Local 376, DC 37, 9 OCB2d 21 (BCB 2016)

(IP) (Docket No. BCB-4131-15)

Summary of Decision: The Union alleged that DEP retaliated against a provisional Construction Laborer in violation of NYCCBL § 12-306(a)(1) and (3) by not appointing him to permanent status. DEP argued that its decision not to grant permanent status was based upon his disciplinary record. The Board found that the union demonstrated *prima facie* evidence of retaliation. Nevertheless, the agency had legitimate business reasons for its decision. Therefore, the improper practice petition is dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

LOCAL 376, DISTRICT COUNCIL 37,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On October 5, 2015, Local 376, District Council 37 ("Union"), filed an improper practice petition against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP"). The Union alleges that DEP 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") by not conferring permanent status upon a provisional employee in retaliation for his union activity. DEP argues that it declined to advance the unit member due to

his disciplinary record. The Board finds that the Union demonstrated a *prima facie* case against DEP, but that DEP had legitimate business reasons for not appointing the unit member. Therefore, the improper practice is dismissed.

BACKGROUND

The Trial Examiner held four days of hearings and found that the totality of the record established the following relevant facts.

DEP is a mayoral agency that manages and conserves the City's water supply. It distributes drinking water and collects and treats wastewater through a network of underground pipes and pumping stations. DEP's Bureau of Water and Sewer Operations ("BWSO") is responsible for the maintenance and repair of water mains and sewers throughout the City. At BWSO, Apprentice Construction Laborers ("ACLs") and Construction Laborers ("CLs") repair and maintain water supply and sewer lines.

ACLs are employed by DEP as apprentices, during which time they have probationary status. The ACL title is a non-competitive title. While in the apprenticeship program, ACLs are evaluated on their performance. Generally, the apprentice program lasts for two years, but DEP may extend an employee's apprenticeship, and therefore their probationary status, for up to one additional year. ACLs that successfully complete the apprenticeship program are provisionally appointed into the CL title. The CL title is a competitive class title, and a provisional CL must

take a promotional civil service exam to attain permanent status.[1] A civil service promotional examination is offered approximately every four years.

Employees who take a promotional examination are placed on a civil service list and ranked based on their score. Selection of candidates from the civil service list is governed by § 61(1) of the Civil Service Law ("CSL"), also known as the "One-in-Three" rule, which requires the appointing agency to select one of the three highest-scoring candidates for each open position.[2] Union Grievance Representative Thomas Kattou testified that since at least 1995, nearly all passing candidates have been certified to permanent CL positions.[3]

Since 1995, the DEP has declined to appoint a provisional CL utilizing the One-in-Three rule only twice. In 2004, DEP did not select a provisional CL because he had been on an extended absence due to a non-work related injury. His personnel record indicates that his non-appointment was considered non-disciplinary and that he remained eligible for reinstatement. Similarly, in 2011, DEP did not select a provisional CL in the three times he was under consideration because he had been on an extended absence following a work-related injury.[4] Apart from provisional CLs, the record demonstrates that in 2013, BWSO requested the termination of a provisional

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[1] The promotional examination for the CL title is scored based on the candidate's "education and experience." (Tr. 82) The candidate fills out an application and indicates his or her educational and employment background. There is no written test component to the examination.

[2] Section 61(1) of the CSL provides: "Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion . . . ."

[3] Approximately 365 candidates have passed the civil service exam since 1995.

[4] During this same period, DEP also terminated a provisional CL, without applying the One-in-Three rule, for using an unmarked City vehicle without authorization. This termination was not in the context of a promotion or appointment process.

Watershed Maintainer who received 100% on the Civil Service Exam but nevertheless had an extensive disciplinary history.[5]

Under the CSL, agencies may not employ provisional employees for longer than two months following the establishment of a civil service list. *See* N.Y.C. Personnel Rules and Regulations, Rule 5.5.3 ("DCAS Rules"); CSL § 65(3).[6] Therefore, provisional CLs who are on the civil service list but are not selected must be discharged.

The instant case was filed after DEP decided not to appoint Nicholas DelPonte, a provisional CL, to permanent status following his certification to a civil service list. His employment was terminated the next day in compliance with the CSL and the DCAS Rules.

The 2013 Improper Practice Decision

The parties' arguments in this matter rely in part upon the facts and legal conclusions of a prior proceeding, *Local 376*, 6 OCB2d 39 (BCB 2013) ("*Local 376 I*"). That matter is briefly summarized here.

