-hour mutual, it means that he is on duty for a 24-hour tour and is off duty for the next 72 hours.[4]

The March 9, 2012 Lifts

Chief Keith Cartica has been the Commander of the 15th Battalion, its highest ranking officer, for approximately 11 years. He is responsible for the operational, administrative, and

[3] PA/ID 1-90, the FDNY's Roster Staffing Scheduled Overtime policy, provides that "Roster Staffing Overtime (RSOT) is prescheduled to provide the opportunity for **each** Firefighter to earn 96 hours of overtime in each calendar year." (Resp. Ex. 2) (emph. in original)

[4] We note that in *UFOA*, 1 OCB2d 17 (BCB 2008), the Board determined that, notwithstanding any written FDNY policies, there existed a practice of "assigning at least some, and perhaps many, light duty Fire Officers to schedules other than five days per week, eight hours per day." *Id.* at 13-14. This finding was based on the FDNY's admission that its supervisors continued to assign light duty Firefighters and Fire Officers to schedules "based on members' personal convenience." *Id.* at 13.

personnel issues within the Battalion, including the overall staffing of the Battalion's fire units and managing overtime assignments and leave usage. As part of his job duties, Chief Cartica also ensures that all of his units are staffed with the minimum manpower to start their respective tours of duty. The minimum manpower required for a ladder company and an engine company is five firefighters and four firefighters, respectively. Chief Cartica receives and reviews detailed notifications documenting approximately 25 aspects of daily administrative and operations issues in the 15th Battalion which enable him to determine which Firefighters within the Battalion are on light duty status and where they are assigned. Chief Cartica routinely visits the ladder and engine companies in his Battalion during every tour.

In late February or early March of 2012, Chief Cartica reviewed Ladder 39's weekly rosters and noticed that at least half of its members were "off the roster." Chief Cartica explained that a Firefighter could be taken off the roster for reasons such as: medical leave, vacation, detail to a different unit, light duty status, or emergency leave. He testified that, during that time period, at least twelve Firefighters assigned to Ladder 39 were off the roster and nine of them were on light duty status. The collective number of Ladder 39 Firefighters who were off the roster created a "critical staffing issue" because they were "not able to assist in the daily staffing needs of the company," according to Chief Cartica. (Tr. 621) He testified that, in reviewing the Ladder 39 rosters, he also noticed that light duty Firefighters were clustered at one location, the Fleet Services Bureau, located at Paidge Avenue in Brooklyn ("Fleet Services" or "Paidge Avenue"). He conceded that he was unaware of the number and location of light duty Firefighters from other companies within the 15th Battalion during the same time period.

Chief Cartica testified that he spoke with Assistant Chief of Operations James Manahan in late February or early March 2012 about Ladder 39's staffing issues, including the fact that there

was a "clustering" of a number of its Firefighters on light duty status at the Paidge Avenue location. (Tr. 629) A few days later, Chief Cartica received a call from FDNY Chief of Personnel Michael Gala, informing Chief Cartica that he had spoken with Asst. Chief Manahan about Ladder 39's staffing issues. Chief Cartica testified that Chief Gala told him that the clustering of light duty staff at one location was an "anomaly" and that normally no more than one or two Firefighters per company are placed at any one particular light duty assignment location.[5] (Tr. 630) According to Chief Cartica, he and Chief Gala discussed possible ways to remedy the clustering issue at Paidge Avenue. Chief Cartica testified that "operations and personnel" subsequently made a decision to relocate some of the Ladder 39 Firefighters from the Paidge Avenue location. (Tr. 631)

On March 9, 2012, six Ladder 39 Firefighters on light duty status were "lifted" from their locations and reassigned to other light duty placements.[6] Firefighters Rivera, Christopher McGovern, Kirk Long, John Faller, and Michael Tompkins were lifted from the Paidge Avenue location where they had been working 24-hour mutuals, had significant overtime opportunities, and sometimes received assignment differential pay.[7] Travis Boroden was lifted from the Mask Service Unit ("MSU") at Randall's Island, where he worked the standard light duty schedule but had considerable leeway in determining which shift to work. All six Firefighters were reassigned to new locations where they were required to work the standard light duty schedule, had extremely

[5] Neither Chief Cartica nor any of the Department's other witnesses explained the rationale behind the FDNY's apparent practice of avoiding "clustering," i.e., the placement of more than two light duty firefighters per company at the same location, or why "clustering" is problematic.

[6] The term "lift" refers to an involuntary transfer. (Tr. 238-39)

[7] These overtime opportunities were in addition to the contractual roster staffing overtime set forth in PA/ID 1-90.

limited overtime opportunities, and received no assignment differential pay.[8]

All six Firefighters testified to the disruptions inflicted on their daily lives, particularly with regard to childcare and commuting, and other issues that resulted from the lifts. For example, Firefighter McGovern testified that when he worked 24-hour shifts at Paidge Avenue, he was able to schedule his tours of duty during weekends to minimize childcare obligations. However, after the lift and schedule change, he had to enlist an elderly relative to aid in the care of his daughter. Firefighter Faller testified that working 24-hour shifts at Paidge Avenue allowed him to commute to the City from his Orange County, New York home only two days a week. Although his new work location after the lift was geographically closer to his home, he had to commute there five days a week, which amounted to "extra tolls, gas money [and] a lot of stress." (Tr. 328-29)

The six Ladder 39 Firefighters who were lifted sought out FDNY officials to find out why they were reassigned. Firefighter Boroden testified that he spoke with several officials, including Chief William Mundy at the MSU and Captain Charles Barraco, the light duty compliance officer at BHS.[9] Chief Mundy told Firefighter Boroden he didn't know what happened but that it was "big," he could not undo it, and that it came from "pretty high up." (Tr. 182-83) According to Firefighter Boroden, Captain Barraco told him that he didn't know what happened "with your company and this chief," but he was told to go "very hard" on Ladder 39 guys. (Tr. 189) Firefighter Boroden, who had been reassigned to light duty at BHS after the March 9 lift, testified

[8] It is undisputed that at least one Ladder 39 Firefighter on light duty status was not lifted and reassigned on March 9, 2012. There is no record evidence indicating the criteria or rationale behind who was selected for reassignment.

[9] BHS stands for the FDNY's Bureau of Health Services, which is located at the FDNY's headquarters at Metrotech. Firefighters on light duty status can be assigned to work at BHS.

that Captain Barraco warned him that other firefighters assigned to BHS were there for "bad reasons," including criminal situations, and not to speak with them. (Tr. 190)

Some of the Firefighters approached Chief Cartica to find out why they had been lifted.[10] Firefighter Rivera testified that he saw Chief Cartica at the firehouse a few weeks after the lifts and asked him what had happened. He testified that Chief Cartica responded that "shots were fired, you were in the cross fire, and I'm very sorry that this happened to you." (Tr. 263) In October or November of 2012, Firefighter Boroden confronted Chief Cartica to express his frustration at how the lifts were executed, the fact that Chief Cartica didn't look into his fellow Firefighters' situations and whether they were really hurt, and to tell Chief Cartica how the lift and its fallout impacted his life. He pressed Chief Cartica for an explanation for the lifts and other problems in the firehouse. Firefighter Boroden testified that Chief Cartica apologized to him about his personal situation and told him that he was "collateral damage" and not the intended target. (Tr. 198)

