

**SSEU, Local 371, 9 OCB2d 3 (BCB 2016)**

(IP) (Docket No. BCB-4108-15)

**Summary of Decision:** The Union alleged that the City violated NYCCBL § 12-306(a)(1) and (3) by discharging a probationary employee in retaliation for requesting the assistance of her Union delegates. The City argued that the Union failed to present facts sufficient to state a *prima facie* case of retaliation and that the probationary employee was discharged for legitimate business reasons. The Board found that the Union proffered its *prima facie* case, but that the City refuted the causation prong and provided legitimate business reasons for its actions. Accordingly, the improper practice petition was dismissed. (*Official decision follows.*)

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

**In the Matter of the Improper Practice**

*-between-*

**SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,  
on behalf of LISSETTE MURIEL,**

*Petitioners,*

*-and-*

**THE CITY OF NEW YORK and THE NEW YORK CITY  
TAXI AND LIMOUSINE COMMISSION,**

*Respondents.*

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**DECISION AND ORDER**

On April 15, 2015, the Social Service Employees Union, Local 371 (“Union”), filed a verified improper practice petition on behalf of its member, Lissette Muriel, against the City of New York (“City”) and the New York City Taxi and Limousine Commission (“TLC”). The Union alleges that the City violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by

discharging Muriel in retaliation for requesting the assistance of her Union delegates. Respondents argue that the Union has failed to present facts sufficient to state a *prima facie* case of retaliation and that the probationary employee was discharged for legitimate business reasons. The Board finds that the Union proffered its *prima facie* case, but that the City refuted the causation prong and provided legitimate business reasons for its actions. Accordingly, the improper practice petition is dismissed.

### **BACKGROUND**

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

The Union represents individuals in the civil service title of Community Associate. The Union and the City are parties to the Social Services and Related Titles collective bargaining agreement (“Agreement”).

On or about September 2, 2014, Muriel began her probationary employment with TLC in the Licensing and Standards Division Customer Service Unit in the civil service title Community Associate and in-house title Customer Service Representative. Muriel’s probationary employment was terminated effective December 22, 2014.

The Licensing and Standards Division processes a variety of license and permit applications and renewals for operating for-hire vehicles within the jurisdiction of TLC. Customer Service Representatives prescreen customers to ensure that they meet the requirements to apply for or renew a drivers license or permit. At the time Muriel was employed, six Customer Service Representatives, including Muriel, were supervised by the Supervisor of Customer Services/Licensee Support, Fabian Cancel (“Supervisor”), who reported to the

Director of Customer Services/Licensee Support, Nicol Fakas (“Director”). The Director reported to the Assistant Commissioner of the Licensing and Standards Division, Allison Siegel (“Assistant Commissioner”).

A few weeks after being hired, Muriel had two unexcused latenesses on September 18 and 19, 2014.<sup>1</sup> The Supervisor testified that he spoke with Muriel on September 18 and informed her that she was on probation and that her continued lateness could lead to her termination. That day, the Supervisor also wrote himself an email that states, in pertinent part, that: “I spoke to [Muriel] and reminded her that she cannot be late and continued lateness may result in disciplinary action and can lead to termination.” (City Ex. 6) On September 19, the Supervisor wrote himself an email that provides, in pertinent part: “2<sup>nd</sup> lateness during her probation.” (City Ex. 6) The Director testified that the Supervisor kept her abreast of Muriel’s lateness in the first few weeks of employment.<sup>2</sup> Muriel testified that she was never criticized, either verbally or in writing, regarding any time and leave issues, including attendance and/or lateness.

The Supervisor also testified that there were occasions when Muriel failed to submit her timesheet and overtime requests in a timely manner. On October 10, the Supervisor sent Muriel an email informing her that her timesheet for the previous week and her overtime requests had not been submitted in a timely manner and stated the deadlines for timely submissions. On November 10, the Supervisor sent Muriel another email about additional late overtime requests

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<sup>1</sup> On September 18, the Supervisor received a call from Muriel informing him she would be late due to a train delay, she was 13 minutes late. On September 19, Muriel was 28 minutes late.

<sup>2</sup> The Director testified that the Supervisor showed her three emails that he sent to Muriel about her lateness. Two emails documenting Muriel’s lateness were entered into the record and both were sent from the Supervisor to himself.

and again reminded her that she must submit her requests in a timely manner. The Director testified that the Supervisor informed her of Muriel's submission of time records in an untimely manner.<sup>3</sup>

On the morning of October 22, the Director sent an email to the Supervisor regarding a verbal warning she gave Muriel about her phone usage. The October 22 email states, in pertinent part:

I just called Lissette [Muriel] in to the office and gave her a verbal warning regarding the usage of the telephone. I explained to her that she cannot spend long periods of time on the telephone as I have observed she has been doing since she started with the [TLC]. Today, she claims she was enrolling for her health benefits while she is working on the assignment we asked her to work on – she has been on either her phone or TLC phone since she arrived this morning during various intervals. I expressed to her that she needs to conduct her personal business during her lunch hour.

