DC 37, L. 3621, 11 OCB2d 35 (BCB 2018)

(IP) (Docket No. BCB-4201-17)

Summary of Decision: The Union alleged that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by retaliating against two EMS Lieutenants for engaging in protected union activity and that its actions independently violated NYCCBL § 12-306(a)(1). The City maintained that there is no evidence that protected activity was a motivating factor in the FDNY's decisions and that the FDNY's actions were taken for legitimate business reasons. The Board found that the FDNY did not violate the NYCCBL by formally disciplining one Lieutenant but that additional actions were taken in retaliation for his union activity. In addition, the FDNY independently violated NYCCBL § 12-306(a)(1) by conditioning his disciplinary penalty on the withdrawal of pending statutory and contractual claims. Regarding the other Lieutenant, the Board found that the FDNY retaliated against him for his union activity when it authorized an employee who had threatened him to work at the same station, but not when it temporarily transferred him to another station. Accordingly, the petition was granted in part and denied in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCAL 3621,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On March 16, 2017, District Council 37, AFSCME, AFL-CIO ("DC 37") and its affiliated Local 3621 (collectively, "Union") filed a verified improper practice petition against the City of

New York ("City") and the Fire Department of the City of New York ("FDNY"). The Union alleges that the FDNY violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by retaliating against two Emergency Medical Services ("EMS") Lieutenants for engaging in protected union activity. With respect to Lieutenant Douglas Rondon ("Lt. Rondon"), the Union alleges that, in retaliation for seeking and receiving Union representation in connection with the FDNY's disciplinary investigation and the Union's demand to bargain over the Paramedic Response Unit ("PRU") pilot program, the FDNY formally disciplined him, treated him as "totally restricted," reassigned him to stock worker duties in the EMS medical supply unit ("MSU"), and delayed the processing of his discipline at the FDNY Bureau of Investigations and Trials ("BITS"). With respect to Lieutenant Ralph Francisco ("Lt. Francisco"), the Union alleges that the FDNY authorized an employee who had threatened him to work at the same station and subsequently transferred him to another station in retaliation for representing Lt. Rondon and other bargaining unit members. In addition to derivative violations, the Union alleges that the FDNY independently violated NYCCBL § 12-306(a)(1) by conditioning a settlement of his disciplinary charges on a waiver of pending statutory and contractual claims. The City maintains that there is no evidence that protected activity was a motivating factor in the FDNY's decisions and, alternatively, that the FDNY's actions were taken for legitimate business reasons.

The Board finds that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by treating Lt. Rondon as totally restricted, assigning him to the MSU, and delaying the processing of his discipline in retaliation for his union activity. In addition, the Board finds that the FDNY independently violated NYCCBL § 12-306(a)(1) by conditioning its disciplinary recommendation on Lt. Rondon's withdrawal of his improper practice petition and contractual grievance.

Regarding Lt. Francisco, the Board finds that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by permitting an employee who had threatened him to work at the same station in retaliation for his union activity. However, the Board finds that the FDNY did not violate the NYCCBL by formally disciplining Lt. Rondon or transferring Lt. Francisco. Accordingly, the petition is granted in part and denied in part.

BACKGROUND

The Trial Examiner held 12 days of hearing and found that the totality of the record, including the pleadings, exhibits, and post-hearing briefs, established the relevant facts set forth below.

DC 37 is the certified collective bargaining representative for employees in the civil service title Supervising Emergency Medical Specialist Levels I and II ("Lieutenant" and "Captain," respectively, or "EMS Supervisor"), who are members of Local 3621. Lieutenants oversee employees in the titles Emergency Medical Specialist – EMT ("EMT") and Emergency Medical Specialist – Paramedic ("Paramedic"), who are represented by DC 37 in Local 2507.[1]

The FDNY's EMS Bureau is responsible for the operation and staffing of all City ambulances deployed utilizing the City's 911 system. In June 2016, the FDNY began the PRU pilot program in EMS Division 2, the Bronx, to more efficiently direct EMS resources regarding

[1] Lieutenants are designated as either a Station Officer or a Conditions Officer. A Station Officer is assigned to the station for the entirety of their tour, performing administrative duties. A Conditions Officer generally operates a Conditions Car and is assigned to perform field supervision of EMS units, including responding to EMT and Paramedic requests for assistance, going to hospitals to "clear" EMS units from emergency rooms, and directing and assisting operations at major and multiple casualty incidents at which they may provide patient care.

incidents that require Advanced Life Support ("ALS") care, which only certified paramedics working in pairs can legally provide.[2] Under the PRU pilot program, Conditions Cars in the Bronx were replaced with PRUs known as Fly Cars. Unlike a Conditions Car, a Fly Car has ALS equipment and is staffed by two certified paramedics, one of whom is an EMS Supervisor.

When Local 3621 learned about the PRU pilot program, it immediately communicated its objections to FDNY senior management, including Division 2 Chief Alvin Suriel and EMS Assistant Chief Mike Fitton. After the program began, Union representatives, including Local 3621 President Lieutenant Vincent Variale continued to express their strong objections, requested that the FDNY cease the program, and demanded bargaining. On November 9, 2016, DC 37 and Locals 3621 and 2507 filed a scope of bargaining petition with this Board seeking an order directing the City and the FDNY to bargain over the alleged practical impact of the PRU pilot program. *See DC 37, L.3621 & 2507*, 11 OCB2d 10 (BCB 2018).[3] Additionally, over the course of 2016, the Union continued to convey its objections to the PRU program and filed grievances about other Division 2 programs and policies.

Lt. Rondon's Discipline

Lt. Rondon has been employed by the City's EMS service for approximately 23 years. Prior to the inception of the PRU pilot program, he had never received formal disciplinary charges.

[2] The term "certified paramedic" refers to any individual who holds and maintains the same certificates as required of Paramedics. Most EMS Supervisors are certified paramedics. Further detail regarding the implementation of the PRU program can be found in *DC 37, L.3621 & 2507*, 11 OCB2d 10 (BCB 2018).

[3] In *DC 37, L.3621 & 2507*, 11 OCB2d 10, the Board ordered bargaining over the workload impact of the PRU pilot program and dismissed the rest of the Union's claims.

When the PRU pilot program began, he received two command disciplines.[4] Thereafter, he received formal charges stemming from a November 14, 2016 incident.

On November 14, 2016, Lt. Rondon was assigned to a Fly Car unit with Paramedic Antonio Adorno. At 4:57 a.m., a Basic Life Support ("BLS") unit, consisting of two EMTs, was assigned to a possible seizure call in a second-floor apartment. At 5:00, the BLS unit arrived on the scene. At 5:06, the call was upgraded to cardiac arrest status, requiring ALS support, and a Certified First Responder ("CFR") engine was assigned to respond.[5] At 5:07, Lt. Rondon and Paramedic Adorno were also assigned to respond. At 5:14, the CFR engine arrived on scene, and an ALS unit was assigned to respond.[6] Lt. Rondon testified that "once they assigned the ALS paramedic ambulance, I reverted to my role and responsibility as I have been trained and as I have operated for the past nine years as an officer responding to a cardiac arrest along [with] CFR, ALS and BLS to perform the role as team leader."[7] (Tr. 249) At 5:16, before the ALS unit arrived, Lt. Rondon and Paramedic Adorno arrived and proceeded to the apartment without any ALS equipment.[8] At 5:26,

[4] In June 2016, Lt. Rondon received a command discipline from the Station Captain and lost one day of annual leave for making "improper entries into his unit history while on patrol." (City Ex. 7) In September 2016, he received another command discipline and lost three days of annual leave because he "failed to supervise by not properly monitoring his assigned hospital." (City Ex. 7).

[5] CFR units are part of an Engine Company and consist of approximately four to five Firefighters who have received medical first responder training.

[6] ALS units consist of two Paramedics assigned to an ambulance containing both BLS and ALS equipment.

[7] Between June and November 2016, when Lt. Rondon was part of the only ALS unit responding to calls, he brought his ALS equipment and performed patient care.