Chief Cartica acknowledged receiving phone calls from Ladder 39 Firefighters after the lifts occurred. He testified that he recalled having a conversation with Firefighter Boroden during which he repeatedly apologized because Firefighter Boroden was saying that he was going through

[10] Many of the Ladder 39 Firefighters suspected that Chief Cartica played a role in the decision to execute the lifts. Firefighter Rivera testified that while Chief Cartica didn't specifically state during their conversation that he was involved in the lifts, the way he answered Firefighter Rivera's questions about the lifts and the fact that he apologized led him to believe that Chief Cartica played a role. Firefighter Long testified that he concluded that Chief Cartica might have been involved because he "doesn't care for guys going sick." (Tr. 375) He stated that he reached this conclusion because Chief Cartica "lets you know that that's not good, to go sick from work" by giving you a harder assignment. (Tr. 376) Firefighter Tompkins testified that "the guys on duty" told him that, on March 1, 2012, Chief Cartica came to the firehouse and asked "where is Tompkins?" They informed him that he was on light duty. Chief Cartica then said, "no, where is Tompkins?" They told him that Firefighter Tompkins is at Paidge Avenue, to which Chief Cartica allegedly responded, "this shit is going to stop right now and I'm going to stop it." (Tr. 494-95)

hard times with his family and Chief Cartica was sorry to hear that. He also testified that Firefighter Rivera approached him about the lifts but he didn't recall whether he apologized to him about them. However, he recalled that at some point Firefighter Rivera asked Chief Cartica for assistance in getting back a 24-hour mutual spot and Chief Cartica responded that he would see what he could do to help him.

After Firefighter Rivera was lifted from Paidge Avenue and reassigned to light duty at the 7th Division in the Bronx, a few 24-hour assignments opened up. Firefighter Rivera testified that each time one of these assignments became available, he put in a request but he was denied all of the 24-hour spots. When he spoke to Lt. Vignali, who handles light duty officers at the 7th Division and denied the requests, Lt. Vignali told him that Deputy Chief Mulrenan had "called downtown" and was told that none of the Ladder 39 members on light duty were permitted to do 24-hour shifts. (Tr. 252) Dep. Chief Mulrenan is the 7th Division's highest ranking member. Other Ladder 39 Firefighters similarly testified that they had attempted to be reassigned back to a location with 24s following the lifts but were rebuffed.

However, Firefighter Tompkins testified that he successfully obtained a reassignment back to a location with 24-hour mutuals after speaking with Chief Cartica. Firefighter Tompkins testified that he served as Chief Cartica's battalion aide from August 2010 to September 2011, during which time they "became friendly." (Tr. 456) Immediately following the March 9, 2012 lifts, he was informed that he was being reassigned to a light duty assignment in the 7th Division. He stated that following the first lift in March 2012, he contacted Chief Cartica to ask for his assistance in returning him to a desirable light duty assignment, but that Chief Cartica did not return his call. Firefighter Tompkins opted to take vacation for the remainder of March 2012, had surgery in April 2012, and then went on medical leave. Following medical leave, Firefighter

Tompkins was placed at a light duty assignment in the 7th Division in May 2012 and again contacted Chief Cartica to request his help in being transferred to a light duty spot on Randall's Island that had 24s. He was transferred to a light duty assignment at Randall's Island, as requested, where he was able to work 24-hr shifts. Chief Cartica acknowledged that Firefighter Tompkins, after being transferred to the 7th Division, asked him for help in regaining a 24-hour mutual slot, and that he told Firefighter Tompkins that he would try to assist him. It is also undisputed that Chief attempted to assist another Ladder 39 Firefighter, John Faller, to obtain a 24-hour mutual light duty spot in the 7th Division. Nevertheless, Chief Cartica also testified that he doesn't have the power to assign light duty spots beyond the 7th Division. [11]

Edward Brown is the UFA's Bronx Trustee, a position he has held since 2004. He has been an FDNY employee since 1982. In his capacity as a UFA trustee, Trustee Brown regularly interacts with FDNY superior officers, including lieutenants, captains, chiefs and battalion chiefs, among others, on issues ranging from firehouse repairs to employee discipline. When an issue arises that requires the attention of FDNY officials, Trustee Brown routinely contacts them at the firehouse or on their cell phone.

Trustee Brown has known Chief Cartica for over 25 years. He testified that he believes Chief Cartica "doesn't look kindly" on Firefighters on medical leave and light duty. (Tr. 556) He stated that this belief stems from a 2007 incident in which both he and Chief Cartica were involved. According to Trustee Brown, a Ladder 39 Firefighter was injured while driving the tiller of a fire truck and was subsequently required to fill out a document stating the circumstances under which the injury occurred. Trustee Brown testified that the Firefighter contacted him because Chief Cartica refused to sign the document, allegedly because Chief Cartica drove the

[11] The record does not indicate whether Randall's Island falls within the 7th Division's jurisdiction.

same route and wasn't injured.

Trustee Brown testified that, on March 9, 2012, Ladder 39 UFA delegate Billy McNally contacted him to notify him of the lifts. He then contacted a number of FDNY officials to gather more information about what had happened. Trustee Brown spoke with 7th Division Commander Mulrennan and FDNY Chief of Operations Sweeney, both of whom denied that the directive to lift the Ladder 39 members came from them. He also attempted to contact Chief Cartica on his cell phone and left a brief voicemail message. Trustee Brown testified that he never received a response from Chief Cartica.

The March 16, 2012 Firehouse Visit

On March 16, 2012, Chief Cartica visited the firehouse shared by Ladder 39 and Engine Company 63 ("Engine 63"). Upon arrival, he contacted the dispatcher and told him to put both companies out of service, which means that they would only respond to an incident if the dispatcher deemed the situation to be urgent. The Firefighters who testified about the meeting stated that placing both companies of a dual house out of service is a very unusual occurrence. Chief Cartica then asked everyone to assemble in the kitchen so that he could speak with them. He excused from the meeting the two Fire Officers who were in the firehouse, as well as one Firefighter who had been detailed from another engine company.

A number of Firefighters provided accounts of what occurred thereafter. Firefighter Thomas Fitzpatrick, who was one of nine Firefighters on duty at the firehouse at the time, testified that Chief Cartica "made it clear he didn't care for guys that were on light duty. [Cartica] expressed that he thought guys, they abused the medical leave system. . . [and] told us calling the Union was going to do no good." (Tr. 411) Firefighter Fitzpatrick further testified that Chief Cartica had a company roster showing full-duty Firefighters on one side and light duty Firefighters

on the other side. According to Firefighter Fitzpatrick, Chief Cartica said something like, "one side is good guys, guys I like, and the other side not so good guys." (Tr. 413) He also testified that Chief Cartica mentioned that Trustee Brown called him at home, and that he didn't have to listen to him or pick up his phone for him.

Firefighter John Yarusso of Engine 63 was also present at Chief Cartica's March 16 meeting. Firefighter Yarusso is a 30-year veteran of the FDNY and stated that he knows Chief Cartica as a "fellow firefighter, officer and now a battalion commander and also immediate friend." (Tr. 504) He stated that the topic of the meeting was the lift of Ladder 39 members from their light duty positions, and that Chief Cartica mentioned the Union during the meeting, stating that "the chiefs are in charge and run the job and not the union," and that Trustee Brown "does not run this job." (Tr. 521-23) Firefighter Joseph O'Rourke, an Engine 63 member who was also present at the meeting, testified as follows:

> Q: So what was stated by Commander Cartica with regard to the lifts on March 9th and light duty firefighters?
> A: He was, you know, unhappy with the situation. I think he was more unhappy that they had called the union on him it seemed like.
> Q: That who had called the union?
> A: I'm assuming the members in Ladder 39.
> Q: What statements were made about the union being called?
> A: He was unhappy about it. He said, you know, he had phone calls from the union and he didn't appreciate it.
> Q: Did he specifically state who called him from the union?
> A: Yes.
> Q: And who was the individual that he mentioned that called him from the union?
> A: Eddie Brown.