In July 2012, DEP proposed a pilot program in which ACLs and CLs would be trained to operate a hydraulic excavator. The Union opposed this plan and, on September 25, 2012, sent a letter to the City asserting that such work was unsafe and outside the scope of the ACL and CL job specification. Despite the Union's opposition, DEP began implementing the pilot program in March 2013 and assigned the hydraulic excavator duties to Union members. By March 20, 2013,

[5] The final disposition of this employee is unclear because his name appears in three civil service lists that post-date BWSO's termination request by several months. In the most recent one, dated over a year following the termination request, he was not appointed due to a failure to report or reply.

[6] Section 65(3) of the Civil Service Law provides, in relevant part: "A provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions . . . ." DCAS Rule 5.5.3 sets forth this same language.

Field Director Anastasios Georgelis had prepared initial recommendations seeking the termination of five of the members of the ACL class, purportedly due to time-and-leave violations, and the extension of the probationary period of the remaining four ACLs, purportedly due to their need for additional training. This latter group included DelPonte.

On March 21, 2013, the Union filed a grievance contending that operating a hydraulic excavator is outside the scope of the job specifications for ACLs and CLs. That same day, BWSO Deputy Commissioner James Roberts reviewed and approved the Field Director's recommendations for terminating and extending the probationary period of ACLs. On March 26, 2013, the Union filed an improper practice petition with the Office of Collective Bargaining ("OCB"), alleging that DEP terminated five ACLs and extended the probation period of four others in retaliation for protected union activity, in violation of the NYCCBL.[7]

In a decision dated December 19, 2013, the Board determined that the terminations and probation period extensions against eight of these nine ACLs, including DelPonte, was improperly motivated by anti-union animus.[8] Although the City asserted that DEP's actions were motivated by time and leave violations and the need for additional training, the Board found that the documentary evidence provided did not support its claim. With respect to DelPonte, the Board concluded that the City's position was undermined by DelPonte's four "very good" overall ratings and comments that he is "a very good employee," "an asset to the department," and "on his way to being an outstanding laborer." *Local 376*, 6 OCB2d 39, at 26. The Board ordered that the

[7] Additionally, on May 31, 2013, the Union, on behalf of the ACLs, brought a special proceeding in Supreme Court, New York County. DelPonte was the first-named petitioner in that proceeding. The legal claim in that special proceeding is not reflected in this record.

[8] The Board found that DEP's decision to extend the probationary period of one ACL was supported by a legitimate business reason.

Respondents reinstate the five terminated employees and reevaluate eight of the nine affected employees for maturation to provisional status. Following this decision, on or around January 18, 2014, DEP promoted DelPonte to provisional CL, effective April 25, 2013, and paid him back pay retroactive to April 2013.

Changes Following *Local 376 I*

On May 1, 2014, David Cohen became DEP's Deputy Commissioner of Labor Relations and Discipline. Cohen testified that, upon his arrival at DEP, newly-appointed Commissioner Emily Lloyd gave him a mandate "to support the Deputy Commissioners as they worked on improving the level of service, the quality of work life, and the general effectiveness of DEP."[9] (Tr. 181) Cohen testified that as he met with his new staff and spoke with the other Deputy Commissioners, he developed an opinion that the DEP inconsistently enforced the personnel rules and was inconsistent in the level of penalty imposed when an employee was determined to have violated the rules. Accordingly, since he arrived at DEP, Cohen has empowered the Deputy Commissioners to more forcefully act on employee misconduct as compared to the past.

Moreover, BWSO began a practice of reviewing time and attendance and disciplinary histories of employees before they were permanently appointed. It is not clear that any other bureau has established such a practice. Deputy Commissioner Cohen testified that DEP's Human Resources Department has advised the bureaus to consider the disciplinary records of provisional employees before conferring permanent status. Deputy Commissioner of Human Resources Zoe Ann Campbell explained that the Deputy Commissioner for each individual bureau has an important role in determining the standards for discipline and hiring in that bureau. With respect

[9] Commissioner Lloyd was appointed about six weeks prior.

to BWSO, she testified that the standards for discipline have become stricter since the appointment of Deputy Commissioner Roberts.[10] Deputy Commissioner Roberts did not testify in this proceeding.