(City Ex. 1)

The Director and the Supervisor also testified that one day in October, right after a holiday, when the office was understaffed, Muriel insisted upon being able to leave early. The Director asserts that she told Muriel that it was short notice, she was short staffed, and she needed her to cover the lobby, which is what she was hired to do. According to the Director, Muriel said it was an emergency and she was going to leave no matter what, so the Director agreed to let Muriel leave without writing her up.

On or about November 13, a customer came to Muriel's workstation asking to speak with the TLC employee they had spoken to on the phone because their license was about to expire.

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<sup>3</sup> The Director testified that she saw one or two emails from the Supervisor to Muriel about her failure to submit her time records on time. This testimony is corroborated by two emails in the record from the Supervisor to Muriel about Muriel's late submission of time records.

Muriel went to locate the requested employee in the Call Center and was absent from her workstation for ten or 15 minutes. Sometime thereafter, the Supervisor and the Director questioned Muriel and another Customer Service Representative about why they had left their workstations. Muriel asserts that she was told that she should not have left her workstation without approval from a supervisor but that she was “fairly new so [she] wouldn’t know,” (Tr. 26) while the other Customer Service Representative was told: “[y]ou know better.”<sup>4</sup> (Tr. 28) The Supervisor and the Director confirmed that Customer Service Representatives are instructed to notify their supervisors before stepping away from their stations so that coverage can be provided in their absence.

On the second floor of the building, Customer Service Representatives are stationed at either a window, or one of five carts, each of which has a laptop and chair. On or about November 21, 2014, Muriel was assigned to work at the window. Muriel asked the Director to change her assignment because she had already worked at the window two times that week, she found it to be “quite overwhelming,” and she wanted to work at a station with a lower volume of work. (Tr. 30) The Director denied the request. Later that morning, Muriel had another Customer Service Representative, Elizabeth Rivera, cover the window while she went to the bathroom. Aside from Rivera, Muriel did not inform anyone that she was going to the bathroom. According to the Director, when she noticed Rivera working at the window, she inquired whether Muriel had asked to switch stations, and she was told that she had. The Director asserts that she then waited by the rest of the work stations, the carts, for “a good 20 minutes” before Muriel returned to an empty cart. It is undisputed that the Director watched Muriel return to a

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<sup>4</sup> The Supervisor similarly testified that he told Muriel that since she was new, the instruction would be considered informal, but if she did it again it would be an issue.

cart, and then called Muriel into her office. Muriel testified that she did not switch stations and that she was only gone for approximately ten minutes.

On or about November 26, 2014, Muriel was presented with a discussion report drafted by the Director regarding “[p]roper [p]rotocol for stepping away from workstation and communicating with supervision” (“November Discussion Report”).<sup>5</sup> The November Discussion Report states, in pertinent part:

As part of your normal and standard job duties and responsibilities, you are required to be at your workstation on time and notify your supervisor if you need to leave your workstation for any reason.

- On November 13<sup>th</sup>, you left your workstation to seek out a member of the call center at the request of an applicant. You didn’t notify your supervisor and were away from your station for approximately 15 minutes, as confirmed by call center staff. An informal discussion took place that afternoon with yourself and another member of our staff.
- On November 21, 2014, you left your workstation without notifying your supervisor and returned 20 minutes later.

This is therefore a formal warning with respect to the manner in which you are conducting yourself with regards to proper office protocol that I perceive could negatively affect the office.

- Employee communicates with management in a concise and courteous manner and complies with instructions and directives from supervisory personnel.
- Problems and/or issues are identified and reported promptly to management in a concise manner that clearly delineates the nature of the problem.

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<sup>5</sup> It is undisputed that Muriel was shown an earlier draft of the discussion report that included an additional bullet about switching workstations without approval. During a meeting with the Director and the Supervisor, at which Muriel denied that she had switched stations, the other Customer Service Representative was called in, and she asserted that she had not been asked to switch stations. The Director had the bullet about switching workstations removed from the discussion report. (*Compare* City Ex. 2 with Union Ex. B) We note that, while Muriel testified that the first draft of the discussion report did not mention the November 13 incident, both versions of the discussion report in evidence reference the November 13 incident.

In the future, I expect you to communicate with me and/or your supervisor with respect to your whereabouts in a professional manner. I should be informed of any need to step away from your station as soon as possible to be able to adjust assignments of the remaining staff and provide coverage. I am more than willing to work with you if a situation arises where you must step away but communication is primary.