(Tr. 532-33) Firefighter O'Rourke further testified that Chief Cartica "basically said he – that the union couldn't touch him, that there was nothing that the union could do about this." (Tr. 534)

Chief Cartica's testimony regarding the events of March 16, 2012 varied considerably from that of the Firefighters who attended the meeting that day. He testified that he discussed the "critical staffing shortage" at Ladder 39, as well as rumors that he was the one who reassigned the Ladder 39 members who had been lifted. (Tr. 759) He stated that he informed the members at the meeting that he was not responsible for the reassignments. However, he admitted at the hearing that he was, in fact, "involved" with the reassignments although he did not actually do the reassigning or have any decision-making authority over the reassignments of the Ladder 39 Firefighters who were lifted. (Tr. 758) Chief Cartica testified that he knew that clustering was not the norm and that it would be addressed by Operations and Personnel, but maintained that he did not know where the Ladder 39 Firefighters were being moved nor does he have access to information on the available light duty positions.

When questioned about whether he said anything negative about the UFA in the meeting, Chief Cartica responded that he couldn't remember. However, he subsequently testified on cross-examination that he never said anything negative about the UFA and their involvement to "fight for the rights" of the Firefighters involved. (Tr. 763) He explicitly denied saying at the meeting that the Union couldn't do anything about the lifts or that "Eddie Brown doesn't run this job." (Tr. 762-63)

Chief Cartica testified that he put the two fire companies out of service because he wanted to talk to the Firefighters without any distractions and then dismissed the officers and the members who were "not from the house" because he was discussing an "in-house issue." (Tr. 638-39) He admitted that Trustee Brown had called him on his cell phone while he was at home and left a voicemail message and testified that the issue he wanted to discuss at the meeting was "trying to find out who gave my personal cell phone number out to a member of the UFA." (Tr. 639)

Regarding receiving a voicemail from Trustee Brown, Chief Cartica stated, "[t]o put it mildly, I was not happy, because this was a departmental matter, that if they wanted it to be addressed it should have been dealt with on department time at a department facility, not in my home." (Tr. 640) He testified that some Ladder 39 Firefighters have his cell phone number, but that the number is something that is maintained in-house, and that "there's an unwritten policy in all firehouses that you don't give out private information to people from outside of the house." (Tr. 641) By "in house," Chief Cartica clarified that he means within the firehouse containing Ladder 39 and Engine 63. Chief Cartica maintained that he had never given out his cell phone number to UFA board members nor had he ever received phone calls from a UFA board member on his cell phone.

The UFA Meeting at the Firehouse

Shortly after Chief Cartica's March 16, 2012 meeting with the Ladder 39 and Engine 63 Firefighters, Firefighter McNally, Ladder 39's UFA delegate, contacted Trustee Brown to tell him about the meeting. Firefighter McNally was not present at the meeting but indicated to Trustee Brown that he had spoken with members who were there. According to Trustee Brown, Firefighter McNally relayed comments from the Firefighters who attended the meeting that Chief Cartica said "Eddie Brown is toothless, him and the UFA, Eddie Brown is laughed at in MetroTech, we run the job, I run the job." (Tr. 568) Trustee Brown testified that he believed this was "union busting" and informed UFA President Steven Cassidy and the Union's lawyers about what had occurred. (Tr. 569)

Toward the end of March 2012, Trustee Brown, President Cassidy, and UFA attorney Michael Block held a meeting at the firehouse with members of Ladder 39 and Engine 63 to discuss the lifts. Block had drafted an affidavit detailing what occurred at the March 16, 2012

meeting that he wanted the members to sign. However, according to Trustee Brown, the members decided not to sign the affidavit for fear of retaliation.

The August 1, 2012 Lifts

The UFA filed a petition initiating the instant action on July 2, 2012. In late July 2012, Chief Cartica learned from the FDNY that he would have to sign an affidavit in conjunction with an improper practice petition filed by the UFA.[12]

On August 1, 2012, six Ladder 39 Firefighters who were on light duty status were lifted from their placements at Paidge Avenue and Randall's Island and reassigned to light duty assignments at the 7th Division that follow the standard light duty schedule.[13] Three of them, Firefighters Faller, Rivera, and Tompkins, had previously been lifted on March 9, 2012. An additional three, Firefighters Dennis McCarroll, Thomas Fitzpatrick, and William McNally, were lifted for the first time. All but Firefighter McNally, who was working a flexible five day, eight hour schedule, had been working 24-hour mutuals at their light duty assignments prior to being lifted. Firefighter McCarroll had been working 24-hour mutuals as well as significant overtime at his light duty assignment at the guard security gate at Randall's Island.

Chief Cartica testified that he learned of the lifts "[s]ometime in August." (Tr. 792) He received paperwork subsequent to the lifts indicating that all six Firefighters were reassigned to one light duty post at the 7th Division. Chief Cartica testified that he did not know in advance of the August 1, 2012 that the six Ladder 39 Firefighters were going to be reassigned and did not contact anyone about it. He conceded that six Firefighters from the same company at the same

[12] The affidavit was attached to the City's answer to the UFA's July 2, 2012 petition.

[13] This second set of lifts occurred the day after Respondents filed their answer to the UFA's first petition.

light duty location could possibly be considered a "cluster." (Tr. 797)

Firefighter McCarroll testified that he received a call on August 1, 2012 from Lt. William Thomas, who was in charge of light duty Firefighters at his post, informing him that he is to report to the 7th Division the following day. Firefighter McCarroll testified that, at his new light duty assignment at the 7th Division, he worked five eight-hour tours of duty and "lost a ton of overtime" because there were no overtime opportunities there.[14] (Tr. 302)

Firefighter Tompkins testified that he was lifted from his light duty assignment for the second time on August 1, 2012. He testified that he was working at gate security on Randall's Island when Lt. Thomas told him that Cartica "must be up to his old tricks again because you're being lifted." (Tr. 475) He was reassigned to a light duty spot at the 7th Division where, he stated, he worked the standard light duty schedule and had minimal overtime opportunities.

After learning he was being lifted again, Firefighter Tompkins contacted Chief Cartica and asked him if he could help him to regain a 24-hour mutual spot. Firefighter Tompkins testified that Chief Cartica responded, "well, if you could probably get this to go away, I would --- they would be more apt to help you do something." (Tr. 478) Firefighter Tompkins testified that, by "this," he assumed that Chief Cartica meant the instant improper practice proceeding. (Tr. 478) He testified that he subsequently had another conversation with Chief Cartica in late August 2012 in which he again asked Chief Cartica for assistance in being transferred back to his previous light duty assignment. According to Firefighter Tompkins, Chief Cartica again asked him if the lawsuit could be dropped, to which Firefighter Tompkins responded that he "did everything he could" but that the UFA wouldn't drop it. (Tr. 481)

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[14] Firefighter McCarroll retired from the FDNY in October 2012. He claimed that, as a result of the reassignment to the 7th Division, his pension was significantly lower than "where it should have been." (Tr. 308)

Firefighter McNally testified that he received a call from Firefighter Tompkins in late August 2012 asking him to ask the Union if it could withdraw the improper practice petition. Firefighter Tompkins explained that he Chief Cartica suggested that if it were dropped, he could get his light duty spot back. Chief Cartica also testified about his conversation with Firefighter Tompkins in August 2012. He confirmed that Firefighter Tompkins asked him for assistance in obtaining a light duty assignment with 24-hour mutual opportunities, but denied that they discussed the withdrawal of the improper practice petition.