[8] Chief Suriel acknowledged that when EMS Supervisors assigned to a Fly Car have confirmed that an ALS unit is already on-scene, they would not be expected to bring the ALS equipment with them. However, he testified that Lt. Rondon and Paramedic Adorno did not confirm whether an ALS unit was on scene despite having many means to do so, such as using the radio in the vehicle

the ALS unit arrived. By that time, Lt. Rondon and Paramedic Adorno had left the apartment to return to the Fly Car to get the ALS equipment. They met the ALS unit on their way to the Fly Car and returned with them to the apartment, where the ALS unit provided ALS care. The patient was transported to the hospital but did not survive.

Later that day, the EMTs in the responding BLS unit alerted their Captain to actions taken by Lt. Rondon and Paramedic Adorno. The Captain informed Chief Suriel, who requested that the EMTs submit written statements. Both statements assert that, when Lt. Rondon and Paramedic Adorno arrived on scene, they neither provided any ALS care nor had any ALS equipment with them. One EMT asserted that they "just watched crew and firefighters perform CPR from the bedroom doorway." (City Ex. 10) Chief Suriel shared the EMTs' assertions with EMS Chief James Booth; the Chief Medical Director of the FDNY Office of Medical Affairs ("OMA"), Dr. Glenn Asaeda; the Director of BITS, Rosharna Hazel; and other members of senior management.[9] (Tr. 714, 727) Chief Suriel testified that he included BITS on his communication because an incident with a potentially avoidable fatality was a litigation risk, not something minor that could be handled at the division level.

On November 16, 2016, after his regularly scheduled days off, Lt. Rondon reported to his station. Chief Suriel spoke with him and requested a written statement about the November 14

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or their handheld radios to ask the dispatcher or checking the status and location of any other responding units through the Mobile Data Terminal ("MDT") in the vehicle.

[9] BITS conducts internal FDNY disciplinary investigations and is responsible for recommending formal discipline. OMA is responsible for the medical oversight of all EMS and 911 System operations. OMA's goal "is not to discipline EMS personnel, but to improve the quality of patient care by identifying issues and providing appropriate guidance and other corrective action." (Union Ex. B)

incident, including answers to specific questions.[10] Lt. Rondon called his Union representative, Lt. Francisco, who reviewed Lt. Rondon's statement with President Variale and the Union Vice President before Lt. Rondon submitted it to Chief Suriel.

Later that day, Chief Suriel spoke separately to both Lt. Francisco and President Variale over the phone regarding the November 14 incident and Lt. Rondon's statement. According to both Lt. Francisco and President Variale, Chief Suriel became angry when they told him that Lt. Rondon's matter should be investigated and handled informally, as Command Discipline. Lt. Francisco testified that Chief Suriel told him that if the Union and Lt. Rondon were not going to cooperate, it would immediately become a disciplinary action. According to President Variale, he told Chief Suriel that "you can't tell [Lt. Rondon] how he should answer the questions," and Chief Suriel angrily responded, "if that's going to be your attitude about it, then I'm just going to send this to BITS and let BITS handle it." (Tr. 81) According to Chief Suriel, he told President Variale that although Lt. Rondon's statement did not answer his questions, he was going to forward it to BITS Director Hazel. (Tr. 739)

That evening, Chief Suriel sent an email to Lt. Rondon stating that he had "received a call from [President Variale] who advises the statement you submitted will be all you will submit at this time" and that the statement "has been forwarded." (City Ex. 19) Approximately 15 minutes later, Chief Suriel forwarded the statement to Director Hazel noting that Lt. Rondon "did not answer all my questions and was advised by Union not to answer further." (City Ex. 19)

[10] Following the meeting, Chief Suriel emailed Lt. Rondon the six questions that he wanted answered.

Lt. Rondon's Restrictions and Transfer

On November 14, 2016, Chief Suriel sent an email informing Lt. Rondon and Paramedic Adorno's Captain that they are both "restricted operationally." (City Ex. 18A) He instructed the Captain to notify them to report to Division 2 in civilian clothes and to send notifications to remove them from 12-hour tours.[11] The same day, OMA's Chief Medical Director issued a memo to Lt. Rondon and Paramedic Adorno informing them that they were both restricted from performing patient care pending a medical case review.[12]

Subsequently, BITS instructed OMA to hold off on their patient care review ("BITS Hold") for both Lt. Rondon and Paramedic Adorno. On or around November 22, 2016, BITS interviewed staff who were present at the November 14 incident, including the BLS crew, the ALS crew, the officer in charge of the CFR crew, Lt. Rondon, and Paramedic Adorno.[13]

BITS did not suspend Paramedic Adorno. Shortly after the interviews, BITS removed the hold it had placed on his medical case review at OMA.[14] Therefore, although OMA generally

[11] Multiple other members of FDNY's management were copied on this email. Neither Lt. Rondon, Paramedic Adorno, or any union representative received the email containing the operational restriction. Approximately 20 minutes later, Chief Suriel forwarded this email to Director Hazel stating that he would call her.

[12] An EMS Supervisor who is patient care restricted by OMA can work as a Station Officer performing administrative duties, wear their uniform and, according to Union witnesses, earn overtime.

[13] At the interview on November 22, 2016, Lt. Rondon was represented by his attorney and the Union Vice President.

[14] Director Hazel asserted that the BITS hold on Paramedic Adorno's OMA review was lifted for several reasons. She stated that he explained his actions, it was determined that his level of misconduct did not rise to a point where he could no longer provide patient care, and it was decided that he would benefit from a medical case review instilling in him the obligation to perform patient care at the level of his certification even when with a Lieutenant. Director Hazel also asserted that during the investigation there was testimony that Paramedic Adorno assisted at the scene. On the

performs its medical case review simultaneously on both crew members, Paramedic Adorno's OMA review was processed, and on December 2, 2016, OMA reinstated Paramedic Adorno's patient care privileges, and he returned to full duty.

In a letter dated November 22, 2016, Director Hazel suspended Lt. Rondon for 20 days based upon his conduct on November 14 and 22. Director Hazel testified that during his "interview under oath [Lt. Rondon] provided no explanation as to why he didn't perform patient care other than to say he was there as a supervisor, but he also did not provide any explanation for why he did nothing as a supervisor." (Tr. 525-26) The November 22 BITS Letter also informed Lt. Rondon that he was restricted "from performing all patient care/field related duties and from driving any [FDNY] vehicles" until further notice. (City Ex. 13)

On December 13, 2016, after Lt. Rondon had served his 20-day suspension, Director Hazel sent an email alerting EMS Operations he was still "restricted from driving and patient care" and "all field duty." (City Ex. 20) EMS Operations Captain and Union member Evan Suchecki responded to Director Hazel's email asking if there were any restrictions as to where Lt. Rondon could be placed. Approximately ten minutes later, Director Hazel replied that Lt. Rondon can go where he is "operationally needed," but he will remain "restricted from all field duty and driving of [FDNY] vehicles." (City Ex. 20)

Less than an hour later, Assistant Chief Fitton responded, stating that Lt. Rondon should report to Chief Suriel at Division 2. Within 15 minutes, Captain Suchecki explained that he had already coordinated with the person who oversees the MEU/MSU to have Lt. Rondon report there.

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other hand, the BITS hold on Lt. Rondon's OMA review was not lifted because "a determination needed to be made about whether he should still be allowed to be a Lieutenant, a paramedic, or even employed by the FDNY." (Tr. 539)

Captain Suchecki called Chief Suriel to confirm that he did not have any issues with Lt. Rondon being placed in the MSU, and the Chief did not.[15] (Tr. 753) Thereafter, Lt. Rondon was assigned to the MSU where he performed duties such as pulling requested supplies from inventory.