BWSO Bureau Administrator Naomi Hamer, who directly reports to Roberts, testified that within the past few years, DEP has encouraged BWSO to apply a more thorough vetting process before promoting or appointing candidates off a civil service list, including checking employee disciplinary records. The Bureau Administrator testified that this encouragement was conveyed to her in a meeting with the other bureau administrators, but she was unable to recall when that meeting occurred or whether she had requested candidate disciplinary histories in connection with any civil service exam other than the most recent one, in February 2015.

Review of DelPonte's Personnel Record

In February 2015, the Department of Citywide Administrative Services ("DCAS") published a Notice of Examination for the CL position. On July 29, 2015, a new civil service list was established for the CL position. DelPonte received an examination score of 100, the highest possible grade, and was ranked number six on the civil service list. Also on the list of eligible employees were the five whom the Board determined were improperly terminated in *Local 376 I*, two of the ACLs (other than DelPonte) whose probationary periods were improperly extended, and the single employee whose extended probationary period was sustained in *Local 376 I*.

On September 8, 2015, the BWSO Bureau Administrator began gathering the disciplinary records of all provisional CLs eligible for permanent status. A member of the Bureau Administrator's staff identified that five provisional CLs had disciplinary records, including

[10] Deputy Commissioner Roberts has been in his present position since at least September 2011. The record does not establish the precise date he was appointed.

DelPonte. Four of these five had been involved in *Local 376 I*. The Bureau Administrator then forwarded disciplinary summaries for these five individuals to Deputy Commissioners Campbell, Cohen, and Roberts, with the following note:

> BWSO has received the list of eligible employees from the current Construction Laborer Civil Service List. Before we send up any . . . we pulled all of their files and looked at their disciplinary [histories]. Attached please find disciplinary [histories] on some of the laborers currently on the Construction Laborer Civil Service list. While one individual has one red light violation, other individuals have more significant disciplinary [histories]. I have included anyone who had any disciplinary [histories] at all in an effort not to be exclusionary.
>
> The Bureau is seeking guidance regarding how to handle these employees as it relates to the current Civil Service List.

(City Ex. 20)

Within an hour after the Bureau Administrator sent this email, Deputy Commissioner Roberts inquired: "Which of these were part of the group of apprentices that were terminated and then forcefully [*sic*] reinstated?"[11] (City Ex. 20) The Bureau Administrator and her staff reviewed which employees being considered for permanent status had been terminated then reinstated in compliance with the Board's decision in *Local 376 I*. (Tr. 243-44) Following this search, she responded with the names of two provisional CLs, neither of whom were DelPonte.[12] (City Ex. 20) Outside of this single email response, the Bureau Administrator testified that she did not communicate at all with Roberts concerning the July civil service list or why he requested the information regarding individuals affected by *Local 376 I*.

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[11] In his reply, Roberts added the Field Director, whose actions were in question in *Local 376 I*, to the email chain.

[12] We note that in *Local 376 I*, DelPonte's probationary period was extended; he was not terminated.

After this exchange, Deputy Commissioner Campbell contacted Deputy Commissioner Cohen to discuss the disciplinary records of the civil service candidates at BWSO. Cohen testified that they spoke about two or three times in total and once in person. Of the five employees with disciplinary records, only DelPonte had issues related to job performance.[13]

In addition to reviewing the file sent by the Bureau Administrator, Deputy Commissioners Cohen and Campbell also reviewed two Step II decisions concerning DelPonte dated June 22, 2015, which addressed several charges stemming from incidents occurring in late 2014 and early 2015.[14] The Step II hearing officer imposed a ten-day suspension and a twenty-day suspension. The ten-day suspension was issued for disobeying an order to help repair a leaking service line.[15] The twenty-day suspension was issued for multiple incidents occurring in October 2014.[16] Additionally, DelPonte and Union President Gene DeMartino testified that at the Step II hearing DEP Disciplinary Counsel Carla Lowenheim stated that DelPonte had a bad attitude, that he should have been terminated "a long time ago," and that he was a "weisenheimer." (Tr. 35-36)

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[13] The disciplinary records of the others were as follows: One candidate had multiple charges for failing to maintain a valid NYS Driver's License. The second candidate had single charge for failing to maintain a valid driver's license. The third received a warning letter for failing to maintain a driver's license. The fourth had one red light violation.