In addition to meeting with Chief Cartica, Firefighter Tompkins testified that after he was lifted for the second time, he set up an appointment to meet with Chief of Personnel Gala. He asked Chief Gala why the firefighters were initially lifted in March 2012 and what could be done to rectify the problem. (Tr. 977) According to Firefighter Tompkins, Chief Gala told him that Chief Cartica had contacted him because he believed that certain Firefighters were "malingering" on light duty and he wanted them placed on a five-day a week schedule to resolve staffing problems at Ladder 39. (Tr. 979) Firefighter Tompkins further testified that, following the conversation between Chiefs Gala and Cartica, Chief Gala had the Firefighters at issue reassigned. (Tr. 979) Firefighter Tompkins' testimony about his conversation with Chief Gala was unrebutted. Chief Gala did not testify in this case.

Testimony of the FDNY's Payroll Director

Mario Manna, the FDNY's Director of Payroll, Timekeeping and Compliance Services, testified on behalf of the City. Manna created overtime reports using data extracted from the FDNY's Payroll Management System to compare the overtime hours and time and leave information of the nine Ladder 39 Firefighters on light duty status that were reassigned on March 9 and August 1, 2012. Manna also created leave detail and City Human Resources Management

System ("CHRMS") payroll reports for the Ladder 39 Firefighters who were lifted on those two dates.[15] Manna testified that Firefighters can earn overtime for many different types of events, which are categorized using codes on the CHRMS reports. The codes distinguish what type of overtime work they performed. There is no specific code for overtime work performed by Firefighters on light duty status.

POSITIONS OF THE PARTIES

Union's Position

The UFA contends that the FDNY violated NYCCBL § 12-306(a)(1) and (3) when it discriminated or retaliated against Ladder 39 Firefighters by reassigning them to less favorable light duty posts. It further contends that the FDNY interfered with the statutory rights of the UFA membership, in violation of NYCCBL § 12-306(a)(1), when, on March 16, 2012, Chief Cartica made threatening and derogatory remarks about these Firefighters, the UFA, and its leadership and, in August 2012, impermissibly linked a favorable personnel decision to the withdrawal of the first petition in this matter.[16]

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[15] All of the reports created by Manna were admitted into evidence.

[16] 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 public employee organization[.]

NYCCBL§ 12-305 provides, in pertinent part, that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively

The UFA argues that the record is "replete" with actions taken by Chief Cartica and the FDNY that were inherently destructive of the UFA membership's rights under NYCCBL § 12-305. (Union Br. p. 43) The UFA contends that, during the March 16, 2012 meeting, Chief Cartica maligned light duty Firefighters, and indicated that they were abusing a contractual benefit and that he did not look favorably on Firefighters who availed themselves of this benefit. According to the UFA, he also stated that engaging the UFA to address the impact of these managerial decisions would do no good, and that the Union "couldn't touch him" and "doesn't run this job." (Union Br. p. 44) Additionally, Chief Cartica informed the Firefighters that Trustee Brown's call to him was "grossly inappropriate and invasive." (*Id.*) The Union argues that Firefighter testimony reflects that the UFA members present were "personally threatened" by Chief Cartica that if they go to the Union and threaten his career, he would retaliate. (*Id.*)

The UFA asserts that the Board should disregard Respondents' contentions that Chief Cartica did not make these anti-union statements because the record reflects that Chief Cartica is not a credible witness. It argues that Chief Cartica's testimony was unreliable and was undermined by the testimony of multiple witnesses who were present at the March 16, 2012 meeting. Chief Cartica testified on direct examination that he was only present at the Firehouse on March 16 to ascertain who divulged his cell phone number to Trustee Brown, but on cross-examination, he testified that he was also there to discuss staffing issues.

The UFA argues that these actions had a chilling effect on the UFA members' exercise of their NYCCBL § 12-305 rights. It asserts that Chief Cartica's actions contained an "innate element of coercion" because they had a demoralizing effect on the entire firehouse and those who

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through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

witnessed it found it to be offensive, threatening, intimidating and demeaning. (Union Br. p. 48) In addition, Chief Cartica's comments about Trustee Brown bespeak an attempt to unilaterally select which UFA representative Firefighters may "utilize," and infers that utilization of a disfavored Union representative may have adverse consequences. (*Id.*)

The UFA next argues that it has satisfied its burden of establishing a *prima facie* case against the UFA for violating NYCCBL § 12-306(a)(3). It contends that it has demonstrated that the nine Ladder 39 members who were lifted were engaged in protected union activity when they "availed themselves of the contractual benefit, as set forth in the Light Duty Policy, of light duty assignments within the FDNY." (Union Br. p. 53) They were also engaged in protected union activity when they spoke to the Ladder 39 delegate and other Ladder 39 Firefighters about the lifts, met with President Cassidy and Trustee Brown, and sought the UFA's assistance in resolving issues pertaining to the terms and conditions of their employment. The UFA further contends that the filing of the first and second petitions also constituted protected union activity. The FDNY had knowledge of all of this protected union activity, according to the UFA. It asserts that when the agent of a public employer commits an improper practice, the employer is deemed to have implied knowledge of the protected union activity provided the agent responsible for the bad act was aware of the protected activity.

The UFA contends that the first and second set of lifts constitute an adverse employment action. Each Firefighter who testified stated that the reassignments adversely affected their lives because they were moved from one favorable light duty assignment to another less favorable one. The UFA asserts that these Firefighters were moved to light duty assignments that required them to work five eight-hour tours of duty and provided them with barely any overtime opportunities. Moreover, the UFA argues that their lives were adversely affected as a result of a reduction in their

paychecks, diminution of pension payments, and disruptions to their personal lives. With regard to causation, the UFA argues that it has demonstrated that even prior to the March 9, 2012 lifts, Chief Cartica viewed light duty Firefighters negatively because he indicated on March 1, 2012 that he was going to put a stop to Ladder 39 Firefighters on light duty status working 24-hour mutuals. Chief Cartica made this comment only days before the March 9, 2012 lifts, indicating temporal proximity.

The UFA contends that there is additional evidence of anti-union animus. First, the second set of lifts occurred on August 1, 2012, just one day after Respondents filed their answer to the first petition. Further circumstantial evidence of anti-union animus, according to the UFA, can be found in the Department's desire to have only Ladder 39 Firefighters work light duty assignments that were restricted to the standard work schedule, and the Department's consistent refusal to entertain requests by these individuals for reassignments back to 24-hr spots. Moreover, Chief Cartica's "tirade" on March 16, 2012, is a "smoking gun" for anti-union animus. (Union Br. p. 71)

Finally, the UFA argues that Respondents' proffered legitimate business reasons for the actions of the FDNY and Chief Cartica must be dismissed as implausible and contradictory. It notes that although Chief Cartica testified that his concern regarding Ladder 39 was alleviating the critical staffing issue, the lifts did not resolve this issue because they neither created nor guaranteed more full duty Firefighters on the Ladder 39 roster. Therefore, the FDNY's alleged legitimate business reason must be disregarded.