While the November 22 BITS letter and Director Hazel's December 13 emails refer only to patient care, field, and driving restrictions, it is undisputed that Lt. Rondon was treated as "totally" or "fully" restricted, which precludes working the desk at a station, wearing a uniform, and earning overtime. EMS employees who are totally restricted are usually transferred to the Division, Bureau of Training, or the MSU and Medical Equipment Unit ("MEU").[16] According to President Variale, EMS Supervisors are very rarely placed on a "total restriction." (Tr. 113-14) Both President Variale and Union Representative Tracey Ziemba testified that, aside from Lt. Rondon, the only Lieutenants and Captains who were totally restricted and involuntarily assigned to the MSU had issues involving allegations of criminal misconduct or a failed drug test. Since January 2015, FDNY records show that approximately 19 EMS employees have worked in the MSU for varying lengths of time, including five Lieutenants. Three of the Lieutenants were assigned due to an "Arrest Case," one was voluntarily assigned due to a "Light Duty assignment," and Lt. Rondon, who was assigned due to "BITS investigation Patient Care Viol/Fail to Supervise." (Union Ex. D) Of the three Lieutenants who had been arrested, one worked at the

[15] We take administrative notice that, in the improper practice proceeding regarding the impact of the PRU program, Chief Suriel was asked whether he objected to transferring Lt. Rondon back from the MSU, and he expressed concern that Lt. Rondon would be embarrassed working at his station without a uniform. *See DC 37, L.3621 & 2507,* 11 OCB2d 10 (BCB 2018).

[16] According to President Variale, the restriction language used in Director Hazel's November 22 letter was consistent with what he had seen when other Lieutenants were patient care restricted but permitted to work the desk at their stations.

MSU for a few days, one worked at the MSU for approximately eight months, and one worked at the MSU from January 2017 until at least the summer of 2017. Lt. Rondon's BITS restriction, BITS hold, OMA patient care restrictions, and assignment to the MSU were not lifted until almost a year later, shortly after the Union filed a petition for injunctive relief in November 2017.[17]

Lt. Rondon's Disciplinary Process

On January 10, 2017, the Union filed a grievance on behalf of Lt. Rondon alleging a wrongful disciplinary transfer. By letter dated January 17, 2017, the FDNY issued a Notice of Charges and Specifications and Step I Hearing ("January 17 Charges") stating, in pertinent part:

> On or about November 14, 2016, ... Lieutenant Rondon failed to verify that a Paramedic ambulance was on the scene. Lieutenant Rondon failed to bring his [ALS] equipment on the scene. Lieutenant Rondon failed to instruct his Paramedic partner to bring the [ALS] equipment to the scene. [U]pon entering the patient's apartment, Lieutenant Rondon was advised by the [BLS] unit that they had a confirmed patient in cardiac arrest. Lieutenant Rondon failed to immediately retrieve / or direct his partner to retrieve their [ALS] equipment. Lieutenant Rondon watched Firefighters and [EMTs] perform CPR, for approximately 10 minutes and did not perform any ALS interventions.

(City Ex. 9) The FDNY also charged Lt. Rondon with providing false testimony during his FDNY interview. Pursuant to the January 17 Charges, a Step I hearing was held at BITS on January 31, 2017, before the only EMS hearing officer at the time, EMS Chief Roger Ahee. President Variale and Representative Ziemba represented Lt. Rondon.[18] Subsequent to Lt. Rondon's Step I hearing, the Union repeatedly asked BITS, both verbally and by email, to issue a Step I decision.

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[17] According to President Variale, "almost all members . . . are afraid to come forward and say anything to me because they feel if they do they'll be retaliated against as severely just like Lieutenant Rondon was." (Tr. 125)

[18] According to Representative Ziemba, no one at the Step I (or Step II) hearings mentioned that Lt. Rondon received formal discipline because a patient died; rather, it was a theory first advanced in this improper practice proceeding.

Chief Ahee did not issue any decisions before he retired in July 2017.[19] In August 2017, Director Hazel and Representative Ziemba met to discuss Chief Ahee's outstanding decisions. Representative Ziemba told Director Hazel that that the Union wanted the decisions issued, and that new hearings were not necessary. According to Representative Ziemba, when she specifically requested a decision regarding Lt. Rondon's discipline, Director Hazel "got so angry, and started screaming . . . [that he] stood over a person and watched him die." (Tr. 1178-79)

On October 23, 2017, almost nine months after the Step I hearing, BITS Associate Disciplinary Counsel Lauren Allerti issued a "Selection of Disciplinary Procedure" letter.[20] The letter states, in relevant part, that:

> The [FDNY] recommends that a penalty of twenty days' pay (satisfied via suspension served from November 23, 2016 through December 12, 2016) and a Stipulation and Agreement to include twelve months' general probation and a waiver and/or withdrawal of all pending and future claims associated with this matter period [sic] be imposed. . . .

(Union Ex. R) In addition, it offered a Step I rehearing or, alternatively, proceeding pursuant to either Civil Service Law § 75 or the grievance procedure. In her 20-plus years as a representative for this bargaining unit, Representative Ziemba had never seen a Step I decision that included "a waiver and/or withdrawal of all pending and future claims associated with this matter" included in the recommended discipline. (Tr. 1344-45)

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[19] Chief Ahee began hearing EMS cases in December 2016. Sometime after January 2017, he took an extended leave and subsequently retired in July 2017. Of the approximately six cases that he heard between December 2016 and January 2017, he did not issue any decisions.

[20] The City provided examples of 11 Local 3621 and 2507 cases (four Lieutenants and four EMTs) within the last ten years that have taken between eight and 18 months to go from Step I hearing to Step I determination.

On the same day, Representative Ziemba sent an email asking Disciplinary Counsel Allerti when Lt. Rondon's patient care restriction would be lifted. On October 25, 2017, Disciplinary Counsel Allerti called and told her that "they were not going to lift Lieutenant Rondon's restriction unless he accepts the agreement that they sent." (Tr. 1350). Representative Ziemba memorialized the conversation in an email to Disciplinary Counsel Allerti dated October 26, 2017, in which she informed BITS that:

> As per our discussion on 10/25, I was advised by you [that] Ms. Tyrell Brown made a decision that if Lt. Rondon does not accept the proposed Step I penalty BITS will not remove Lt. Rondon's restriction.
>
> Please note the offer made by BITS was 20 days pay (time served), one year stipulation, and withdrawal of all pending and future claims associated with this matter. In my 22 years working with the FDNY as a representative of DC 37 I have never seen a Step I waiver claim with this type of language.
>
> Attached is a copy of Lt. Rondon's waiver rejecting the proposed penalty and to proceed to the grievance procedure. Please schedule a Step 2 conference as soon as possible.

(Union Ex. S)[21] Representative Ziemba also contacted FDNY Labor Relations on a few occasions to inform them that if the restriction on Lt. Rondon was not lifted, the Union would petition the Board for injunctive relief, which it did on November 2, 2017.[22] The Union amended this improper practice petition the next day. The following Monday, on November 6, 2017, Lt. Rondon's BITS

[21] In addition to Representative Ziemba's testimony and her October 26 email, she also affirmed that she "was informed [by BITS] that [Lt. Rondon's restriction] would not be lifted until all the litigation, including this retaliation improper practice proceeding is completed. . . . BITS made clear that the 'waiver and/or withdrawal' directly related to this improper practice proceeding." (Pet. Inj, Rel., Ex. B at ¶ 21; Pet. Inj. Rel., ¶¶ 57, 81, 110; Amended Pet., ¶¶ 48, 72, 74)

[22] The injunctive relief petition asserted that, since he was placed on restricted duty, Lt. Rondon received $1,000 less in his bi-weekly paycheck, forcing him to obtain loans to avoid foreclosure.

restriction and BITS hold on the OMA review were lifted.[23] Shortly thereafter, OMA reviewed Lt. Rondon's case and reinstated his patient care privileges the same day. By November 19, 2017, Lt. Rondon was back at a station, where he was eligible to earn overtime. On November 22, 2017, BITS issued an Amended Selection of Disciplinary Procedure letter that did not include the waiver/withdrawal language.[24]

Lt. Francisco

Lt. Francisco has been a Local 3621 Executive Board Member for approximately three years and, prior to that, he was the Bronx Borough Delegate. Like President Variale, after June 2016, Lt. Francisco conveyed the Union's objections concerning the PRU pilot program and other FDNY programs to Chief Suriel, with whom he had at least one heated discussion over whether a vehicle was ready to go into service. Additionally, Lt. Francisco dealt with Chief Suriel and/or Division 2 Deputy Chief Michael Fields when he represented bargaining unit members in disciplinary matters related to the PRU pilot program. Also, on November 16, 2016, he spoke to Chief Suriel about Lt. Rondon's statement concerning the November 14, 2016 incident.