I am also presenting you with a copy of the breaks memo as distributed to licensing staff on February 13, 2014. This memo was forwarded to your email on September 3, 2014.

Failure to follow office policy may lead to disciplinary action.

(Union Ex. B) The November Discussion Report was signed by Muriel, the Director, and the Supervisor.

The Director and the Supervisor testified that they made it very clear to Muriel during the interview process that one of the reasons that she was being hired was to work in the building lobby and her training included shadowing the Director, the Supervisor, and the Assistant Commissioner when they worked in the building lobby. Muriel acknowledged that during the interview process she was informed that she would have to work in the lobby, but asserts that she was promised, and never provided, a station in the lobby with a chair and computer.

At 8:00 a.m. on December 12, 2014, the Supervisor sent Muriel downstairs to the lobby to prescreen TLC customers because there was a system outage.<sup>6</sup> The Director testified that around 9:00 a.m., Kala Wright, the then Director of the Call Center (“Call Center Director”), told

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<sup>6</sup> Muriel testified that she had been assigned to the lobby on two occasions prior to December 12. She also testified that she was the only customer service representative ever given the lobby assignment. The Supervisor testified that during the short time Muriel was employed she was the only customer service representative assigned to the lobby because she was a new hire and needed to learn the process. The Director testified that all of the customer service representatives were required to perform an equal amount of work in the lobby, except for the one representative that regularly manned the window.

her that she was waiting on guests for a meeting. The Director explained that because of the systems outage, the Call Center Director's guests may be stuck in the lobby so she should go downstairs and ask Muriel to look out for them. The Call Center Director testified that, on the advice of the Director, she approached Muriel in the lobby that morning, explained that she was expecting guests for a 9:30 a.m. meeting, and asked if Muriel could point them in the right direction if she saw them. The Call Center Director asserts that Muriel "replied that she didn't understand why she had to be downstairs, that she had heels on and they were hurting her feet . . . [and] she had been downstairs since 8:00 am." (City Ex. 3) The Call Center Director suggested that Muriel call her supervisor and instead asked security to help direct the meeting attendees.<sup>7</sup> Muriel testified that this conversation with the Call Center Director never occurred. Additionally, after the Call Center Director testified, Muriel testified that she did not recognize the testifying witness to be the Call Center Director and asserted that the witness never approached her.

Also on the morning of December 12, 2014, at approximately 9:27 a.m., Muriel began texting and calling the Supervisor from the lobby requesting that she be relieved so that she could use the bathroom. Muriel indicated it was urgent, but she was not relieved for approximately 25 minutes. According to Muriel, on her way to the bathroom, the Supervisor told her to come see him after she used the bathroom, and she did so. Muriel asserts that the Supervisor told her she had been very aggressive when she asked three times to go to the bathroom. After meeting with the Supervisor, Muriel returned to the lobby until the systems were restored.

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<sup>7</sup> The Call Center Director acknowledged that Muriel never actually told her that she could not or would not help get the meeting attendees into the building.



Around lunchtime, Muriel was called to a meeting with the Director and the Supervisor, at which she was given a discussion report regarding “work assignments,” dated December 12, 2014 (“December Discussion Report”). The December Discussion Report states, in pertinent part:

As part of your normal and standard job duties and responsibilities, periodically you will be assigned to different tasks that are independent of the rest of the unit. This part of your title was expressly covered in the interview process. At the time, you stated you would be willing and capable to perform the tasks as explained during our 2 interviews.

December 12<sup>th</sup> 2014 due to multiple system failures, TLC was forced to limit the licensees being seen on the 2<sup>nd</sup> floor from 8:00 AM until approximately 10:15 AM.

At 8:00 AM you were assigned to the first floor to help separate licensees that we could help in our limited capacity from the licensees who had to wait.

- At 9:27 you sent me a text requesting someone relieve you. At the moment I was working on procedures for our systems failures and had to stop what I was doing to find coverage.
- At 9:30 you called my phone to let me know you needed someone to cover you because you were wearing heels and also needed to use the rest room. It was not 5 minutes from your initial text before you expected an answer. I informed you during that call that I was working on getting someone to relieve you from your post.
- At 9:44 you called me again to ask if anyone was coming to cover for you. Elizabeth [Rivera] was waiting for the elevator and was already on her way. I told you that you need to wait for coverage and that you could not demand to be relieved and that someone was on their way.

Given the system problems which the agency experienced this morning, it was within a reasonable amount of time that coverage was found for you and arrived to your assigned location (which you were assigned to less than an hour and a half when you requested a break).

This document serves as a confirmation that you have been given the opportunity to state if you feel you are suited to the tasks to which you agreed during the interviews and when you accepted your position with the TLC.