As a remedy, the UFA seeks an order directing the FDNY to cease and desist from all actions complained of that violate the NYCCBL, to make all adversely affected UFA members

whole monetarily, the restoration of all UFA members to posts they previously occupied prior to the events at issue, and the posting of notices.

City's Position

The City argues that the Board should dismiss the petitions in their entirety because the UFA has failed to establish that the FDNY discriminated or retaliated against the Firefighters in violation of NYCCBL § 12-306(a) (3) or that there was an independent § 12-306(a) (1) violation. With regard to the allegation of retaliation, the City asserts that the UFA has not demonstrated a *prima facie* claim. First, the UFA failed to establish that any of its named members engaged in protected union activity that could form the basis for the allegedly retaliatory reassignments by the FDNY. The City contends that "simply being on light duty status" does not constitute protected activity. (Resp. Br. p. 30) It notes that there is no evidence that any of the UFA's named members filed grievances or formal complaints prior to being reassigned. Moreover, the named UFA members did not actively seek to enforce, invoke, or exercise a right set forth in the Agreement, which in fact contains no provision regarding the assignment of light duty.

The City further contends that, to the extent that the UFA argues that its members' complaints to Union officials regarding the reassignments constitutes protected union activity, there was no evidence of such complaints or, if there were complaints, the FDNY did not have notice of them.[17] Specifically, the UFA failed to establish that the Bureau of Personnel, which the City asserts was responsible for the decision to reassign the Firefighters, was aware of any protected union activity. The City also argues that, assuming the Board finds that the Ladder 39 Firefighters engaged in protected union activity, the UFA has not shown that any FDNY agent who was responsible for the alleged adverse actions was aware of such protected activity.

[17] The City further asserts that Trustee Brown's voicemail to Chief Cartica following the March 9 lifts also does not establish protected union activity.

Even if the UFA has presented sufficient evidence to establish the first prong of their *prima facie* case, the City argues that it cannot establish that the FDNY took any adverse employment action against the Firefighters at issue nor has it demonstrated the requisite causal link between such action and any protected union activity. The transfer of a light duty Firefighter to an alternate post does not constitute an adverse employment action. Although the FDNY attempts to accommodate the needs of light duty employees, there is no entitlement to a schedule other than the standard one of five eight-hour tours. Similarly, light duty assignments are not made based on overtime or differential pay opportunities, preferred childcare or physical therapy schedules. The City contends that the UFA failed to prove that, but for the alleged protected activity, these Firefighters would not have been reassigned. The UFA provides no support for its conclusory allegations that once light duty Firefighters are assigned to a particular post, they remain there unless there is a disciplinary or job performance issue. The City further contends that the UFA cannot establish that, but for the protected activity, Chief Cartica's alleged threats of reprisal on March 16, 2012 would not have been made. It argues that Chief Cartica considered the fact that someone at Ladder 39 gave Trustee Brown his personal contact information and that Trustee Brown left him a voicemail on his cell phone while at home to be "grossly inappropriate and invasive." (Resp. Br. p. 40) As such, he had a conversation with the Firefighters to address this conduct.

In addition, the City claims that the UFA has not set forth any evidence of any anti-union animus. The UFA offered no direct evidence that Chief Cartica was "behind" the light duty reassignments, providing only conclusory claims instead.[18] (Resp. Br. p. 45) It points to the fact

[18] The City also maintains that the UFA presented insufficient evidence to establish that Chief Cartica has a bias against light duty Firefighters.

that all the Firefighters admitted that they either indirectly heard that he was responsible or they simply assumed he was responsible. Firefighter Tompkins' testimony that Chief Gala told him that Chief Cartica requested the reassignments was only hearsay testimony raised on rebuttal. The City maintains that Chief Cartica was not, in fact, responsible for the decision to transfer the Firefighters. Nor is there evidence that the Personnel Bureau was motivated by anti-union animus to transfer the Firefighters. The City asserts that the UFA has similarly failed to establish any adverse employment action resulting from the complaints Firefighters made to the UFA regarding the reassignments. The UFA made only conclusory allegations that their members felt intimidated or threatened by remarks Chief Cartica allegedly made about these complaints. Additionally, the City notes that Chief Cartica is a member of the Uniformed Fire Officers Association ("UFOA"), which undermines any claims of Chief Cartica's anti-union animus. Finally, even if Chief Cartica made disparaging remarks to the Firefighters about these complaints, his actions cannot be ascribed to management as violative of the NYCCBL.

The City contends that even if the UFA successfully establishes a *prima facie* case, it has demonstrated that the FDNY's actions were taken for legitimate business reasons and would have been taken even in the absence of the alleged protected conduct. Initially, the City argues that the FDNY has a managerial right pursuant to NYCCBL § 12-307(b) to direct its employees and "to determine the methods, means and personnel by which government operations are to be conducted."[19] This prerogative, according to the City, extends to light duty assignments. In this

[19] 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 determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other

instance, the FDNY reassigned the Ladder 39 Firefighters because of their concentration at certain locations and because they were at locations that did not follow the standard light duty schedule. In addition, the 15th Battalion, under which Ladder 39 falls, was understaffed. Accordingly, the FDNY's determination to reassign light duty Firefighters clustered at Randall's Island and Paidge Avenue to alternate locations in March and August of 2012 was a legitimate exercise of its management rights. Thus, the Bureau of Personnel determined "for staffing purposes" to reassign some of the Firefighters back to their Division or to different locations. (Resp. Br. p. 50) Because the reassignment to alternate light duty posts falls under the purview of the FDNY's management rights pursuant to NYCCBL § 12-307(b), the matter should be dismissed.

Chief Cartica's March 16, 2012 conversation with the Firefighters was similarly motivated by legitimate business reasons, the City contends. Specifically, Chief Cartica's personal contact information was distributed to the UFA and he received a phone call from Trustee Brown. He deemed these actions inappropriate and discussed the distribution of his personal contact information with the Firefighters.

Finally, the City argues that the UFA has failed to establish an independent violation of NYCCBL § 12-306(a)(1) because it has not demonstrated any conduct that is "inherently destructive" of employee rights. Rather, the City asserts, the UFA has merely made conclusory allegations as to Chief Cartica's motive for calling the March 16 meeting and has failed to establish that Chief Cartica's alleged statements had any negative effect on the Firefighters and,

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> legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and technology of performing its work.

specifically that Firefighters suffered "reprisals" following the talk. The City also denies that Chief Cartica told Firefighter Tompkins that he could return him to his light duty post during 24s if the Union would drop the Board action.

DISCUSSION

There are two issues before the Board in this matter. The Board must determine whether the FDNY discriminated or retaliated against certain Local 39 Firefighters on light duty status for their alleged Union activity, in violation of NYCCBL § 12-306(a)(3). It must also determine whether certain actions allegedly taken by Chief Cartica, as an agent of the Department, were inherently destructive of the rights of Union members, in violation of NYCCBL § 12-306(a)(1).