From 2014 to 2016, Lt. Francisco was assigned to Station 27. On August 12, 2014, Lt. Francisco filed a Workplace Violence Incident Report stating that an EMT at Station 27 told members of the Command that he intends to shoot Lt. Francisco and that he knows where he lives. Thereafter, that EMT "was administratively reassigned on 8/8/14 to EMS Station 18." (City Ex. 14)

[23] The Union withdrew its injunctive relief petition the same day.

[24] The parties proceeded with the grievance process, and the Step II hearing was held in December 2017.

On at least one occasion in 2016, the same EMT worked overtime on a unit coming out of Station 27. (City Ex. 25A) On October 28, 2016, Deputy Chief Gerard Santiago sent Chief Suriel and the current Commanding Officer of Station 27 an email explaining that Lt. Francisco had made a complaint of workplace violence in 2014, when Deputy Chief Santiago had been the Commanding Officer of Station 27, and asking them to consider banning the EMT from Station 27 because Lt. Francisco did not feel safe. On October 29, 2016, the Commanding Officer at Station 27 sent an email stating that, pending any additional direction from the division, the EMT was restricted from working at Station 27 effective immediately based on his past and most recent history ("October 29 Email").

On November 17, 2016, just one day after Lt. Francisco's discussion with Chief Suriel about Lt. Rondon's written statement, Chief Suriel responded to the October 29 Email, stating that "pending documentation [of the incident] as requested, and my determination of that documentation, [the EMT] **shall be allowed** to work overtime at Sta 27."[25] (City Ex. 25A) (emphasis in original). Chief Suriel testified that he sent the email because the Local 2507 President told him he was going to the Office of Labor Relations because the FDNY was imposing a financial hardship on its member without any evidence. Later that day, Chief Suriel forwarded the email chain to Chief Fitton, stating:

> I got a call from 2507 as to why their member is being refused OT. There is no paperwork to my knowledge and the Captain has not produced evidence/WPV Report/ISR/UOR. The member in question has worked at Station 27 when Lt. Francisco is off and yet Lt. Francisco is adamant that the member be band [*sic*] from working at station 27.
>
> Amongst other things, I was accused of retaliation by Vincent Variale… He stated that since "Lt. Francisco represented Lt.

[25] Chief Suriel was not Division Commander in August 2014 when Lt. Francisco filed the Workplace Violence Incident Report.

> Rondon", I am allowing [the EMT] to work at Station 27 so he can get back at Lt. Francisco for his representation. I advised Vincent Variale his comments are without merit since I have no idea who is/will represent Lt. Rondon.
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> I also asked him for a date of incident ..[*sic*] He had no answer … I asked him for a copy of a WPV report. He had none to produce..[*sic*] I asked if [the EMT] has worked while Lt. Francisco was on duty ..[*sic*] He advised he "has not".
>
> FYI since Variale stated he was going to meet with you and he is concerned about "Lt Francisco's safety". He was advised to have Lt. Francisco forward paperwork.

(City Ex. 25A)

On November 30, Chief Booth sent an email to Chief Suriel telling him to inform the EMT "that station 27 is off limits" and that the Workplace Violence Incident Report exists "albeit two years old." (City Ex. 25B) There is no record evidence that Lt. Francisco and the EMT ever worked the same tour at the same station since 2014, and there is no evidence that the EMT worked any tours at Station 27 after Chief Suriel's email on November 17.

On January 29, 2017, Lt. Francisco discussed a bargaining unit member's scheduling issue with Deputy Chief Fields.[26] Shortly after the interaction, Lt. Francisco was detailed from working the desk at Station 27 to working the desk at Station 15 approximately one mile away. Lt. Francisco did not start working at Station 15 until March 2017 because he was out of work on a Line of Duty Injury ("LODI").[27] Initially, Lt. Francisco did not have access to certain computer

[26] Regarding the scheduling issue, Deputy Chief Fields testified that he told Lt. Francisco, "this is a minor issue . . . if you can work this out with your members, I have no issue with it. . . . There was no hostility there whatsoever. I actually gave him exactly what he wanted. . . . That's the last I heard of it until I received this IP." (Tr. at 941-42)

[27] Between January and August 2017, Lt. Francisco was out of work on LODI at times and working on LODI Limited Duty at other times. The LODI Limited Duty Procedure states that light duty desk personnel shall "[a]ssign members to an appropriate limited duty assignment, which best

programs at Station 15, but was granted access once Deputy Chief Fields became aware of the issue. On April 20, 2017, Lt. Francisco was detailed back to Station 27. Before, during, and after his detail, Lt. Francisco's tour and general duties remained the same.

Chief Suriel and Deputy Chief Fields testified that Lt. Francisco was detailed to Station 15 because it had two Lieutenant vacancies, one Lieutenant was on an extended sick leave, and one Lieutenant was on family leave.[28] In addition, Lt. Francisco was on LODI Limited Duty in January 2017. They further testified that the FDNY's practice of detailing employees on LODI Limited Duty has not changed - an officer on LODI gets detailed throughout the borough to cover vacancies as needed, sometimes on a daily basis. Both Chief Suriel and Deputy Chief Fields confirmed that once the vacancies at Station 15 were resolved, Lt. Francisco was sent back to Station 27, which now needed coverage.[29] However, according to Lt. Francisco, there was no vacancy at Station 15 and moving him caused a vacancy at Station 27, which he then covered on more than one occasion.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by retaliating against Lt. Rondon and his Union representative, Lt. Francisco, because of their union activity and

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meets the needs of the [FDNY]." (City Ex. 21) Chief Suriel and Deputy Chief Fields testified that in the case of a returning officer, the light duty desk often calls the division to see where they have a need for the officer. (Tr. 771-72, 922-24).

[28] Additionally, Deputy Chief Fields stated that the other officers at Station 27 were complaining that they always had to work the Fly Car since Lt. Francisco could only work the desk.

[29] This testimony is corroborated by an email, dated April 19, 2017, from the Commanding Officer of Station 27.

the Union's challenges regarding the PRU pilot program.[30] Regarding Lt. Rondon, the Union asserts that the FDNY's retaliatory actions were as follows: formally disciplining him;[31] a total restriction on his duties; BITS' holding up his OMA patient care review; his transfer to the MSU; BITS' delay in issuing the Step I decision; and BITS' conditioning its recommended penalty upon a waiver of his contractual and statutory rights. As a result, Lt. Rondon lost over $40,000 in overtime, night shift differential, and meal money earnings. The Union alleges that the FDNY retaliated against Lt. Francisco by permitting an EMT who had threatened him to work at the same station and subsequently transferring him to a different station.

The Union asserts that the evidence establishes a causal connection between its opposition to the PRU pilot program and its representation of Lt. Rondon, and the adverse actions taken against Lt. Rondon and Lt. Francisco. According to the Union, the FDNY's extreme disparate treatment between Lt. Rondon and Paramedic Adorno demonstrates its actions were motivated by

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[30] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter . . .
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

[31] The Union claims that the retaliation began "the first moment he was treated differently than [Paramedic Adorno]," on November 22, 2016, when he was immediately suspended for 20 days. (Tr. 1422)

anti-union animus. The Union asserts that the only explanation for the disparate treatment of two similarly situated employees is that Local 2507, Paramedic Adorno's union, has a good working relationship with Chief Suriel and did not have contentious disputes with him regarding the PRU pilot program, while Local 3621, Lt. Rondon's union, has "a contentious and acrimonious relationship" with Chief Suriel. (Union Br. p. 49) Further, when Lt. Rondon sought Union assistance in responding to Chief Suriel's questions, Chief Suriel said if the Union wouldn't cooperate, he would send the case to BITS. Additionally, prior to Lt. Rondon, no EMS Superior Officer had been totally restricted and involuntarily transferred to the MSU unless the officer was accused of a crime or failed a drug test.