[14] The file originally sent by the Bureau Administrator contained seven charges for incidents occurring on February 20, 2015, January 14, 2015, October 24, 2014, October 8, 2014, and August 6, 2014. DEP did not pursue discipline for the August 6th incident.

[15] According to the Step II decision, DelPonte also was charged with two counts of neglecting his duties and one count of leaving his worksite without authorization on January 14, 2015. These charges were not sustained by the hearing officer.

[16] On October 8, 2014, DelPonte was charged with leaving the worksite without authorization when he took a lunch break against his supervisor's explicit instruction that he should keep working. Later that day, he was charged with neglect of assigned duty for leaving a six-foot ductile pipe in a DEP vehicle. On October 24, 2014, DelPonte was charged with two counts of insubordination when he refused to retrieve sand and bricks, respectively, from a construction truck.

Cohen and Campbell also reviewed DelPonte's performance evaluations. Since 2011, DelPonte had received 12 evaluations, 11 of which primarily concerned work performance prior to his appointment to provisional status in 2014. Those 11 evaluations all characterized DelPonte as a good employee who followed orders well and got along with his colleagues. However, the most recent evaluation, addressing the period subsequent to his promotion to provisional CL status, January 1, 2014 to December 31, 2014, commented that "Mr. DelPonte has displayed disgruntled behavior which has resulted in disciplinary actions taken against him by more than one supervisor. Mr. DelPonte requires constant supervision." (Pet. Ex. C) Additionally, the review noted that "Mr. DelPonte needs to improve his behavior, as well as his attitude." (Pet. Ex. C)

Deputy Commissioner Cohen explained that he and Deputy Commissioner Campbell conducted their review of DelPonte's record as follows:

> When we got to Mr. DelPonte, he has an extensive set of charges that were working their way through the system. They had all gone to Step II. Step II determinations had been issued and most of the charges were sustained, and most of them dealt with insubordination . . . . We determined that we should bypass him, consider him not selected, and not appoint him to a permanent position. It was my opinion, looking at the progression of charges over time, that he was going to not conform his behavior to our expectations and I would likely see him again in [a] third set of charges.

(Tr. 169)[17]

During their assessment of DelPonte's record, Deputy Commissioners Cohen and Campbell also discussed the fact that DelPonte had been involved in *Local 376 I*. Cohen testified:

> [We] discussed whether we had business justification for not appointing him. It was certainly my expectation, reading the Board's [*Local 376 I*] decision . . . that we would be in exactly this

[17] Cohen further explained that he was already familiar with DelPonte's Step II determinations before this stage in the review process. One of Cohen's duties is to discuss all Step II determinations with the relevant hearing officer, who are members of his staff, before they are finalized.

> proceeding if we did not appoint him, because that would be his only avenue of appeal for non-appointment, was to claim retaliation. So we discussed his record extensively because I wanted to be comfortable that we did, in fact, have a defense which was going to be a bona fide defense and which the Board would uphold."

(Tr. 174)

Overall, Deputy Commissioner Cohen explained, his intent was to make a "rational, reasoned, careful, articulable decision" that would be upheld by the Board. (Tr. 204) On September 11, 2015, Deputy Commissioner Campbell instructed the Bureau Administrator to elevate the other four provisional CLs with disciplinary histories, but to not appoint DelPonte.

On September 21, 2015, nine provisional CLs were appointed to permanent status. Eight of them had been involved in *Local 376 I*.[18] DelPonte was the only provisional CL not appointed.[19]

On October 1, 2015, the Bureau Administrator sent a request to Deputy Commissioner Campbell to terminate DelPonte due to the "existing civil service list for the title of Construction Laborer." (Ans. Ex. 5). At the hearing, the Bureau Administrator was questioned about whether she conferred with Deputy Commissioner Roberts regarding this request. She testified that she did not remember whether she ever discussed the matter with Roberts following the promulgation of the civil service list. However, Deputy Commissioner Cohen testified that the Bureau Administrator does not have operational authority to request an employee's termination without clearing it with Roberts.

The next day, DEP advised DelPonte that he was dismissed effective immediately "due to the promulgation of the civil service list." (Ans. Ex. 4)

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[18] This number includes the single employee whose probationary period had been extended for legitimate business reasons in *L. 376 I.*

[19] Several other provisional CLs were not qualified for consideration for a permanent appointment because they did not meet the work experience requirement. These candidates remained on the eligible list.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that DEP retaliated against DelPonte for protected activity, in violation of NYCCBL §§ 12-306(a)(1) and (3).