Claimed Independent Violations of NYCCBL § 12-306(a)(1)

The UFA argues that Chief Cartica's speech to the Ladder 39 and Engine 63 Firefighters on March 16, 2012, as well as his conversations with Firefighter Tompkins in August 2012, were inherently destructive of Union members' rights. NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. . . ." We have long recognized that conduct that contains "an innate element of coercion, irrespective of motive, [can] constitute conduct which, because of its potentially chilling effect . . . is inherently destructive of important rights guaranteed under the NYCCBL." *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010) (quoting *ADWA*, 55 OCB 19, at 40 (BCB 1995). Further, a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions. *L. 375, DC 37*, 6 OCB2d 15, at 10 (BCB 2013); *see L. 1180, CWA*, 71 OCB 28, at 9

(BCB 2003) ("Actions that are inherently destructive of important employee rights may constitute unlawful interference even in the absence of improper motive.") (citations omitted)

As an initial matter, we must make a credibility determination because Chief Cartica's testimony conflicts with that of the Firefighters present at the March 16, 2012 meeting, as well as with Firefighter Tompkins' testimony regarding their August 2012 conversations. We find that Chief Cartica's testimony regarding the events of the March 16, 2012 meeting was not credible because it conflicted with the consistent accounts of the Firefighters present at the meeting and was also beset by inconsistencies. Chief Cartica initially testified that he couldn't remember whether he said anything negative about the UFA during the meeting. Then, on cross-examination, he testified that he did not say anything negative about the UFA during the meeting. However, the Firefighters testified consistently that Chief Cartica condemned the Union and its officials during the meeting and discouraged them from seeking the Union's assistance. Moreover, the Firefighters' recollection of Chief Cartica's disparagement of the Union, as well as other comments he made at the meeting, corroborated each other. *See COBA*, 2 OCB2d 7, at 52 (BCB 2009) (corroboration strengthens credibility). Chief Cartica also testified that he did not tell the Firefighters at the meeting that he was involved with the March 9, 2012 reassignments. Yet, during the hearing, he admitted that he did, in fact, play a role in facilitating the reassignments. Thus, while it may be true that Chief Cartica was not the official who actually reassigned the Firefighters, he failed to disclose to the Firefighters that he played a significant role in the process.

Similarly, we credit the testimony of Firefighter Tompkins over Chief Cartica's testimony with regard to their August 2012 conversations. Chief Cartica denied suggesting a *quid pro quo* of obtaining a dismissal of the improper practice petition in exchange for helping Firefighter Tompkins obtain a more favorable light duty assignment. However, Firefighter Tompkins'

testimony was corroborated by Firefighter McNally, who testified that Tompkins asked McNally to see if he could get the Union to drop the petition. Firefighter McNally testified that Firefighter Tompkins told him that if the petition were dropped, Chief Cartica would help him get a better light duty position. In addition, there is evidence in the record that Chief Cartica had the ability to assist Firefighters in obtaining more favorable light duty spots. He admitted that he had the power to effectuate light duty assignments on behalf of Firefighters within the 7th Division and had assisted Firefighter Tompkins in obtaining a 24-hour assignment only a few months before the August 1, 2012 lifts. Thus we credit Firefighter Tompkins' version of the conversation.

Based on these findings of fact, we conclude that Chief Cartica made statements at the March 16, 2012 meeting that conveyed to the UFA members present that seeking the Union's assistance was useless and that he could not be threatened by or with the Union. He also made statements disparaging Trustee Brown, from whom the Firefighters had sought assistance following the lifts. For example, Chief Cartica told the Firefighters that Trustee Brown "does not run this job," and that he doesn't have to listen to him or pick up the phone for him. He also made it clear that he was angry that Brown had attempted to contact him. We find that these statements can be construed as coercive and thus have a potentially chilling effect on the Firefighters' rights to engage in union activity. Indeed, the evidence shows that the Ladder 39 Firefighters present at a Union meeting in late March 2012 were too intimidated to sign an affidavit detailing the events of the March 16, 2012 meeting for fear of repercussions by the FDNY. This Board has previously found similar comments by employers to be inherently destructive of employee rights. *See SSEU, L. 371*, 3 OCB2d 22, at 15-16 (finding that supervisor's comment, in the context of a discussion about an employee's termination, that "nobody could threaten him with the Union," was a veiled threat and could lead an employee to conclude that any union involvement would be detrimental to

their working relationship with this supervisor); *CSTG, L. 375*, 3 OCB2d 14, at 15 (BCB 2010) (finding that a superior's comment in reference to a grievance that the employee should "let it go" was inherently destructive of employee rights). Accordingly, we find that Chief Cartica's conduct at the March meeting was inherently destructive of employee rights, in violation of NYCCBL § 12-306(a)(1).

As to the UFA's remaining interference allegation, we previously credited Firefighter Tompkins' testimony that Chief Cartica asked him to secure the withdrawal of the Union's improper practice petition in exchange for Chief Cartica's assistance in securing a 24-hour mutual spot at a light duty location. We now find that this interchange interfered with UFA members' rights to file improper practice petitions under the NYCCBL. Regardless of whether Chief Cartica possessed any anti-union animus, his action in asking Firefighter Tompkins to obtain the Union's consent to withdraw the petition may be viewed as coercive, and thus is inherently destructive of important rights guaranteed under NYCCBL § 12-305. *See DEA*, 4 OCB2d 35, at 9 (BCB 2011) (conduct containing an "innate element of coercion, irrespective of motive, [can] constitute conduct which, because of its potentially chilling effect . . . is inherently destructive of important rights guaranteed under the NYCCBL.") (citations omitted).

Claimed Violations of NYCCBL § 12-306(a)(3)

To determine whether an alleged action constitutes impermissible discrimination or retaliation based on anti-union animus, the Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny. The test provides that, to establish a *prima facie* case of discrimination or retaliation under the NYCCBL, the petitioner must demonstrate that:

1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19*; see also DC 37, L.376*, 6 OCB2d 39 (BCB 2013). If the petitioner establishes a *prima facie* case, then 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." *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006); *see also Feder*, 4 OCB2d 46, at 49 (BCB 2011).

For union activity to be protected under the NYCCBL, "it must be related, even if indirectly, to the employment relationship and must be in furtherance of the collective welfare of employees." *Local 1087, DC 37*, 1 OCB2d 44, at 25 (BCB 2008) (citations omitted). If it is demonstrated that the employer has knowledge of the protected union activity, then the first prong of the *prima facie* case is met. *See Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004).

The UFA alleges that the FDNY retaliated against certain Ladder 39 Firefighters on light duty status by reassigning them to less favorable light duty positions on March 9, 2012 and again on August 1, 2012. Most of these Firefighters were reassigned from positions in which they could work 24-hour mutuals to positions in which they were required to work the standard, eight-hour schedule.[20] To satisfy the first prong of the *Bowman* test, the UFA must establish that the Firefighters at issue were engaged in protected union activity. The UFA claims that simply by "avail[ing] themselves of the contractual benefit, as set forth in the Light Duty Policy," the Ladder 39 Firefighters on light duty status were engaged in protected union activity.