The Union argues that the City has not established legitimate business reasons for the adverse actions taken against Lt. Rondon following his 20-day suspension.[32] Since BITS issued a recommended penalty of a 20-day, time-served suspension for Lt. Rondon's actions, the Union contends that any adverse action taken beyond that suspension is *per se* neither legitimate nor justified. Further, the City's numerous, and often conflicting, *post hoc* justifications for its actions are pre-textual and support the Union's claims of retaliation. The FDNY claims that they treated Lt. Rondon more harshly because he was a supervisor, he made a false statement in the investigation, and a patient died on the call. However, it did not charge Lt. Rondon with failing to supervise. Moreover, there is no evidence that Lt. Rondon made a false statement, and the FDNY did not raise the patient's death as a basis for its actions at either the Step I or Step 2 disciplinary hearings. According to the Union, Chief Suriel contradicted himself by claiming both that he did

[32] The Union asserts that the Deputy Commissioner for Legal Affairs, who supervises several units including BITS, had a contentious relationship with Lt. Rondon's father, who sought assistance from his union regarding a civil service appointment.

not make the decision to reassign Lt. Rondon to the MSU and that he did so because he did not want Lt. Rondon to be embarrassed by working at the station without his uniform.[33] According to the Union, the delay in issuing Lt. Rondon's Step I decision was neither common practice nor a result of Chief Ahee's retirement because, unlike the other delayed Step I decisions, the Union repeatedly requested that BITS issue the decision.

With respect to Lt. Francisco, the Union asserts that Chief Suriel lifted the EMT's restriction in an attempt to intimidate Lt. Francisco days after he represented Lt. Rondon during Chief Suriel's questioning. Then, in January 2017, after Lt. Francisco intervened in an overtime dispute and complained to Deputy Chief Fields about the situation, he was transferred from his home station, creating a vacancy, to a less desirable station that had no vacancies, in retaliation for his protected union activity.

In addition, the Union argues that the actions taken against Lts. Rondon and Francisco constitute independent violations of NYCCBL § 12-306(a)(1) because they are inherently destructive of their statutory rights. The Union asserts the FDNY's actions have had a chilling effect on other bargaining unit members, making them afraid to seek the Union's assistance and discouraging their participation in union activity.

As a remedy, the Union requests that the Board order the City to make Lt. Rondon whole for his 20-day suspension; provide him backpay for the lost overtime, night shift differential, and

[33] The Union also discredits Chief Suriel's concern for Lt. Rondon's pride since, it alleges, Chief Suriel drove Lt. Rondon to near financial ruin.

meal money he would have received but for his restriction period; post appropriate notices; and other just and proper relief.[34]

City's Position

The City argues that the petition should be dismissed because the FDNY has not violated NYCCBL § 12-306(a)(1) or (3). It asserts that the Union has failed to establish a causal link between instances of union activity and the FDNY's actions against Lt. Rondon. First, the City notes that Lt. Rondon's union activity occurred days after Chief Suriel had referred the matter to BITS, OMA, and the Chief of EMS and, thus, could not have been a motivating factor. Second, the City contends that nothing but speculation and conclusory allegations connect the FDNY's actions toward Lt. Rondon with the Union's opposition to the PRU pilot program and other policies since Lt. Rondon was not involved in any of the Union and FDNY's discussions regarding those issues.[35]

Regarding Lt. Francisco, the City contends that the Union has not established retaliation because there was no adverse employment action. There was no evidence that Lt. Francisco and the accused EMT actually worked together. In addition, the City asserts that Lt. Francisco was detailed to another station based on FDNY needs, just like any other LODI Limited Duty Officer. The stations were close by, and at all relevant times his schedule and general duties remained the same.

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[34] According to the Union, Lt. Rondon would have reached the maximum allowable percentage of overtime, as he had for the past ten years, but for the retaliatory restriction.

[35] In response to the allegation that Lt. Rondon was retaliated against by the Deputy Commissioner for Legal Affairs because she disliked his father, the City notes that Lt. Rondon's father received the civil service status he sought and that subsequently the Deputy Commissioner hired Lt. Rondon's brother.

Assuming, *arguendo,* that the Union demonstrated a *prima facie* case of retaliation, the City argues that its actions were the result of legitimate business reasons and would have been taken regardless of any protected union activity. According to the City, Lt. Rondon was suspended, restricted, and temporarily reassigned because of his failure to act in response to a cardiac arrest that resulted in the death of a patient.[36] Lt. Francisco was temporarily detailed based on his pre-existing designation as LODI Limited Duty and the FDNY's staffing needs. The City notes that the FDNY has managerial discretion to discipline its own employees and assign its personnel.

Regarding Lt. Rondon, the City contends that he was not singled out because his partner, Paramedic Adorno, was also charged and restricted. The City asserts that the difference between the two is that Paramedic Adorno eventually did assist during the call, while Lt. Rondon, a supervisor who is held to a higher standard, inexcusably failed to act as both a supervisor and as a first responder.

The City asserts that the decisions to impose patient care restrictions on Lt. Rondon were made by BITS and OMA, not Chief Suriel. According to the City, BITS maintained its hold on OMA's review for Lt. Rondon longer than for Paramedic Adorno because it was "still making a determination as to whether [Lt.] Rondon was capable of performing his duties as a Lieutenant." (City Br. at 39) BITS determined that having a medical case review without the underlying matter adjudicated defeats the purpose of OMA's retraining. Further, the City contends that there is nothing unusual about the length of time for the Step I decision to issue as there have been multiple

[36] Contrary to the Union's assertions, the City maintains that command discipline was inappropriate for Lt. Rondon given the circumstances of the patient's death and because BITS deemed the matter chargeable.

other decisions within the last ten years that have taken at least that amount of time or longer. The City asserts that the FDNY decision to temporarily detail Lt. Rondon to the MSU was made by Captain Suchecki because Lt. Rondon was restricted in the duties he could perform. He could only work at the Division, the MEU, the MSU, or the Bureau of Training, and it was determined that he could be used operationally at the MSU.[37]

Lastly, the City asserts that the FDNY's actions were not inherently destructive of important Union rights, so the Union's independent NYCCBL § 12-306(a)(1) charge must be dismissed.

DISCUSSION

To determine whether an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, 39 OCB 51 (BCB 1987), and its progeny. This test states that, 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.3621*, 7 OCB2d 29 (BCB 2014). If the petitioner establishes a *prima facie* case, then the employer "may attempt to refute this showing on one or both elements or demonstrate that legitimate business reasons would have caused the employer to

[37] The City asserts that even if the Board were to find retaliation, there is no appropriate financial remedy. When an EMS member is fully restricted, there are only a limited number of locations where they can work, and they cannot earn overtime. Additionally, overtime is speculative unless expressly provided for, and the Union has not identified any source of right.

take the action complained of even in the absence of protected conduct." *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006); *see also Feder*, 4 OCB2d 46, at 49 (BCB 2011).

Upon review of all the evidence adduced in this case, we find that the Union established a *prima facie* case of retaliation for totally restricting Lt. Rondon, detailing him to the MSU and for the delay in processing his discipline. Respondents have not refuted the *prima facie* case nor have they provided credible evidence that the FDNY would have taken the same actions even in the absence of Lt. Rondon's protected activity. Therefore, we find that the FDNY violated NYCCBL § 12-306(a)(1) and (3).

Regarding the first prong, for union "activity to be protected under the NYCCBL, it must be related, even if indirectly, to the employment relationship and must be in furtherance of the collective welfare of employees." *Local 1087, DC 37*, 1 OCB2d 44, at 25 (BCB 2008) (citing *Finer*, 1 OCB2d 13 (BCB 2008)) (other citations omitted). If the employer is shown to have knowledge of the protected union activity, then the first prong is satisfied. *See Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011). The Board has held that seeking and receiving union assistance and filing contractual grievances and improper practice petitions constitute activity that is protected under the NYCCBL. *See UFA*, 8 OCB2d 3, at 32 (BCB 2015); *Nealy*, 8 OCB2d 2, at 18-19; *Local 621, SEIU*, 5 OCB2d 38, at 12 (BCB 2012); *see also Edwards*, 1 OCB2d 22, at 17; *Colella*, 79 OCB 27, at 53-54 (BCB 2007); *Fabbricante*, 61 OCB 38, at 10-11 (BCB 1998). Here, Lt. Rondon was engaged in union activity when he called the Union on November 16, 2016.[38] It

[38] The record established that the Union and the City were in a dispute over the PRU program at the time of the November 2016 incident, and therefore when Lt. Rondon required Union assistance, the Union's relationship with Chief Suriel had been impacted. Nevertheless, we do not attribute the evident acrimony arising out of the Union's challenge to the PRU pilot program to Lt. Rondon, as the Union argued.

is undisputed that Chief Suriel spoke with Union representatives regarding Lt. Rondon on November 16 and that BITS was aware of the Union's representation of him going forward. Indeed, on November 16, Chief Suriel acknowledged Lt. Rondon's union activity when he forwarded Lt. Rondon's statement to Director Hazel, asserting that Lt. Rondon "did not answer all my questions and was advised by Union not to answer further." (City Ex. 19) Additionally, Union representatives were present and advocated on Lt. Rondon's behalf at the November 22, 2016 BITS interview and the January 31, 2017 Step I hearing. Finally, between November 2016 and October 2017, the Union filed a wrongful disciplinary grievance and this improper practice petition on Lt. Rondon's behalf and made inquiries and complaints concerning the delayed processing of Lt. Rondon's discipline. Therefore, we find that the first prong of the *prima facie* case has been satisfied.

To establish the second prong, "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." *OSA*, 7 OCB2d 20, at 19 (BCB 2014) (quoting *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007)) (internal quotation marks omitted). "[T]ypically, motivation is proven through the use of circumstantial evidence, absent an outright admission." *Colella*, 7 OCB2d 13, at 22 (BCB 2014) (internal quotation and editing marks omitted) (quoting *Burton*, 77 OCB 15, at 25 (BCB 2006)). In the absence of an express statement, the Board 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)).

We find a causal connection between Lt. Rondon's protected union activity and the FDNY's decision to formally discipline him, treat him as totally restricted, detail him to the MSU,

and delay the processing of his Step I matter at BITS. At a minimum, statements that Chief Suriel made to Lt. Francisco and President Variale on November 16 demonstrate a hostility towards the Union's advice to its member.[39] *See CEU, L.237*, 77 OCB 3, 13-14 (BCB 2006). We find that Chief Suriel became angry upon learning that the Union would not direct Lt. Rondon to submit a new statement and reacted the same way after Lt. Francisco stated that the Union's position was that the Captain should oversee the investigation. In both conversations, Chief Suriel was clearly unhappy with the Union and stated that because of the Union's position or advice, the matter would become formal discipline. Further, the hostility towards the Union's intervention on behalf of Lt. Rondon continued after November 16, 2016. The October 23, 2017 Selection of Disciplinary Procedure Letter contained an unprecedented clause expressly conditioning its recommended penalty upon withdrawal of Lt. Rondon's pending grievance and this improper practice petition. We find that conditioning the recommended discipline on waiver of statutory and contractual rights demonstrated that the anti-union animus displayed in November 2016 remained in place almost one year later.

With respect to the decision to formally discipline Lt. Rondon, his total restriction after November 22, and the decision to detail him to the MSU on December 13, there is temporal proximity to Lt. Rondon's request for Union representation and the Union's intervention on his behalf that began on November 16. While the delay in processing Lt. Rondon's discipline appears more remote in time to his initial protected activity, the Union continued to intervene and advocate on his behalf while the Step I decision was pending. Therefore, based on the evidence of animus

[39] We credit Lt. Francisco and President Variale's testimony concerning the statements made by Chief Suriel to each of them. Chief Suriel did not expressly deny Lt. Francisco's assertions, and President Variale's testimony was more detailed than Chief Suriel's. *See DC 37*, 6 OCB2d 13, at 18 (BCB 2013) (finding specific and consistent testimony is credible).

noted above, we also find a causal relationship between Lt. Rondon's protected activity and the delay in processing his discipline. Accordingly, the evidence demonstrates a causal relationship between the protected activity and the FDNY's acts sufficient to establish a *prima facie* case that the decision to formally discipline Lt. Rondon, his total restriction, detail to the MSU, and delay in processing his discipline were motivated by Lt. Rondon's union activity.

Having found that the Union has established a *prima facie* case, we examine the City's proffered legitimate business reasons for the FDNY's adverse employment actions against Lt Rondon. We find that the FDNY has established a legitimate business reason for some, but not all of its actions, as more fully set forth below.

At the outset, we note that the FDNY has the right to "direct its employees; take disciplinary action; . . . [and] determine the methods, means and personnel by which government operations are to be conducted," pursuant to NYCCBL § 12-307(b). However, NYCCBL § 12-307(b) "does not provide [the Employer] unlimited protection from claims that its decisions violate the NYCCBL." *CSTG, L. 375*, 4 OCB2d 61, at 23 (BCB 2011); *see also DC 37*, 61 OCB 13, at 16 (BCB 1998) ("the right to manage is not a delegation of unlimited power, nor does it insulate the City from an examination of actions claimed to have been taken within its limits"). In sum, "actions taken within an employer's managerial prerogative . . . may not be taken for a retaliatory purpose." *DC 37, L. 3621*, 7 OCB2d 29, at 27 (BCB 2014) (quoting *SBA*, 4 OCB2d 50, at 25 (BCB 2011)) (internal quotation marks omitted).

When examining the proffered legitimate business reasons, "this Board will look to whether the record supports their contentions. When the reasons provided are unsupported and/or inconsistent with the record, this Board will find that the employer committed an improper practice." *SBA*, 74 OCB 22, at 24 (BCB 2005) (citations omitted). The FDNY argues its actions

were motivated by Lt. Rondon's failure to properly respond to a cardiac arrest on November 14, 2016.

With respect to the FDNY's decision to formally discipline Lt. Rondon, we find that the FDNY has established legitimate business reasons. Chief Suriel, the Division Commander, has the authority to investigate a matter and/or refer it to BITS. Here, Chief Suriel was notified on November 14th that two EMTs alleged that Lt. Rondon and Paramedic Adorno arrived at the scene of a cardiac arrest and failed to provide the necessary patient care. Chief Suriel promptly relayed this information to FDNY senior management, OMA, and BITS, and he did so approximately two days before the Union got involved. Chief Suriel's testimony about his actions on November 14 was corroborated by his contemporaneous emails.

Additionally, at least at the early stages, Lt. Rondon and Paramedic Adorno were treated similarly in that they were both duty restricted, investigated, and interviewed at BITS. It was only after the referral to BITS that Lt. Rondon and Paramedic Adorno were treated differently. Director Hazel explained, and the evidence supports, the conclusion that the different treatment was based on how they acted at the scene and throughout the investigation process, including at their BITS interviews. In addition, Lt. Rondon had two recent incidents of command discipline. Thus, the record supports the conclusion that formal discipline would have been initiated regardless of Lt. Rondon's protected union activity. As such, we find that the FDNY had a legitimate business reason to exercise its right to pursue formal discipline at that time.[40]

However, we do not find that the FDNY established legitimate business reasons for the total restriction of Lt. Rondon and his detail to the MSU. The FDNY asserts that Lt. Rondon's

[40] Our conclusion only addresses the initiation of formal discipline. It does not address whether any discipline imposed was appropriate. This issue is left to the parties' disciplinary and grievance process.

detail to the MSU was not retaliatory because the assignment decision was made by EMS Operations Captain Suchecki, a member of the same bargaining unit as Lt. Rondon. It also argues that because of Lt. Rondon's duty restriction, there were only a few locations he could be assigned, including the Division, the MSU, the MEU, and the Bureau of Training.[41] (City Br. p. 40) We cannot credit these explanations. First, the documentary evidence indicated that Lt. Rondon was only restricted from patient care, field work, and driving at the time he was detailed. Nevertheless, it is undisputed that he was treated as totally restricted. The City provided no evidence or explanation concerning why the FDNY imposed a greater restriction than what was written in the BITS letter and confirmed by Director Hazel in an email. In addition, the evidence established that the only other EMS Supervisors who were involuntarily transferred to the MSU were the subject of a criminal investigation or had failed a drug test.[42] There is no dispute that the MSU was an undesirable assignment where Lt. Rondon basically functioned as a stock worker and did not have overtime opportunities.[43] Accordingly, we reject the FDNY's proffered business reason for totally restricting Lt. Rondon and detailing him to the MSU.

Similarly, we are not persuaded that the FDNY established a legitimate business reason for its delay in processing the discipline and lifting the OMA restriction. Under the circumstances, the FDNY's explanation that the hearing officer assigned to EMS cases, some of which predated

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[41] An EMS Supervisor who is totally restricted can only be assigned to the Division, the MEU/MSU, or the Bureau of Training.

[42] The only identified exception was a lieutenant on light duty who was posted there voluntarily.

[43] Since it was highly unusual to assign a superior officer who was duty restricted to the MSU, we are not persuaded that Captain Suchecki's role in identifying the MSU vacancy rebuts the Union's showing of causation. Further, Captain Suchecki was subordinate to Chief Suriel, and it is undisputed that he consulted with Chief Suriel prior to finalizing the assignment.

Lt. Rondon's, did not issue any decisions in the eight months preceding his retirement does not rebut the *prima facie* case.[44] It is undisputed that the City had options other than issuing a Step I decision. In fact, the "Selection of Disciplinary Procedure" it ultimately issued in November 2017, did not require the review of the 2017 hearing record or the involvement of the Hearing Officer. The record is devoid of any explanation as to why the Selection of Disciplinary Procedure letter could not have been issued, or some other action taken, earlier.[45] Despite the Union's repeated requests for a decision and offer to waive the right to a new hearing in August 2017 and the FDNY's statement that a decision was forthcoming, the Selection of Disciplinary Procedure Letter was not issued for another two months and was conditioned on an unprecedented waiver of statutory rights. In sum, while the FDNY's initiation of formal discipline was not retaliatory, we find that its assignment of Lt. Rondon to the MSU and the delay in processing his discipline and total duty restriction would not have happened in the absence of Lt. Rondon's union activity.[46] Consequently, we find that the FDNY committed an improper practice, in violation of NYCCBL § 12-306(a)(3) and, derivatively, § 12-306(a)(1).

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[44] We are also not persuaded that the Union's *prima facie* showing of retaliation has been rebutted because BITS took between eight and 18 months to issue Step I determinations in some other cases in the last 10 years. Here, BITS never issued a Step I determination, despite the Union's repeated requests to do so. The delays in other cases could have been caused by any number of reasons or may have occurred with the unions' consent or acquiescence.

[45] It should also be noted that the City argued that, as of August 2017, BITS was still making a determination regarding whether Lt. Rondon was capable of functioning as a lieutenant. Such a claim is belied by the evidence, which showed that no action was taken on Lt. Rondon's discipline prior to issuing the Selection of Disciplinary Procedure letter.

[46] We do not separately analyze the failure to lift the BITS hold on the OMA review of Lt. Rondon since this action flowed directly from the delay in processing Lt. Rondon's discipline. However, this hold was lifted shortly after the Union filed a petition for injunctive relief on November 2, 2017, and no explanation was given as to why, in the absence of a Step I decision, it was now appropriate to permit OMA to proceed with its review.

The Union also claims that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by permitting an EMT who had threatened Lt. Francisco to work at Station 27 and later by transferring Lt. Francisco to a less desirable station in retaliation for his union activity.

We find that Petitioners have satisfied the first prong of the *Bowman* test with respect to Lt. Francisco. It is undisputed that Lt. Francisco was an active Union representative during the relevant time period. In addition, management was aware of his Union activity. For example, he objected to the PRU Pilot program. Further, he represented Lt. Rondon regarding the events on November 14 and addressed a bargaining unit member's scheduling dispute with Deputy Chief Fields in January 2017.

With respect to the claim that the FDNY authorized an EMT who had threatened Lt. Francisco to work at the same station, we find that Petitioners have satisfied the second prong. Here, there is clearly temporal proximity between Lt. Francisco's representation of Lt. Rondon on November 16, 2016, and Chief Suriel's email allowing the EMT to work overtime at Lt. Francisco's station just one day later. As explained above, statements that Chief Suriel made to Lt. Francisco and President Variale on November 16 demonstrated a hostility towards the Union's advice to its member. Chief Suriel became angry upon learning that the Union would not direct Lt. Rondon to submit a new statement and reacted the same way after Lt. Francisco stated that the Union's position was that the Captain should oversee the investigation.

While Chief Suriel authorized the EMT to work at Station 27 following a call from the Local 2507 President, we find that the resolution of the EMT's overtime complaint was a pretext for the adverse action regarding Lt. Francisco. Chief Suriel's testimony that immediate action was required because the EMT may have suffered a loss of income rings hollow in the context of this record, where Lt. Rondon's potential loss of income from his total restriction was far greater and

was also brought to management's attention by the Union, but was not addressed for 11 months. In addition, Deputy Chief Santiago brought Lt. Francisco's complaint to Chief Suriel's attention on October 28 and recommended that the EMT be banned from Station 27. A day later, the Station 27 Captain agreed. Despite professed concerns regarding the EMT's ability to earn overtime, Chief Suriel's opposition was not expressed for more than two weeks, until immediately after his conversation with Lt. Francisco about Lt. Rondon. Moreover, rather than accepting the Deputy Chief and Captain's recommendations or investigating the issue further, Chief Suriel immediately lifted the restriction on the EMT. The inappropriateness of lifting the EMT's restriction is further supported by Chief Booth's email, approximately two weeks later, when he instructed Chief Suriel to tell the EMT "that [S]tation 27 is off limits . . . . The work place violence reports exists albeit two years old." (City Ex. 25B) Taken together, the unsupported justification, temporal proximity, and evidence of animus satisfy the second prong of the *Bowman* test, and accordingly, we find that Petitioners established a *prima facie* case.[47]

Based on these facts, we find that the City has not established that it would have taken the same actions irrespective of Lt. Francisco's union activity. Accordingly, the FDNY violated NYCCBL § 12-306(a)(3) and, derivatively, § 12-306(a)(1) by permitting an EMT who had threatened Lt. Francisco to work at Station 27.

With respect to Lt. Francisco's detail to Station 15, we do not find a *prima facie* case. Deputy Chief Fields detailed Lt. Francisco to Station 15. It is true that Lt. Francisco's detail to

[47] We are not persuaded by the City's argument that there was no adverse employment action because Lt. Francisco and the EMT did not actually work together. The action that we have deemed retaliatory is the decision to lift the assignment restriction put in place due to a Workplace Violence Report. The fact that Lt. Francisco was not harmed by the retaliatory action does not negate that the action was taken and that the potential for harm existed until the assignment restriction was re-imposed.