A full explanation of the position and tasks that could be assigned to you was made clear during the interviews. The fact that you could be assigned to review applicants in the first floor lobby and outside of the agency doors in the cold, heat and any other inclement weather while on your feet has been the largest focus of the interview process. We made certain that any candidate for the job was fully aware that they would be assigned to this task whenever there was a need for it.

(Union Ex. C) Muriel refused to sign the December Discussion Report, asserting it was harassment since, first, she was written up for failing to inform a supervisor before using the bathroom, and now she was being written up for making too many requests to use the bathroom. The Director testified that she reported Muriel's allegation of harassment to the Assistant Commissioner.

Later that day, when the Director asked the Call Center Director about her meeting that morning and mentioned Muriel's name, the Call Center Director described her interaction with Muriel.<sup>8</sup> Muriel's Director asked the Call Center Director to submit her account of the events in writing, and at 2:50 p.m. on December 12, the Call Center Director sent an email to the Director documenting her interaction with Muriel.<sup>9</sup> (*See* City Ex. 3)

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<sup>8</sup> The Assistant Commissioner testified that she was in the room when the Directors were discussing the Call Center Directors interaction with Muriel. The Assistant Commissioner believes that she learned of the conversation between the Call Center Director and Muriel before she was aware Muriel had sought Union assistance.

<sup>9</sup> In the email the Call Center Director did not refer to Muriel by name, but as "{Customer Service Staff}." The Call Center Director testified that she did not know Muriel's name at the time and had planned to go back and fill it in later, but failed to do so.

After meeting with her supervisors on December 12, Muriel, during her lunch break, spoke to two Union delegates that work in the same building, but for a different City agency, Anthony Sweeney and Anna Correa (“Delegates”).<sup>10</sup> Muriel shared her concerns such as being written up for going to the bathroom, and the Delegates told her that they would talk to her supervisor. That afternoon, the Delegates went to the second floor elevator bank, knocked on the door of TLC, which was having its holiday party, and asked an employee to get the Supervisor. When the Supervisor came to the door, Sweeney introduced himself and explained that they wanted to discuss Muriel’s being written up for needing to go to the ladies’ room.

The Supervisor informed the Delegates that he could not discuss the situation with them due to TLC protocols.<sup>11</sup> The Delegates asked to meet with the Supervisor’s supervisor so he went back and told the Director and the Assistant Commissioner what had transpired. The Assistant Commissioner then spoke with the Delegates, informed them that she was not authorized to have conversations related to employee issues with them, and gave them the contact information for two TLC Human Resources (“HR”) employees whom they should contact. Specifically, she gave the contact information for the Assistant Commissioner for HR/Director of Labor Relations, Carmen Rojas (“Director of LR”), and the Assistant General Counsel, Ira Goldapper (“Assistant GC”).<sup>12</sup> Sweeney did not call the HR contacts, but he

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<sup>10</sup> Although Muriel asserts that she first contacted the Union sometime between November 21 and December 12, it is undisputed that she did so anonymously and there is no evidence Respondents had knowledge of this call.

<sup>11</sup> The Director corroborated that the policy is that union representatives have to make an appointment with the TLC human resources director.

<sup>12</sup> The Supervisor described Sweeney as “brusque” and asserted that Sweeney shook some papers in his face. The Assistant Commissioner testified that the body language, volume, and tone of the Delegates was agitated and that the hallway by the elevator was not an appropriate

testified that he did call the Union, told them about the incident, and faxed over some papers including the December Discussion Report.

After the conversation with the Delegates, at 3:55 p.m., the Assistant Commissioner sent an email to the two HR employees to whom she had referred the Delegates, and to the Deputy Commissioner, Gary Weiss (“Deputy Commissioner”), stating, in pertinent part:

[The Director] and [the Supervisor] wrote up Lissette Muriel, one of our new employees. She accused them of harassment and contacted the union [Delegates]. They were here, during our holiday party trying to meet with us, insisting that we are harassing her and that they could file an EEO complaint. I referred them to you and [the Assistant GC] to arrange for a meeting.

(City Ex. 7) A few minutes later, the Assistant GC requested a copy of the write-up issued to Muriel. Shortly thereafter, the Director forwarded the December Discussion Report and the email from the Call Center Director to all recipients of the Assistant GC’s email. In her forwarding email, the Director noted that the Call Center Director “also had an encounter with Ms. Muriel this morning (see email attachment), which we found out about after we had the formal discussion with her.” (City Ex. 7). Three days later, on December 15, the Supervisor sent multiple documents regarding discussions and situations that had arisen with Muriel to all recipients on the email chain.