Initially, the Union argues that anti-union animus motivated DEP's refusal to appoint DelPonte to permanent status. The Union first points to DEP's "unprecedented" application of the One-in-Three rule. (Union Br. at 10) Although DCAS has conducted seven promotional examinations since 1995, involving over 300 candidates, only two employees prior to DelPonte have been rejected under the One-in-Three rule, both of whom had been absent from work for over a year by the time that their names appeared on the eligible list.

The Union asserts that the email from Deputy Commissioner Roberts also demonstrates anti-union animus. The only communication from Roberts put into the record was an email in which he asked whether the current list of eligibles included certain individuals who had been involved in *Local 376 I.* The Union argues that this communication demonstrates Roberts' desire to "take revenge on the workers who 'forced' the agency to take them back." (Union Br. at 11) (internal quotations in original)

Moreover, the Union contends that Deputy Commissioner Roberts effectuated DelPonte's termination. It alleges that the City's witnesses offered inconsistent testimony on this point, "indicat[ing] a conscious effort to cover up Roberts' role in the firing." (Union Br. at 6) In particular, the Union charges that the Bureau Administrator's testimony concerning Roberts' involvement lacked credibility. The Union thus urges that the Board should draw an adverse inference against Respondents for failing to call Roberts to testify.

The Union additionally argues that DelPonte's prior performance evaluations demonstrate DEP's anti-union animus. Between July 2011 and February 2014, DelPonte received 11 evaluations generally indicating that he was a cooperative employee who performed good work. In DelPonte's last evaluation before his termination, he was criticized for his "attitude" and "disgruntled behavior." (Union Br. at 12) The Union also emphasizes that, around this time, he was characterized as a "weisenheimer" by an attorney in DEP's disciplinary office. (Tr. 35-36) The Union asserts that these comments could be understood to "describe a worker who insists on his statutory and contractual rights." (Union Br. at 12)

The Union additionally charges that DEP's business justification for refusing to appoint DelPonte – his disciplinary history – is pretextual. It asserts that no provisional CL has ever been denied a permanent appointment based upon their disciplinary history and that BWSO has only adopted such a policy to provide itself with another opportunity to dismiss ACLs and provisional employees. The purpose of the extended ACL probationary period, it explained, is to provide the City with a substantial period of time to identify and terminate problem employees. Moreover, it contends that the testimony of Deputy Commissioner Cohen demonstrates both that the policy of reviewing a candidate's disciplinary history was motivated by the Union's success in *Local 376 I* and that BWSO is the only bureau that maintains such a policy. Additionally, the Union urges that we find that DEP's justification is pretextual because "[h]ostility to the union is almost hard-wired into DEP's culture." (Union Br. at 16) In support of this position, it cites to multiple instances since 2003 in which it has prevailed against DEP in improper practice proceedings before our Board.

Additionally, the Union notes that DEP only sought a suspension for DelPonte's alleged misconduct, rather than termination. It contends that, by neither seeking nor obtaining termination

at the Step II hearing, DEP has demonstrated that it does not believe DelPonte's disciplinary record actually warrants such an extreme level of discipline.

City's Position

The City contends that Petitioner has failed to allege or prove a *prima facie* violation of NYCCBL § 12-306(a)(3).[20] Although they concede that Petitioner has engaged in protected activity and that it had knowledge of such activity, the City argues that Petitioner has failed to establish evidence to support a finding of improper motive. The City asserts that the Union relies solely on the fact that the Union previously filed improper practice and Article 78 petitions on DelPonte's behalf. This, alone, is insufficient to establish the requisite causal connection to support a claim of retaliation. Moreover, the City contends, the other provisional CLs involved in *Local 376 I* were appointed to permanent positions, thereby undermining Petitioner's assertions that DEP's decision not to appoint DelPonte was improperly motivated.