Station 15 occurred shortly after the two had discussed a bargaining unit member's scheduling issue. However, on the evidence presented, we do not find that the detail was motivated by his union activity. There is no evidence that the discussion between Lt. Francisco and Deputy Chief Fields was heated or otherwise remarkable, and the scheduling issue was quickly resolved. In addition, we do not find that the temporary detail to a station approximately one mile from Station 27 was punitive.[48] Lieutenants on LODI Limited Duty are regularly detailed to cover vacancies as needed, and both Chief Suriel and Deputy Chief Fields consistently testified that Lt. Francisco was detailed to Station 15 because there were two Lieutenant vacancies at Station 15. It is also undisputed that Lt. Francisco performed the same duties in each location. Further, Lt. Francisco was returned to Station 27 once the vacancies were resolved, and Chief Suriel and Deputy Chief Fields' actions and testimony were corroborated by an April 19 email from the Captain of Station 15.[49]

Our conclusions thus far reflect where we have found violations of NYCCBL § 12-306(a)(1) on derivative grounds. Unlike derivative violations, independent violations of § 12-306(a)(1) are usually acts that do not result in an adverse employment action, but consist of statements, promises, or threats which interfere with, restrain or coerce employees that engage in or refrain from engaging in union activity. *See UFA*, 8 OCB2d 3, at 28 (BCB 2015); s*ee also SSEU, L.371*, 3 OCB2d 22, at 15-16 (BCB 2010); *CSTG, Local 375*, 3 OCB2d 14, at 14-15 (BCB

[48] The Union does not allege that Lt. Francisco lost any income as a result of the detail. *Cf. DC 37, L. 3621*, 7 OCB2d 29, at 25 (BCB 2014) (Board found a transfer punitive where respondents provided no credible explanation for reassigning an EMS Lieutenant to a position that altered his 20-year work schedule, impacted his income through a loss of night shift differential, and was labeled as an "administrative reassignment" perceived as a disciplinary measure).

[49] Although Lt. Francisco testified that there were occasional vacancies at Station 27 that he filled during the time he was detailed to Station 15, this statement, if true, does not rebut the City's evidence that there were vacancies at Station 15 when the at-issue assignment was made.

2010). As a result, the only claim that requires an independent analysis as to whether there has been a violation of § 12-306(a)(1) is the Union's assertion that the FDNY unlawfully conditioned its proposed penalty of a twenty-day suspension without pay, a 12-month probationary period, and transfer out of the MSU upon withdrawal of all pending legal matters.

Based on this record, we find that the FDNY unlawfully interfered with employee rights under the NYCCBL by conditioning its disciplinary penalty and transfer out of the MSU upon withdrawal of the instant improper practice charge along with any other pending claims associated with this matter.[50] This Board has repeatedly stated that "conduct that contain[s] an innate element of coercion, irrespective of motive, [can] constitute conduct which, because of its potentially chilling effect . . . is inherently destructive of important rights guaranteed under the NYCCBL." *OSA* 6 OCB2d 26, at 7 (BCB 2013) (quoting *DEA*, 4 OCB2d 35, at 9 (BCB 2011); *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010)) (internal quotations omitted). As such, the Board has found that an employer's request that an employee convince the Union to withdraw an improper practice petition in exchange for a promise to place the employee in a desired position was coercive, and thus inherently destructive. *See UFA*, 8 OCB2d 3, at 29. We find that the FDNY's conduct here was similarly coercive and interfered with Lt. Rondon's statutory and contractual rights.

The record reflects that the agency's recommended disciplinary penalties do not customarily include language requiring "a waiver and/or withdrawal of all pending and future claims associated with the matter." Representative Ziemba had never seen waiver language included in the recommended penalty in her over twenty years of experience. Indeed, a close

[50] The record reflects that the only "pending … claims associated with" Rondon's disciplinary charges in October 2017 were this improper practice petition and a contractual grievance concerning Lt. Rondon's transfer to MSU. (Union Ex. R) We take administrative notice that a grievance over Lt. Rondon's disciplinary charges, docketed as A-15508-18, was not filed until May 2018.

examination of the letter reveals that the waiver clause was awkwardly inserted in the middle of the phrase "probation period," suggesting that it was a unique addition to Lt. Rondon's letter, and that the customary letter would have contained just a recommended penalty. (Union Ex. R) Further, after issuance of the letter, Disciplinary Counsel Allerti told Representative Ziemba that BITS would not lift Lt. Rondon's patient care restrictions unless he accepted the recommended penalty and waiver. None of these facts were rebutted.

Thus, we find that conditioning the disciplinary penalty and transfer out of MSU upon withdrawal of the instant improper practice charge along with other pending contractual claims constitutes an independent violation of NYCCBL § 12-306(a)(1).[51] *See County of Chautauqua*, 42 PERB ¶ 4512 (ALJ 2009) (finding that the employer's offer not to pursue discipline in exchange for the employee's withdrawal of an unrelated grievance constituted unlawful interference under the Taylor Law). *See also In Re McKesson Drug Co. and Teamsters, Loc. 667 Intl. Bhd. of Teamsters*, 337 NLRB 935, 938 (NLRB 2002) (holding that an employer unlawfully interfered with an employee's rights when it conditioned his right to reinstatement from suspension on his signing a last-chance agreement that would waive his right to file an unfair labor practice charge against the employer).

[51] In reaching this conclusion, we note that the Selection of Disciplinary Procedure Letter was addressed to Lt. Rondon and was the FDNY's contractually required response to the Step I hearing, part of the formal discipline process. There was no evidence presented that it was an attempt to reach a bilateral resolution of the discipline.

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 District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621, docketed as BCB-4201-17, be, and the same hereby is, granted to the extent that it asserts that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by treating Lt. Rondon as totally restricted, assigning him to the MSU, and delaying the processing of his discipline in retaliation for his union activity; that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by permitting an employee who had threatened Lt. Francisco to work at the same station in retaliation for his union activity; and that the FDNY independently violated NYCCBL § 12-306(a)(1) by conditioning its disciplinary recommendation on Lt. Rondon's withdrawal of the Union's improper practice petition and contractual grievance; and it is further

ORDERED, that the referenced improper practice petition be and hereby is dismissed with respect to the remaining claims; and it is further

ORDERED, that the FDNY cease and desist from retaliating against Lts. Rondon and Francisco for their union activity; and it is further ordered

ORDERED, that the FDNY make Lt. Rondon whole; and it is further

ORDERED, that the FDNY post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain for a minimum of thirty days.

Dated: October 16, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

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

We hereby notify:

That the Board of Collective Bargaining has issued 11 OCB2d 35 (BCB 2018), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621 and the Fire Department of the City of New York.

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 District Council 37, AFSCME, AFL-CIO, and its affiliated Local 3621, docketed as BCB-4201-17, be and hereby is granted to the extent that it asserts that the Fire Department of the City of New York violated NYCCBL § 12-306(a)(1) and (3) by treating Lieutenant Douglas Rondon as totally restricted, assigning him to the MSU, and delaying the processing of his discipline in retaliation for his union activity; that the Fire Department of the City of New York violated NYCCBL § 12-306(a)(1) and (3) by permitting an employee who had threatened Lieutenant Ralph Francisco to work at the same station in retaliation for his union activity; and that the Fire Department of the City of New York independently violated NYCCBL § 12-306(a)(1) by

conditioning its disciplinary recommendation on Lieutenant Rondon's withdrawal of the Union's improper practice petition and contractual grievance; and it is further

ORDERED, that the referenced improper practice petition be and hereby is dismissed with respect to the remaining claims; and it is further

ORDERED, that the City of New York Fire Department cease and desist from retaliating against Lieutenants Rondon and Francisco for their union activity; and it is further

ORDERED, that the Fire Department of the City of New York make Lieutenant Douglas Rondon whole; and it is further

ORDERED, that the Fire Department of the City of New York post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the Notice must remain conspicuously posted for a minimum of thirty days from the date of posting, and must not be altered, defaced, or covered by any other material.

Fire Department of the City of New York
(Department)

Dated: _____ (Posted By)
(Title)