The Assistant Commissioner and the Director testified that sometime after the Delegates visit on December 12, HR reviewed the paperwork, gave them the authorization to discharge

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venue for what they were saying. Sweeney asserted that the Supervisor and the Assistant Commissioner were disrespectful to him and to the Union, and they were “very crude and rough with their voice.” (Tr. 118) Sweeney also alleged that the Assistant Commissioner would not allow the Delegates into the TLC offices and told them what they were doing was highly inappropriate.

Muriel, and then the Director made the final determination.<sup>13</sup> The Director testified that she ultimately decided to terminate Muriel because:

I just felt for the three months that she worked there she wasn't on her A game. I felt like the person that I interviewed was the complete opposite of what we had when she started to work with us. We did our best to give her all of the tools and anything, you know, that she needed, we would try to help her, accommodate her, anything, and she was, she just wasn't willing to work with us or any of the instructions that we had or just very difficult to work with.<sup>14</sup>

(Tr. 192) The Assistant Commissioner testified that in discussions with the Director and the Deputy Commissioner they “went over the incidents and how it was working out, and we came to the decision that based on the fact that she was a probationary employee, that we were ready to terminate.”<sup>15</sup> (Tr. 346) She also testified that the same protocol was followed with Muriel as with other probationary employees including counseling the employee, documenting the processes, letting the employee know about the issues, and then, if their prior acts were ineffective, asking HR to review the documents and recommend the next step.

On or about December 19, 2014, the Assistant Commissioner and the Director notified Muriel that her probationary employment was terminated. Muriel testified that when she asked why, she was told that they did not have to give her an explanation because she was on

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<sup>13</sup> The Director of LR testified that after consulting with the Deputy Commissioner and the Director of Discipline and Employee Matters, she recommended that TLC terminate Muriel based on the time and leave and performance issues.

<sup>14</sup> The Supervisor similarly testified that he experienced too much “head-butting” with Muriel over simple things like filling out a time sheet, submitting paperwork on time, being at your post, and notifying somebody before stepping away. (Tr. 319)

<sup>15</sup> The Director of LR prepared the termination document dated December 19. The Assistant Commissioner is not sure when the Director made the final decision to terminate, but she believes that it was on December 19 because they usually get the termination letter from HR on the same day the decision is made.

probation. The Assistant Commissioner informed Muriel that if she wished to resign her position then she could avoid having a discharge in her employment record. Muriel then requested and was granted the opportunity to leave the meeting to confer with her Union representatives. Muriel asserts that she spoke with her Union for five or ten minutes, but when she attempted to return to the meeting everyone had dispersed.<sup>16</sup> When Muriel saw the Assistant Commissioner, she told her that she would not sign the resignation, so she was given the termination letter dated December 19, 2014.

### **POSITIONS OF THE PARTIES**

#### **Union's Position**

The Union argues that the City violated NYCCBL § 12-306(a)(1) and (3) by retaliating against Muriel for engaging in protected union activity.<sup>17</sup> Specifically, the Union alleges that Muriel was discharged in retaliation for requesting the assistance of the Delegates to intervene on

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<sup>16</sup> The Director and the Assistant Commissioner assert that while they were waiting for Muriel to return to the meeting, the Supervisor stopped in and told them that Muriel was at her desk packing her things.

<sup>17</sup> 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;

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(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;

her behalf to stop the harassment to which she believed she was being subjected. The Union contends that the reasons advanced for Muriel's discharge were clearly pretextual.

According to the Union, the City attempted to justify Muriel's discharge based on performance reasons, but the testimony of its witnesses was inconsistent and unpersuasive. The Union notes that there were inconsistencies between the Director's testimony and the Supervisor's testimony concerning which customer service representatives were assigned to work in the lobby, the number of emails the Supervisor sent regarding Muriel's lateness, and who were the recipients of the Supervisor's emails regarding Muriel's lateness. Further, the Union alleges that the Director had difficulty providing examples of times when Muriel allegedly did not follow instructions or allegedly did the opposite of what she was told to do.

Regarding the alleged December 12 incident with the Call Center Director, the Union noted that the Call Center Director's email was never given to or discussed with Muriel. Additionally, the Union states that this alleged incident is supported by an email that identifies Muriel only as "customer service staff," while Muriel testified that the incident did not involve her. The Union also notes that the Call Center Director acknowledged that Muriel did not refuse to assist her.