Even assuming that Petitioner establishes its *prima facie* case, the City argues that its actions were justified by legitimate business reasons and would have been taken even absent any protected activity. It asserts that the decision not to appoint DelPonte followed a review of the disciplinary records for all employees on the eligible list. Unlike the other provisional CLs, DelPonte had recent serious infractions whereas other employees had either no discipline or minor disciplinary infractions that were later rectified. Moreover, DelPonte received an overall "conditional" rating on his most recent performance evaluation. Respondents emphasize the testimony of Deputy Commissioner Cohen, who explained that DelPonte's work record indicated

[20] The City argues that any claim under NYCCBL § 12-306(a)(1) must fail because no facts have been alleged supporting the assertion that its actions are inherently destructive of important employee rights. We do not address this claim as the Union has not set forth an argument in support of it.

that he was unwilling to improve his behavior and that he was not qualified to be a permanent employee.

The City argues that the CSL and DCAS Rules authorize DEP to decline to appoint a provisional CL from the civil service list. Under CSL § 61 (the One-in-Three rule), agencies have the discretion to choose among qualified candidates and consider factors aside from examination performance, including disciplinary history. This provision is mirrored in DCAS Rule 4.7.1(c).[21] Further, DCAS Rule 4.7.4 establishes that an employee is no longer eligible for certification if he is considered and not selected for three different vacancies at one agency. Here, Respondents assert, DelPonte's disciplinary record and his performance evaluation set him apart from the other candidates eligible for promotion.[22] Respondents additionally argue that, following the certification of the civil service list, it was compelled to terminate DelPonte by operation of CSL § 65(3) and DCAS Rule 5.5.3.

The City further claims that NYCCBL § 12-307(b) affords DEP the discretion to decline to appoint someone off the civil service list. That section provides that a public employer has the right to determine the methods, means, and personnel by which government operations are to be conducted, to make staffing decisions, and to relieve employees from duty for lack of work and other legitimate reasons. The City argues that DEP's decision to not appoint DelPonte because of his disciplinary history was a legitimate and proper exercise of DEP's managerial authority.

[21] DCAS Rule 4.7.1(c) provides, in relevant part: "Appointment or promotion from an established eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the commissioner of citywide administrative services or the head of the certifying agency, as the case may be, as standing highest on such established list who are qualified and willing to accept such appointment or promotion."

[22] The City contends that among the other four candidates with disciplinary histories, one received a ticket for a red light camera violation in 2013, and the others failed to possess a valid CDL license.

Moreover, the City emphasizes that DelPonte is not entitled to be appointed just because he passed the civil service examination.

Additionally, the City argues that the consideration of the provisional CLs' disciplinary histories was not itself discriminatory. The City explains that since the appointment of Commissioner Lloyd to DEP, the agency has been more rigorous in screening out appointees with disciplinary records and DelPonte is not the first employee to have been denied an appointment. In support of this claim, the City highlights the discharge of an ACL who was terminated after using an unmarked City vehicle without authorization, as well as the termination of a provisional Watershed Maintainer due to his extensive disciplinary history. The City additionally contends that previously, it has declined to appoint two employees who, although scoring highly on the civil service exam, were both absent from work for over a year due to health issues.

DISCUSSION

We find that while the Union has established a *prima facie* case, we also find that DEP's decision not to appoint DelPonte was made for legitimate business reasons.

In determining if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). In order to establish a *prima facie* claim of retaliation, a 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 18, at 13 (BCB 2013).

Here, the Union satisfied both elements of this test. The first element is satisfied because DEP concedes that DelPonte was engaged in protected union activity because he participated in *Local 376 I.* In addition, DEP supervisors and managers involved in the decision not to promote him were aware of this union activity.

In order to establish the second prong of the *Bowman/Salamanca* test, "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions which are the subject of the complaint." *DC 37, L. 376*, 6 OCB2d 18, at 28-29 (*quoting DC 37, L. 376*, 79 OCB 38, at 16) (BCB 2007); *see also Local 376, DC 37*, 73 OCB 15, at 12 (BCB 2004). Absent an outright admission, proof of improper motivation must necessarily be circumstantial. *Id.* at 14 (citing *CEU, L 237*, 67 OCB 13, at 9 (BCB 2001)); *see also Feder*, 4 OCB2d 46, at 44 (BCB 2011).

Our finding that the Union has satisfied the causation prong of the *prima facie* case is based on several facts. First, the record demonstrates that for at least 15 years DEP has conferred permanent status on almost all eligible and available provisional CLs. The record shows only two occasions in which an eligible provisional CL was not appointed; in both instances the candidate had been unavailable to work. Therefore, September 2015 was the first time that BWSO conducted a systematic review of employee disciplinary records before appointing provisional CLs to permanent status.