We disagree with the Union's premise that being on light duty status, in and of itself, is

[20] One or two of the nine Firefighters who were lifted on March 9 and/or August 1, 2012 were not working 24-hour mutuals prior to being lifted but nonetheless had flexible standard work schedules.

protected union activity. We have held that employees who invoke a right set forth in a collective bargaining agreement or who seek to enforce a contractual provision may demonstrate protected activity sufficient to satisfy the first prong of the Bowman test. *See, e.g.*, *Local 376, DC 37*, 6 OCB2d 39, at 20 (union officials engaged in protected union activity when they complained to management about the assignment of their members to out-of-title work). Here, there is no evidence that the Firefighters at issue invoked or sought to enforce a right set forth in the Agreement. Indeed, the parties' Agreement does not address light duty status for Firefighters.[21] Contrary to the UFA's contentions, we do not find that our holding in *PBA*, 78 OCB 16 (BCB 2007) supports the argument that the Ladder 39 Firefighters on light duty status were engaged in protected union activity. Unlike in the instant matter, the grievant in *PBA* invoked the right, enumerated in the Agreement, to receive overtime compensation in the form of cash, and the union sought to enforce that contractual right. *See PBA*, 78 OCB 16, at 15.

Moreover, the Light Duty Policy is unilaterally set by the FDNY. It was not negotiated by and between the parties to the Agreement and therefore is not a source of contractual right. Further, we find that there is nothing in the record to indicate that the March 9, 2012 lifts were initiated due to anti-union animus or for retaliatory reasons.

In sum, we find no evidence that the Ladder 39 Firefighters were engaged in protected union activity prior to the March 9, 2012 lifts. Accordingly, the UFA cannot establish a *prima facie* case that the FDNY retaliated against these Firefighters by lifting them from their light duty assignments on March 9, 2012, and we dismiss this claim.

[21] The UFA asserts that Article XVII of the Agreement incorporates the terms and conditions set forth in "existing policy or regulations" of the FDNY. (Union Br. p. 53 n. 54) However, we find nothing in Article XVII providing that it incorporates the FDNY's existing policy or regulations.

We find, however, that the Ladder 39 Firefighters engaged in certain union activities subsequent to the March 9, 2012 lifts that are protected under the NYCCBL. First, we find that the Ladder 39 Firefighters were engaged in protected union activity when they communicated their concerns about the March 9, 2012 lifts and Chief Cartica's actions on March 16, 2012 and thereafter to Trustee Brown and other UFA officials. *See SSEU, L. 371*, 3 OCB2d 22, at 12 (finding that an employee is engaged in protected union activity when he or she seeks the union's assistance in resolving concerns regarding the employment relationship); *DEA*, 79 OCB 40, at 22 (BCB 2007) (union member sought union's assistance in remedying his claim that he was inappropriately denied overtime). In addition, we have long held that "the filing of contractual grievances and improper practice petitions constitutes activity protected under our law." *Local 621, SEIU*, 5 OCB2d 38, at 12 (BCB 2012); *see Fabbricante*, 61 OCB 38, at 10-11 (BCB 1998). Thus, we find that the filing of the UFA's improper practice petition on July 2, 2012 is also protected union activity.

It is clear that the FDNY had knowledge of this protected union activity. Chief Cartica admitted that he received a voicemail message from Trustee Brown shortly after the March 9, 2012 lifts. He testified that he convened the March 16, 2012 meeting at the Firehouse expressly to find out who gave Trustee Brown his cell phone number. In addition, it is undisputed that the FDNY had knowledge of the filing of the Union's petition because it filed an answer on July 31, 2012. An employer's knowledge of the filing of an administrative action, such as an improper practice petition, "can be sufficiently established by its participation in those proceedings." *Local 621*,

SEIU, 5 OCB2d 38, at 12. Accordingly, it is reasonable to conclude that the FDNY was aware of the Union's protected activities.[22]

The second prong of the *Bowman* test requires proof of a causal connection between the alleged improper act and the protected union activity. *See SBA*, 75 OCB 22, at 22 (BCB 2005). The petitioner may carry its burden of proof "by deploying evidence of proximity in time, together with other relevant evidence." *CWA, L. 1180*, 77 OCB 20, at 14 (BCB 2006). This proof must rely on "specific, probative facts rather than on conclusions based on surmise, conjecture or suspicion." *Feder*, 1 OCB2d 27, at 16 (BCB 2008). Absent an "outright admission of any wrongful motive, proof of the second element must necessarily be circumstantial." *CWA, L. 1180*, 77 OCB 20, at 15 (citation omitted).

We find that the UFA has established that the August 1, 2012 lifts were causally connected to the Local 39 Firefighters' protected union activity. The Ladder 39 Firefighters on light duty status complained to the UFA membership about the first set of lifts and also about Chief Cartica's conduct at the March 16, 2012 meeting. During that meeting, Chief Cartica expressed his displeasure with the Union's involvement in the aftermath of the lifts. He made it clear that there was nothing the Union could do about the lifts and that the Union "couldn't touch him". The fact that these lifts occurred shortly after the Union filed its first improper practice petition on July 2, 2012, establishes temporal proximity. This evidence is sufficient to suggest a causal relationship

[22] We reject the City's attempts to rebut the Union's *prima facie* case. The City contended that the Personnel Bureau effectuated the light duty assignments and was not aware of the Firefighters' protected union activity. The record establishes that the Personnel Bureau was not involved with every light duty assignment or reassignment in the Department. Chief Cartica testified that he had the power to effectuate light duty assignments within the 7th Division and statements attributable to him show that he did so. Thus, whether the Personnel Bureau had direct knowledge of the protected activity is simply irrelevant.

between the protected activities of the UFA and its members and the alleged retaliatory act to the extent required to make out a *prima facie* case.[23]

Since the Union has established a *prima facie* case with regard to the August 1, 2012 lifts, we now examine the City's proffered legitimate business reasons for those lifts. At the outset, we note that the City relies heavily upon its managerial prerogative, pursuant to NYCCBL § 12-307(b), to argue that it has the right to reassign and schedule its employees as it deems necessary. However, this statutory provision "does not provide [the Employer] unlimited protection from claims that its decisions violate the NYCCBL." *CSTG, L. 375*, 4 OCB2d 61, at 23 (BCB 2011); *see also DC 37*, 61 OCB 13, at 16 (BCB 1998) ("the right to manage is not a delegation of unlimited power, nor does it insulate the City from an examination of actions claimed to have been taken within its limits"). In short, actions taken within an employer's "managerial prerogative . . . may not be taken for a retaliatory purpose." *DC 37, L. 3621*, 7 OCB2d 29, at 27 (BCB 2014) (quoting *SBA*, 4 OCB2d 50, at 25 (BCB 2011)).

The City provided three reasons for reassigning the six Ladder 39 Firefighters on August 1, 2012. First, it contended that Ladder 39 Firefighters were concentrated at certain locations. Second, it argued that the locations at which these Ladder 39 Firefighters were clustered did not follow the standard light duty schedule. Finally, it asserted that the 15th Battalion was understaffed, so the Bureau of Personnel determined that some Firefighters should be reassigned back to the 7th Division for staffing purposes.

We find that all of these reasons are either contradicted by the evidence or are simply unsupported by the record. First, the record reflects that the City reassigned the six Firefighters to

[23] The UFA also asserts that the FDNY lifted six Ladder 39 Firefighters on August 1, 2012 because they were on light duty. Since we have already determined that being on light duty status is not protected union activity, we do not address this particular § 12-306(a)(3) allegation.

light duty assignments at the same location, the 7th Division.[24] Therefore, it is reasonable to conclude that, had clustering been a true concern, the FDNY would not have reassigned all six Firefighters to the same light duty location. Accordingly, we reject this business reason as pretextual.

The record also reflects that Chief Cartica played a role in facilitating Firefighter Tompkins' transfer back to a light duty location with 24-hour mutuals in May 2012, less than three months before the second lift took place. This evidence makes it difficult to conclude that the placement of the Ladder 39 Firefighters at locations that follow the standard light duty schedule was a priority for the FDNY. Therefore, we also reject this proffered legitimate business reason. Finally, we cannot credit the City's argument that the 15th Battalion was understaffed prior to August 1, 2012 because there is simply no evidence in the record to support it. Chief Cartica was the only witness who testified about understaffing issues in the 15th Battalion and, in particular, at Ladder 39. His testimony was there was a critical staffing issue in late February and March 2012. Further, the record reflects that Chief Cartica and other FDNY officials orchestrated the March 9, 2012 lift in order to remedy that staffing issue. There is no evidence to support the contention that this staffing issue existed in the 15th Battalion or Ladder 39 subsequent to that date. Indeed, neither Chief Cartica nor any other FDNY official testified about Ladder 39 Firefighters on light duty status being clustered at certain locations or working 24-hour mutuals subsequent to the March 9, 2012 lifts. *See SBA*, 75 OCB 22, at 24 (When examining the employer's proffered legitimate business reasons, "this Board will look to whether the record supports their contentions. When the reasons provided are unsupported and/or inconsistent with the record, this Board will find that the employer committed an improper practice.") (citations omitted) Moreover, no explanation

[24] The City offered no evidence that the Firefighters were reassigned to separate locations within the 7th Division.

was provided by the FDNY as to how reassigning light duty Firefighters to the 7th Division would alleviate staffing issues on regular tours.

In short, the business reasons proffered by the City have not persuaded us that the August 1, 2012 lift would have taken place in the absence of the protected union activity that occurred subsequent to March 9, 2012. The undisputed fact that there is no record evidence of continued staffing concerns regarding Ladder 39 after the March 9, 2012 lifts, combined with the absence of any credible explanation from the City for the August 1, 2012 lifts, compels us to reject the City's defenses. *See Colella*, 79 OCB 27, at 61 (BCB 2007) (when "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.") (citations omitted). Consequently, we find that the City and the FDNY violated NYCCBL § 12-306(a)(1) and (3) when it lifted and reassigned six Ladder 39 Firefighters on light duty status on August 1, 2012.

As a remedy for the FDNY's violations of the NYCCBL, the UFA has requested that the Board order the FDNY to "cease and desist from all actions complained of that violate the NYCCBL, to make all adversely affected UFA members whole monetarily, the restoration of all UFA members to posts they previously occupied prior to the events at issue, and the posting of notices." The UFA argues that its members lost overtime opportunities as a result of being reassigned to less desirable light duty posts.

We find no basis on which to award a monetary make whole remedy to the six Firefighters who were reassigned on August 1, 2012. Initially, the record does not support a claim that UFA members on light duty status had a contractual, statutory, or any other basis on which to assert a right to overtime, other than the 96 hours of Roster Staffing Overtime mandated pursuant to PA/ID

1-90. Here, there is no claim that the six Ladder 39 Firefighters at issue did not receive overtime pursuant to PA/ID 1-90. In addition, the City offered credible documentary evidence to rebut the UFA's claim that these six Ladder 39 Firefighters suffered financially from lost overtime opportunities as a direct result of the August 1, 2012 reassignments. The payroll documents in evidence reflect that, on average, these Ladder 39 Firefighters experienced no significant decrease in their credited overtime hours in 2012 following their August 1, 2012 reassignment.[25] Although the 2012 annual overtime report shows a dip in credited overtime hours for five of the six Firefighters in the month of August 2012, the number of overtime hours for which they were credited in the remaining months of 2012 averaged the same or higher than immediately prior to August 1, 2012.[26] (*See* City Ex. 8.) In light of the above, we cannot conclude that the compensation of these six Ladder 39 Firefighters was significantly affected by the August 1, 2012 reassignments. Consequently, back pay is not warranted for the loss of overtime opportunities resulting from the FDNY's retaliatory reassignment of six Firefighters on August 1, 2012. However, we grant the UFA's remaining requests for a remedy.

[25] Our overtime analysis was performed on reports that do not distinguish between overtime hours credited for work performed while on light duty status and other types of overtime hours.

[26] The exception is Firefighter McNally, who was injured in July 2012 and had no overtime hours that month, but was credited for 60 overtime hours in August 2012. We also note that in October 2012, Firefighter Fitzpatrick returned to full duty and Firefighter McCarroll retired.

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-3028-12 and BCB-3057-12, filed by Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, are hereby granted as to the claims that the City (1) violated NYCCBL § 12-306(a)(1) when the FDNY engaged in actions on March 16, 2012 and in August 2012 that were inherently destructive of employee rights, and (2) violated NYCCBL § 12-306(a)(1) and (3) when it reassigned six Ladder 39 Firefighters on light duty status on August 1, 2012; and it is hereby

ORDERED, that the improper practice petitions are hereby denied as to the claim that the City violated NYCCBL § 12-306(a)(1) and (a)(3) by reassigning six Ladder 39 Firefighters on light duty status on March 9, 2012; and it is hereby

ORDERED, that the FDNY restore the six Ladder 39 Firefighters who were reassigned on August 1, 2012 to the light duty assignments they held immediately prior to that date, provided that they are eligible for and still assigned to light duty; and it is hereby

ORDERED, that the FDNY cease and desist from retaliating against the UFA and its members for engaging in protected union activity; and it is hereby

ORDERED, that the FDNY post appropriate notices detailing the violations of the New York City Collective Bargaining Law described in this Decision and Order.

Dated: February 2, 2015
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER B. PEPPER
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 the Board of Collective Bargaining has issued 8 OCB2d 3 (BCB 2015), determining an improper practice petition between UFA, Local 94, IAFF, AFL-CIO, and the City of New York and the New York City Fire Department.

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, Docket Nos. BCB-3028-12 and BCB-3057-12, filed by UFA, Local 94, IAFF, AFL-CIO, and the same hereby are, granted as to the claims that the New York City Fire Department violated New York City Collective Bargaining Law § 12-306(a)(1) when the FDNY engaged in actions on March 16, 2012 and in August 2012 that were inherently destructive of employee rights, and that the New York City Fire Department also violated NYCCBL § 12-306(a)(1) and (a)(3) when it reassigned six Ladder 39 Firefighters on light duty status on August 1, 2012 in retaliation for protected union activity; and it is further

ORDERED, that the improper practice petitions are hereby denied as to the claim that the New York City Fire Department violated NYCCBL § 12-306(a)(1) and (a)(3) by reassigning six Ladder 39 Firefighters on light duty status on March 9, 2012; and it is hereby

ORDERED, that the New York City Fire Department restore the six Ladder 39 Firefighters who were reassigned on August 1, 2012 to the light duty assignments they held immediately prior to that date, provided that they are eligible for and still assigned to light duty; and it is hereby

ORDERED, that the New York City Fire Department shall cease and desist from all efforts to interfere with, restrain or coerce public employees in the exercise of their rights under the New York City Collective Bargaining Law, and it is further

ORDERED, that the New York City Fire Department post this Notice for no less than thirty (30) days at all locations it uses for written communications with employees of UFA, Local 94, IAFF, AFL-CIO.

New York City Fire Department
(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.