Further, the Union alleges that Muriel did nothing wrong with respect to three incidents the City is trying to use to justify her termination. Specifically, on November 13, Muriel left her work station to assist a TLC customer; on November 21, Muriel got coverage for her workstation before going to the bathroom, which was verified by the employee who covered for her; and on December 12, Muriel contacted her Supervisor three times due to an urgent need to use the bathroom. Also, Muriel received only one warning about spending too much time on a personal telephone call while enrolling in health insurance benefits, which does not constitute a

performance issue that supports discharge. Finally, the Union asserts that Muriel's two unexcused latenesses were trivial--one was for only 13 minutes and due to train delays. The Union contends that these are "frivolous" and "obfuscatory" reasons to attempt to justify Muriel's discharge. (Union Br. at 12)

According to the Union, Muriel's discharge, shortly after the Delegates were rebuffed when they attempted to meet with TLC management to protest the December 12, 2014 Discussion Report, was the result of the Union's intervention on her behalf. (Union Br. at 12) The Union asserts that absent the Union's intervention, none of the incidents advanced by Respondents as the reason for Muriel's discharge would have resulted in Muriel's discharge.

As a remedy, the Union seeks a cease and desist order directing the City to reinstate Muriel to her former position with full backpay and benefits retroactive to the date of her discharge, the posting of an appropriate notice, and any such other and further relief as the Board deems just and proper.

### **City's Position**

The City argues that the Board should dismiss the petition entirely because the Union has failed to establish that it retaliated against Muriel in violation of NYCCBL § 12-306(a)(1) and (3) or that there was an independent violation of NYCCBL § 12-306(a)(1).<sup>18</sup> With regard to the allegation of retaliation, the City asserts that the Union has not demonstrated a *prima facie* claim. It argues that Petitioner has not demonstrated that Muriel was involved in protected activity, that Respondents were aware of the protected activity, or that the protected activity was the motivating factor behind the alleged retaliatory action.

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<sup>18</sup>The Union does not assert an independent violation of NYCCBL § 12-306(a)(1), thus, we need not address the City's arguments concerning one.



According to the City, the Union has failed to prove a causal link between any Union activity and any adverse action taken by the City. The City asserts that the Union relies solely on temporal proximity between the intervention of the Delegates and the decision to end Muriel's probation; however, the record demonstrates that the decision to terminate had already been set in motion prior to any alleged Union activity. The City also asserts that each of the issues for which Muriel was counseled predated the employer's knowledge of any protected union activity. Further, when Muriel responded to counseling from her supervisors by accusing them of harassment, they reasonably concluded that she was not suited for the position. As all of the above occurred prior to any involvement by the Union, it cannot be said that these issues were fabricated *post hoc* to justify a retaliatory charge.

Additionally, the City notes that Muriel's act of meeting with Union representatives from another City agency for ten to 15 minutes does not amount to union activity within the meaning of NYCCBL § 12-306(a)(3). Moreover, aside from the single approach by the Delegates on December 12, the Union did not engage or contact management on Muriel's behalf, including the appropriate HR personnel at TLC for whom contact information was provided. According to the City, the HR department gave its approval for a decision to terminate independent of any involvement of the Union as Sweeney acknowledged that he made no attempt to contact the Director of LR on Muriel's behalf.

Finally, the City contends that, assuming *arguendo* that Petitioner were to establish that her supervisor was displeased with her for going to the Union, such alleged antipathy would not automatically equate to a violation of the NYCCBL as the employer may proffer a business reason establishing that the decision to terminate would have been made in the absence of any

protected activity. The City argues that it has shown several legitimate business reasons for the termination of Petitioner's probationary employment.

According to the City, there is no evidence to suggest that TLC's decision to terminate Muriel was based on union animus. Muriel was a probationary employee who in less than four months demonstrated an inability or unwillingness to take direction, to follow specific instructions about filing her time records, to provide advance notice of the need to take personal leave, or to give notice when leaving her assigned post. Additionally, she was observed frequently talking on the telephone when phone usage was not required for her job. Further, she showed complete disregard for the mission and purpose of the TLC when she responded to the Call Center Director's request for assistance with such disdain on December 12. The City asserts that these shortcomings were especially troublesome in the high volume customer service setting in which she worked. The City also notes that the purpose of a probationary period is to determine an individual's suitability to a particular position, and Muriel's performance record showed that she failed to meet the expectations that were essential to the position and had been clearly communicated to Muriel at the time she was hired. Thus, the record shows that the employer's decision to terminate Muriel's probationary employment was based entirely on her record of unsatisfactory workplace performance, and not anti-union animus.

Thus, the City asserts that the decision to discharge an uncooperative and recalcitrant probationary employee was a proper exercise of its managerial prerogative. It contends that the Union has not demonstrated the requisite causal link between any protected activity and the decision to terminate, nor has the Union demonstrated that there was any anti-union animus underlying the decision. Accordingly, the petition should be denied in its entirety.

### DISCUSSION

The Union claims that the City violated NYCCBL § 12-306(a)(1) and (3) by terminating Muriel for engaging in union activity. We find that, although the Union proffered a *prima facie* case of retaliatory action, the City has established that its actions were not motivated by union animus and that it would have terminated Muriel regardless of her protected activity. Accordingly, the petition is dismissed.

This Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), to determine whether an employer has violated NYCCBL §12-306(a)(1) or (3). This standard provides that 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; *SSEU, L. 371*, 8 OCB2d 35, at 11-12 (BCB 2015). If a petitioner makes out a *prima facie* case, "the employer may attempt to refute this showing on one or both elements or to demonstrate that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *Local 30, IOUE*, 8 OCB2d 5, at 23 (BCB 2015) (quoting *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006); *CEU, Local 237*, 77 OCB 24, at 18-19 (BCB 2006)).

Regarding the first prong of the standard, the petitioner must show that the union activity was protected and that management had knowledge of that activity. NYCCBL § 12-305 provides that public employees "shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities." The

Board has held that an employee's seeking assistance from a Union is protected activity. *See Local 376, DC 37, 5 OCB2d 31, at 18-19 (BCB 2012)* (Board found union member's actions were protected when she sought union's assistance in appealing disciplinary charges); *CSBA, L.237, 71 OCB 5, at 10 (BCB 2003)*. Here, the record established that Muriel engaged in union activity prior to her termination when she sought the assistance of the Delegates on December 12. The record also established that the Supervisor, the Assistant Commissioner, and the Director became aware that Muriel had sought the help of the Union Delegates on December 12 and that this information was relayed to TLC HR that same day. *See SSEU, L. 371, 8 OCB2d 35, at 12; Kaplin, 3 OCB2d 28, at 14 (BCB 2010)*. As the final decision to terminate Muriel's probationary employment was made after December 12, Respondents were aware of Muriel's union activity prior to making the final decision. Accordingly, we find that the Union has satisfied the first prong of the standard.

The second prong of the standard requires that "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions [that] are the subject of the complaint." *OSA, 7 OCB2d 20, at 19 (BCB 2014)* (quoting *DC 37, L. 376, 79 OCB 38, at 16 (BCB 2007)*) (internal quotation marks omitted). It "is a rare case where there is direct evidence of the employer's improper motivation." *Local 30, IOUE, 8 OCB2d 5, at 21*. Thus, "typically, motivation is proven through the use of circumstantial evidence, absent an outright admission." *Colella, 7 OCB2d 13, at 22 (BCB 2014)* (quoting *Burton, 77 OCB 15, at 25 (BCB 2006)*) (internal quotation and editing marks omitted). The Board, therefore, considers "whether the temporal proximity between the protected union activity and the retaliatory action, in conjunction with other facts, supports a finding of improper motivation." *Id.* (citing *DC 37, L. 376, 6 OCB2d 39, at 19 (BCB 2013)*). Claims of improper motivation, however, "must be based

on statements of probative facts, rather than speculative or conclusory allegations.” *Local 30, IOUE*, 8 OCB2d 5, at 21 (citing *DC 37, L. 983*, 6 OCB2d 10, at 29 (BCB 2013); *Morris*, 3 OCB2d 19, at 15 (BCB 2010)).

Here, the Union proffered circumstantial evidence of improper motivation. Although it is not clear from the record exactly when the final decision to terminate Muriel’s probationary employment was made, the record reflects that it was made sometime after December 12, when Muriel requested the Delegates’ assistance, and it was communicated to Muriel on December 19. The close temporal proximity of the Union activity to the decision to terminate “raises suspicion of a retaliatory motive.” See *Local 376, DC 37*, 6 OCB2d 39, at 21 (temporal proximity established where disputed act occurred two days after union activity). Further, the documentation about Muriel’s workplace issues was not sent to HR for review and her termination was not fully discussed with HR until after the Delegates and the supervisors spoke on December 12. Taking these facts together with the established temporal proximity, we find that the Union proffered a *prima facie* case of retaliation.

Next, our analysis shifts to the employer’s refutation of the *prima facie* case and/or establishment of a legitimate business reason for Muriel’s termination. See *Local 30, IOUE*, 8 OCB2d 5, at 23; *DC 37, L. 1113*, 77 OCB 33, at 25; *CEU, Local 237*, 77 OCB 24. Upon consideration of the entire record, we find that the *prima facie* case has been refuted and that the City has established that it would have terminated Muriel regardless of her protected activity.

We find the *prima facie* case is refuted because all of the actions taken by Muriel’s direct supervisors to document Muriel’s missteps predated her union activity. See *Kassim*, 8 OCB2d 8, at 18 (BCB 2015); *DEA*, 79 OCB 40, at 22 (BCB 2007) (“adverse actions cannot be persuasively shown to have been retaliatory in nature simply because they [predated] the protected activity”).

The Director and the Supervisor began documenting workplace issues with Muriel very early on in her probationary period. Indeed, all of the documents written by the Supervisor and the Director were drafted before any alleged Union activity occurred.<sup>19</sup> For example, the Supervisor sent himself emails in September documenting Muriel's late arrival; the Director sent an email to the Supervisor in October documenting a verbal warning that she gave to Muriel about improper telephone usage; the Supervisor sent Muriel an email in October and another in November about failing to submit a timesheet and multiple overtime requests in a timely manner; the Supervisor and the Director gave Muriel a November Discussion Report after she stepped away from her station without notifying her supervisors on two occasions; and the Supervisor and the Director gave Muriel a December Discussion Report about work assignments. All of the above were drafted before Muriel contacted the Delegates and before the Delegates spoke with Muriel's supervisors on December 12. While it is not clear exactly when Muriel's supervisors were made aware of what had transpired between the Call Center Director and Muriel, the incident itself also preceded the alleged union activity.<sup>20</sup> Further, the Assistant Commissioner testified that the same protocol was followed with Muriel as with other probationary employees including counseling the employee, documenting the processes, letting the employee know about the issues, and then, if their prior acts were ineffective, asking HR to review the documents and recommend the next step. Thus, the record before us does not show that Muriel's supervisors

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<sup>19</sup> The only event that was documented right around the time that the Union delegates spoke with Muriel's supervisors was the Call Center Director's email, which was sent to the Director on December 12, at 2:50 p.m.

<sup>20</sup> The Director's email on December 12, states that she found out about what had transpired between the Call Center Director and Muriel, after she and the Supervisor met with Muriel and gave her the December Discussion Report that same day.

were motivated by union animus. Accordingly, TLC has refuted the *prima facie* case.

In addition, although the Union characterizes the incidents documented by the City as pretextual and/or unpersuasive, it does not dispute that the underlying incidents addressed in her supervisors emails' and Discussion Reports actually occurred.<sup>21</sup> For example, the Union does not deny that Muriel had two unexcused latenesses, was on the telephone for an extended period of time on at least one occasion, and left her work station twice without notifying her supervisors. Moreover, we credit the Director's testimony and the Supervisor's testimony that they found Muriel difficult to work with. The Director testified that, in deciding whether to terminate Muriel's probationary employment she concluded that "the person that I interviewed was the complete opposite of what we had when she started to work with us . . . . she just wasn't willing to work with us or any of the instructions that we had or just very difficult to work with" (Tr. 192) The Assistant Commissioner also testified that after reviewing "the incidents and how it was working out, [ ] we came to the decision that based on the fact that [Muriel] was a probationary employee, that we were ready to terminate." (Tr. at 346)

For the reasons stated above, and particularly in light of Muriel's probationary status, we also find that the City has demonstrated that legitimate business reasons would have led to Muriel's termination absent her protected activity. *See SSEU, L. 371*, 8 OCB2d 35, at 16 (a probationary employee's difficult working relationship with her supervisor and co-workers and deficient writing and verbal skills were found to be legitimate business reasons for her termination); *see also Kaplin*, 3 OCB2d 28, at 14 (in finding a legitimate business reason for

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<sup>21</sup> Despite Muriel's testimony to the contrary, we find that a conversation between the Call Center Director and Muriel occurred on December 12. We credit the Call Center Director's testimony about the conversation not only because we found her credible, but also because she documented the December 12 conversation in an email to the Director on that same date and her testimony was corroborated by the Assistant Commissioner and the Director.

petitioner's termination, the Board rejected the argument that as a probationary employee, petitioner was entitled to the same settlement offered to a permanent employee accused of similar misconduct); *Rockville Centre Union Free School District*, 32 PERB ¶ 3050 (1999), *affd sub nom. Rockville Centre Teachers Assn. v NYS Pub. Empl. Relations Bd.*, 281 AD2d 425 (2d Dept 2001) (recognizing "the wide latitude the courts have granted municipal employers with respect to termination of probationary employees.").

Finally, as we find no violation of NYCCBL §12-306(a)(3), we likewise find no derivative violation of NYCCBL § 12-306(a)(1). Accordingly, we dismiss the instant petition in its entirety.



**ORDER**

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

ORDERED, that the improper practice petition filed by the Social Service Employees Union, Local 371 on behalf of its member Lissette Muriel against the City of New York and the New York City Taxi and Limousine Commission, docketed as BCB-4108-15, hereby is dismissed.

Dated: February 23, 2016  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

PAMELA S. SILVERBLATT  
MEMBER

CHARLES G. MOERDLER  
MEMBER

PETER PEPPER  
MEMBER