Second, we find that Deputy Commissioner Roberts' email inquiry is evidence of the requisite anti-union animus. In response to the Bureau Administrator's delivery of disciplinary records to Deputy Commissioners Cohen and Campbell, Deputy Commissioner Roberts asked which candidates were part of the group who had been terminated and "forcefully reinstated" following *Local 376 I.* (City Ex 20) Both the content and context of the email demonstrate animus

towards union activity. On the face of the email, Roberts' use of the word "forcefully" suggests a negative opinion about the impact of the remedy in *Local 376 I*.[23] Additionally, Roberts raised his question in an email chain regarding decisions about appointment to permanent status, a subject unrelated to *Local 376 I*. The City offers no explanation for his inquiry beyond asserting that the email does not establish any improper motive. In light of the record before us, and absent evidence demonstrating a credible, non-retaliatory reason for his question, we conclude that Roberts' question suggested that the appointment process should consider the employees' protected activity, which "forced" the agency to undo certain personnel practices.

Finally, we can reasonably infer that Deputy Commissioner Roberts participated in making the decision to review of candidates' disciplinary records. This is based on the testimony that the Deputy Commissioners of each bureau plays a role in determining hiring standards, as well as testimony that the disciplinary standards across BWSO have become stricter since Roberts' appointment. In addition, it is undisputed that the September 2015 request to review the candidates' disciplinary records came from the BWSO Bureau Administrator, a subordinate of Deputy Commissioner Roberts. Based on these facts, we find sufficient evidence to conclude that anti-union animus was a motivating factor in the decision to review the candidates' disciplinary records. The Union has therefore met the second prong of the *Bowman* test.

Once a petitioner has alleged sufficient facts to establish a *prima facie* case, the burden shifts to the City to refute this showing or to demonstrate legitimate business reasons for its actions. *See DC 37, L. 983,* 6 OCB2d 10, at 33 (BCB 2013); *CEU, L 237*, 77 OCB 3, at 12 (BCB 2006).

[23] We note that in *Local 376 I*, Roberts' actions were found to have been tainted with anti-union animus. *See Local 376*, 6 OCB 2d 39, at 21.

We find that the City has fulfilled its burden by establishing a legitimate business reason. The record establishes that although BWSO's request was tainted with anti-union animus, Deputy Commissioners Cohen and Campbell based their ultimate decision on an independent analysis of DelPonte's disciplinary history. *See DC 37, L. 983*, 6 OCB2d 10 (BCB 2013). Cohen and Campbell's decision not to promote DelPonte relied upon the Step II decisions relating to DelPonte's prior misconduct as well as his performance evaluations. Importantly, Cohen elaborated that before any Step II decision is finalized, he discusses it with the Step II hearing officers, who are members of his staff. Cohen credibly testified that his prior knowledge and his review of the Step II decisions persuaded him that DelPonte's behavior and attitude would not change and that he was not suitable for appointment to permanent status.[24] Additionally, we credit Cohen and Campbell's testimony that they did not seek Deputy Commissioner Roberts' opinion when determining that DelPonte should not be appointed to permanent status. Thus, the City has demonstrated that Cohen and Campbell were not motivated by anti-union animus when they determined not to appoint DelPonte.

Further supporting our finding that Deputy Commissioners Cohen and Campbell's assessment was conducted independently of any bias is the fact that within the group of candidates who had disciplinary records, DelPonte stood out among his colleagues as the only one with

[24] We disagree with the dissenting Board Members that Cohen, by his comment that he wanted to "send a message to the other employees," evidenced a retaliatory motive in his determination that DelPonte should not be appointed to permanent status. (Tr. 182) Cohen offered the quoted testimony in the context of explaining his goals after being hired by DEP and why he sought to increase penalties imposed for employee misconduct throughout the agency. Cohen's statement was not made concerning his review of DelPonte's disciplinary history or his decision not to appoint DelPonte.

insubordination charges and the only one who had been suspended during his provisional period.[25] In addition, the remaining eligible provisional CLs, several of whom had participated in the same union activity as DelPonte, were appointed to permanent status. Thus, the record demonstrates that Cohen and Campbell singled out DelPonte based upon his disciplinary record, not his union activity.

This conclusion is consistent with our prior cases in which we have found that an independent analysis can break the causal connection. For example, in *Lamberti*, 77 OCB 21 (BCB 2006), although the petitioner's supervisor exhibited anti-union animus and it played a part in the decision to grant a promotion to an employee other than the petitioner, the Board concluded that the opinion of the biased supervisor was not determinative in the ultimate decision. In reaching this conclusion, the Board found that the final decision-maker relied on the candidates' supervisory experience in deciding which employee should be promoted. *See id.* at 18 ("[T]he employer may proffer a business reason establishing that the anti-union animus was not the substantial or motivating factor in the decision to pass over the employee."). Similarly, in *Kemp*, 1 OCB2d 43 (BCB 2008), we found that despite evidence of animus, the decision not to promote the petitioner would have occurred anyway, because the employer relied on the fact that the petitioner was not bilingual when the job description called for that skill, as well as the petitioner's conduct during the job interview.[26] *Id.* at 14, 17.

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[25] The record establishes that among 12 candidates, only five had disciplinary records. More significantly, among the nine individuals who had been involved in *Local 376 I*, four had disciplinary records and five did not. Of these nine eligible provisional CLs, eight were appointed to permanent status.

[26] The record in that case established that, among the several individuals involved in the final decision, one person was motivated by anti-union animus.

We note that our approach is also consistent with the Supreme Court's decision in *Staub v. Proctor Hospital*, 562 U.S. 411, 421 (2011). There, the Court considered the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision. 562 U.S. at 413.[27] The Court held that an employer may be liable for discrimination when a biased supervisor performs an act intended to cause an adverse employment action and that act is then the proximate cause of the ultimate employment action. However, the Court explained that the causal link may be broken where an unbiased decision-maker independently concludes that an adverse employment decision is warranted, apart from the biased supervisor's involvement or opinion. *Id.* at 1193; *see also Vasquez v. Empress Ambulance Services, LCC*, No. 15-3239-cv, (2d Cir. Aug. 29, 2016) (holding that an employer may be held liable for a biased subordinate's animus where the employer engages in negligent conduct that gives effect to the animus); *Lobato v. New Mexico Environmental Dept.*, 733 F.3d 1283, 1295 (10th Cir. 2013) (clarifying, in a claim arising under Title VII, that the proximate cause element is broken where the unbiased decision-maker "independently verifies the employee's acts and does not rely on the biased source," even if the biased subordinate first alerted the employer to the employee's misconduct). As we set forth above, in this instance Deputy Commissioners Cohen and Campbell's determination relied on their independent assessment of DelPonte's Step II decisions and disciplinary record.

Accordingly, we find DEP had legitimate business reasons to deny DelPonte permanent status. The petition is therefore dismissed.

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[27] The case was brought under the Uniformed Services Employment and Reemployment Rights Act, which prohibits discrimination against employees based upon their membership in the armed forces.

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 verified improper practice petition filed by District Council 37, Local 376, docketed as BCB-4131-15 against the City and the Department of Environmental Protection is hereby dismissed in its entirety.

Dated: October 6, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

I Dissent. CHARLES G. MOERDLER
MEMBER

I Dissent. PETER PEPPER
MEMBER

We respectfully dissent.

This proceeding turns on credibility issues and largely on the creditability of Deputy Commissioner Cohen. However, the Record does not warrant according his actions any credibility. To the contrary, it reflects a retaliatory effort by Commissioner Cohen to "get" Mr. Del Ponte and a careful and deliberately executed plan on his part to create a "bullet proof" Record to achieve that result. The Record shows soon after Mr. Cohen first learned that a prior attempt to separate Mr. Del Ponte had failed based on the proceedings then initiated and that yet another opportunity was here presented, Mr. Cohen determined not to permit Mr. Del Ponte's appointment (e.g., Tr. 169,175). Mr. Cohen testified that, with knowledge of the prior proceedings in which Mr. Del Ponte prevailed, Mr. Cohen then led discussions seeking to determine whether "business justifications" existed" for not appointing Mr. Del Ponte (e.g., Tr. 174-176).Indeed, Mr. Cohen admitted that the prior proceedings and determination in favor of Mr. Del Ponte were a "…a part of the discussion about whether he should be appointed." (R. 175). Retaliation as a driving force is evident as is Mr. Cohen's stated approach that on his watch at the Department he wanted "to send a message to other employees" concerning the penalties that could be imposed…." (R 182).

October 6, 2016
New York, New York

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER