DC 37, L. 1549, 13 OCB2d 20 (BCB 2020)

(Docket No. BCB-4333-19)

Summary of Decision: The Union claimed that DEP violated NYCCBL § 12-306(a)(1) and (3) when it terminated an employee in retaliation for filing an out-of-title grievance. The City argued that the employee was not terminated because of his union activity but because he sent a threatening e-mail to his supervisor and because of his work performance, both of which constitute legitimate business reasons. The Board found that the Union failed to establish a *prima facie* claim of retaliation. Accordingly, the petition was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1549,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On June 3, 2019, District Council 37, AFSCME, AFL-CIO, Local 1549 ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP"). Petitioner alleges that DEP violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by terminating an employee in retaliation for filing an out-of-title grievance. The City argues that the Union has failed to demonstrate that

the employee's termination was motivated by his union activity. Instead, the City contends that his termination was motivated by a threatening e-mail he wrote to a supervisor as well as his work performance, both of which constitute legitimate business reasons. The Board finds that the Union failed to establish a *prima facie* claim of retaliation. Accordingly, the petition is denied.

BACKGROUND

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

Michael Greene was hired by DEP in March 2018 as a Paralegal Aide, Level I. The position carried a one-year probationary period. Greene worked in the Enforcement Unit of DEP's Bureau of Water and Sewer Operations. His primary duty was to serve summonses related to water backflow devices, which protect the City water supply from being contaminated by water from private properties. Backflow devices are required to be tested yearly, and if the private property owners fail to conduct the testing, the City issues them a summons. According to Greene's Team Leader, Elaine Cooper, Greene was trained to knock on the owner's door and serve the summons to anyone over 18 years of age who was willing to accept it. If that person refused to accept service, or if no one was home, Greene was required to post the summons on the door and take a picture. Cooper testified that Greene was trained to stay at the door rather than go on or into any private property.

Greene explained that every day he would receive a stack of summonses that he was to serve. The summonses were located throughout all five boroughs, and the stack was organized by borough but not by neighborhoods within the borough. Greene testified that beginning sometime in the summer of 2018, he also occasionally accompanied a DEP Inspector who performed

inspections on properties while Greene served water termination notices.[1] Greene stated that this was a more involved process than serving summonses, because it required greater interaction with the public, entailed higher penalties, and added to his volume of overall work.

On days when Greene was not serving summonses, he was assigned to represent the agency in relation to those summonses during hearings at the City's Office of Administrative Trials and Hearings ("OATH"). Greene testified that because he dressed differently for OATH hearings than he did when serving summonses, he would generally go home once the hearings were finished.

Greene testified that sometime around August of 2018, he complained to his supervisors that he believed he was working out-of-title. Greene testified that he believed a Paralegal Aide was a clerical title, but that the duties he performed were more akin to that of an Inspector or a Claims Specialist. After his complaints went unaddressed, on October 26, 2018, the Union filed an out-of-title grievance on Greene's behalf. A Step II hearing on this grievance was later held on January 22, 2019.

Greene testified that he raised multiple issues regarding his equipment throughout his employment at DEP. Specifically, he complained that his radio battery would not hold a charge, and therefore it was difficult for him to stay in contact with the Department. Greene also complained that he was not given proper navigational tools to help him to effectively plan his route based on traffic and the distances he had to travel, and this negatively impacted his productivity. Although he had an electronic tablet, Greene explained that this was an old piece of equipment that was mainly used to enter affidavits.[2] He elaborated that the tablet's connectivity was poor,

[1] Greene testified that he served water termination notices on less than ten occasions.

[2] Greene testified that after service was made or attempted to be made at a residence, he was required to fill out an affidavit stating where and to whom the summons was served or, if it could not be served, explaining the efforts he made to serve it.

and it did not navigate well, if at all. Because of this, Greene stated that he had to use his own personal cell phone to navigate his route, and he often had to come back to the office and work past his regular hours in order to enter the affidavits manually there. According to Greene, these issues were never adequately addressed.

Cooper and DEP's Administrator of Compliance and Special Projects, Yocanda Baez, testified that they were aware of Greene's equipment complaints. With respect to his radio, Cooper testified that Greene had many problems getting it to function correctly, but that those problems were always addressed. Baez testified that she assisted Greene with getting a new car charger for the radio and that she also suggested that he charge the radio in the office overnight. Since Greene's desk did not lock, she instructed him to lock the radio in a different desk, however, Greene complained that the desk was too far away. With respect to the tablet, Baez testified that it had the Google Maps application installed to assist Greene with navigation. In addition, after Greene complained that Google Maps was not sufficient, she arranged for a different navigational application to be installed on his tablet. Baez stated that even if the tablet was not functioning at any particular time, Greene could still serve summonses by using his DEP-issued cell phone to navigate.[3] Additionally, Cooper testified that Greene complained that the cell phone, radio, and tablet were too difficult to carry.[4]

Greene was given two performance evaluations on October 10, 2018, which were completed by his direct supervisor, Mina Mashreki. The first was for the period of March 26, 2018

[3] There was no evidence rebutting Baez's assertion that Greene could use his DEP-issued cell phone to navigate. However, Greene testified that he sometimes used his personal cell phone for navigational purposes.

[4] According to both Cooper and Baez, Greene's co-worker did not have the same issues with or complaints about the equipment.

to June 25, 2018 ("Evaluation 1"), and the second was for the period of June 26, 2018 to September 25, 2018 ("Evaluation 2"). Each evaluation included a rating for five tasks as well as an overall rating.[5] On both evaluations, Greene's supervisor gave him an overall rating of "Conditional." (City Ex. 1) The justification for Evaluation 1's overall rating stated that "Mr. Greene has shown adequate ability at court in conferencing with respondents and representing the Agency at the hearings. Mr. Greene needs [to] improve setting up his routes for service and meeting deadlines." (*Id*.) The recommendations section stated that "I would recommend that Mr. Greene takes the time to strategically plan out his routes and keep deadlines in mind." (*Id*.) The justification for Evaluation 2's overall rating stated that "Mr. Greene failed to follow proper communication with the yard on 9/24/18 when attempting to serve a summons and failed to report the incident. Due to his lack of strategically planning his routes he hasn't met his deadlines of service." (*Id*.) The recommendation section stated that "I recommend Mr. Greene immediately report any incidents he encounters in the field. He should take successful workplace communication training and motivating [him]self for professional service." (*Id*.)

Greene testified that he believed these evaluations were not a fair assessment of his work performance since he never actually performed Task number 2, even though he was hired to do so. He also testified that he believed he was doing the work of two people, since a co-worker who was hired on the same day as him resigned in late October 2018 and was never replaced. Moreover, he stated that he was never offered the training that was recommended in Evaluation 2.

[5] Task number two is described as "Under supervision, serves corporate NOVs to the Department of State monthly." (City Ex. 1) This appears to be a task that Greene described as serving corporate summonses in Albany, which he testified that he never actually performed. This task was marked on the evaluations as "not ratable." (*Id*.) Of the other four tasks, two were rated "conditional," and two were rated "good" on both evaluations. (*Id*.)

Cooper and Baez testified for the City regarding Greene's work performance. Both testified that Greene had difficulty planning his routes and serving the summonses in a timely fashion. According to Cooper, Greene would often leave the office late in the morning to serve his summonses and arrive back there early. Additionally, he "seemed to complain about things a lot." (Tr. 160) Baez testified that overall she found Greene to be disorganized, lazy, and untimely. She stated that she had conversations with Greene regarding his inability to serve summonses in a timely fashion, and Greene stated that part of the reason for this was that he wasn't assigned to serve in the boroughs he wanted. Baez testified that she agreed with Greene's performance evaluation rating of "conditional" because he was just meeting the minimum requirements for his tasks.[6] With respect to Greene's claim that his workload increased after his co-worker quit, Cooper and Baez both testified that upon the co-worker's departure, Greene was not assigned additional summonses to serve. Instead, Inspectors were assigned the additional summonses.

With respect to the September 24, 2018 incident cited to in Evaluation 2, the record demonstrates that DEP received a complaint from a property owner who "wanted to know why the inspector who came to his property insisted on gaining entrance to his home. He stated that his wife was not properly dressed and she felt intimidated." (City Ex. 12) During the investigation into this complaint, Greene explained that due to the presence of some dogs inside the apartment, he followed a property owner inside and through a glass door to the backyard to speak. According

[6] Both Cooper and Baez testified that Greene's co-worker did not have the same problems getting the summonses served in a timely manner. Greene's co-worker's performance evaluations were entered into the record. They show that, like Greene, this co-worker was also given overall ratings of "conditional." (Union Exs. J & K) However, on both evaluations she was rated as "good" on the task of serving summonses, whereas Greene was rated "conditional" for this task. (*Id.*; City Ex. 1) On the other hand, for the task of representing the agency at OATH, the co-worker was evaluated as "conditional" on Evaluation 1 and "unsatisfactory" on Evaluation 2, while Greene was rated "good" for this task on both evaluations. (*Id.*)

to Greene, while the conversation started out friendly, once the property owner learned of the nature of the summons, he became hostile. Greene therefore served the summons, left the premises, and filled out his affidavit. Greene testified that that he did not report the incident because he "was never informed of any means by which I should report incidents that occur in the field." (Tr. 87) The owner's complaint was ultimately found to be "unsubstantiated." (City Ex. 12)

On at least two occasions, Greene requested a schedule change. First, sometime in or around October 2018, Greene requested to change his hours to 7:30 a.m. through 3:30 p.m., which is the same schedule worked by employees in the maintenance yards, whom Greene needed to contact via radio when he served a summons.[7] Greene explained that working these hours would make communication with the yards easier and would prevent him from having to return his City-issued vehicle during rush hours. This request was denied. On or about November 13, 2018, Greene submitted a request for a schedule change as a religious accommodation. In particular, he requested to leave early on Fridays to observe the Sabbath, since the sun began to go down earlier following daylight savings time. This request was also denied; however, Greene testified that he was permitted to leave early on Fridays as long as he used his own time.[8]

On another occasion, Greene complained to his supervisors that due to the volume of cases he had to defend at OATH, he was not able to take a lunch break. Cooper and Baez testified that

[7] Cooper confirmed that, when serving summonses, Greene was instructed to use his radio to inform someone at the yards of his location before and after serving each summons.

[8] These requests were officially denied by DEP's Office of EEO & Diversity in an e-mail dated January 31, 2019. The e-mail explained that the schedule change request was denied because Greene's supervisors and managers arrived after the proposed 7:30 a.m. start time. The e-mail also stated that his request to work 30 minutes of overtime Monday through Thursdays was denied because there were no overtime opportunities in his unit.

Greene was permitted to take lunch when he was at OATH for the day. Baez explained that Greene was never at OATH alone and was instructed to coordinate with a co-worker in order to schedule his lunch break.

Baez testified about an incident on November 19, 2018, during which she questioned Greene regarding an incorrect timesheet. In particular, Greene had submitted what is known as a "missed punch" for a day in which he was at OATH in the morning, returned to the office in the afternoon, and then left for the day at 2:30 p.m. She asked him why he submitted a missed punch when he could have used the hand scanner in the office to punch out, and she also questioned why the missed punch was submitted for 5:30 p.m. instead of 2:30 p.m. According to Baez, Greene stated that he left early for his religious observance. However, she explained to him that even if he leaves early for that purpose, he has to indicate the actual time that he left and use his own time to make up the difference. Greene testified that he thought it was OK to state that he worked until 5:30 p.m. because he had worked extra hours uncompensated earlier in the week and so he felt that it was a "wash." (Tr. 115)

Sometime in or around December of 2018, Greene requested personal protective equipment ("PPE") that he believed would help identify him as a City employee. According to Greene, he felt that members of the public would be more willing to speak with him if they knew he was working for DEP. Although he was given a DEP badge, he stated that it was his practice to only show the badge when requested to do so. Moreover, the Inspectors that Greene accompanied when serving water termination notices had a reflective vest, a flashlight, and a hard hat for their safety, and therefore, he wanted the same. Greene testified that he obtained an equipment requisition form to submit to his supervisor. However, he stated that as he was on his way to submit the form to his supervisor, Cooper "said something to the effect that there would be

trouble if I submitted it." (Tr. 32) He testified that he understood this to mean that "there would not be a good outcome" if he submitted the form. (Tr. 33) Consequently, he did not do so.[9] However, he continued to request the equipment and was later loaned some from a supervisor in the Inspectors' department.

Cooper and Baez both testified regarding Greene's request for PPE. According to Cooper, when Greene first asked her for the PPE, she told him that it "really wasn't necessary for his job," but she did inform Baez of the request. (Tr. 173) Cooper denied that she ever said or implied that there would be trouble for Greene if he submitted an official request for the PPE. Additionally, she testified that PPE is reserved for those who actually need the equipment to complete their job duties and that it was not necessary for Greene to have PPE. In particular, hard hats are meant to protect someone like an Inspector from hitting their head on an object while doing an inspection on someone's property. They are not meant as a form of DEP identification or to protect employees from irate customers.

Sometime in January 2019, Greene again raised issues regarding his work tablet's navigational ability. In a January 24, 2019 e-mail, Baez informed Greene that the following day he should stop by the IT Department to "get some restrictions removed in order to assist us with getting you navigation." (City Ex. 4) The e-mail also stated: "At this time you have a working tablet which you can use for direction and a working radio to serve summonses tomorrow." (*Id*.) Greene testified that thereafter he had a conversation with Baez about his continuing issues with the tablet, and she directed him to put these concerns in writing. In response, he e-mailed Baez on January 29, 2019. That e-mail states:

[9] Greene explained that he believed his out-of-title claim was supported by his need for equipment used by employees in other titles and that is why DEP failed to provide him with any.

> Yocanda,
>
> In your e-mail to me last week January 24 you stated "At this time, you have a working tablet which you can use for direction . . .". At the time you did not know whether it would be possible to load navigation on this tablet. My understanding was you would provide me a solution that is functionally the same as if I were using my own equipment which includes the ability to see the directions and not just hear them. I cannot understand your actions other than to attempt to avoid addressing the fact that I am working out of title. This approach ultimately does not hurt me as much as it calls into question your leadership of enforcement section. Had you informed me that this is what you intended to do I would of (*sic*) told you not to bother as it is not workable.
>
> It is telling that you have never come to court to see how things operate on the ground in real time. It is very easy to stay in the office and say on paper how things should work or go out and observe the reality. I would suggest you read [the] 22 page report in its entirety issued post shooting in Kingston which addresses these issues of over reliance on e-mail, giving instructions from remote locations from where work is performed etc.
>
> All the best,
> Michael

(City Ex. 5)

Greene testified that his e-mail was meant to address the fact that Baez stated that his tablet was working, when it was not. He elaborated that "if she disputed whether it was in fact working or not, she would have to come with me to drive all around the City, and see for herself if what I am saying to her is true or not." (Tr. 67) Greene explained that his e-mail also referenced an investigation report from a DEP facility in Kingston, New York, after a DEP employee shot and killed his co-worker in February 2014. Greene testified that he felt that the report should be more

widely distributed as it was a "case study in how not to manage things."[10] (Tr. 68) He stated that "in no way was I intending any harm by it" and that he sent it to Baez because he thought that she would "read it in the way it was intended." (*Id*.) Greene elaborated that he felt he could "trust [Baez] enough to respond . . . in an honest and open way." (Tr. 69)

With respect to Greene's January 29, 2019 e-mail, both Cooper and Baez testified that they were aware that the e-mail referenced the report made in response to the shooting at DEP's Kingston facility and that they found the e-mail to be highly inappropriate.[11] Baez stated that upon initially reading it, she was in shock and left speechless. At that same time her boss, DEP's Bureau Administrator, happened to be walking by Baez's office so she called her in to look at the e-mail. According to Baez, the Bureau Administrator's "jaw dropped as well," and she confirmed that she also thought the e-mail was inappropriate. (Tr. 236) Baez acknowledged that Greene had never personally threatened her. However, she testified that the e-mail made her "scared" and that she "just didn't know where that was coming from." (*Id*.) Baez also testified that she was aware that Greene owned guns and had been told by other staff members that he enjoyed going to shooting ranges. Ultimately, Baez forwarded the e-mail to the Labor Relations and Workplace Violence departments.

On February 1, 2019, prior to the end of his probationary period, Greene was informed that he was terminated from his employment with DEP. The letter informing him of this decision was

[10] According to Greene, the report found that, amongst other things, DEP should rely less on e-mail for communications and engage in more face-to-face interactions. Thus, he felt that if the report was read, "perhaps there could be a positive change in the department." (Tr. 169)

[11] Baez testified that she had not personally read the report.

dated January 30, 2019, and it did not list any reason for his termination. On February 11, 2019, Greene's out-of-title grievance was denied as moot since he had been terminated.[12]

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DEP violated NYCCBL § 12-306(a)(1) and (3) when it terminated Greene in retaliation for his protected union activity. Specifically, Greene engaged in protected activity when he requested that the Union file an out-of-title grievance on his behalf and pursued this grievance at a hearing. Greene's supervisors were aware of his complaints that he was working out-of-title when he brought the issue to their attention in October 2018. The grievance was heard on January 22, 2019, and Greene was terminated shortly thereafter. Thus, the Union contends that there is no dispute that DEP was aware of Greene's protected union activity.

The Union contends that there is a causal connection between Greene's union activity and his termination. According to the Union, after Greene filed his grievance, he suffered several "adverse employment actions" that establish causation. (Union Br. at 12) In particular, the Union claims that his workload increased, such that he did not have enough time in the day to finish assignments or take a lunch break; he received evaluations on tasks he did not perform; he was discouraged from asking for PPE because it could further his out-of-title grievance; and he was not provided with a functioning radio or computer tablet. Additionally, DEP denied Greene's requested religious accommodation. According to the Union, the testimony of Greene's supervisors shows that they were tired of his attempts to rectify what he viewed as violations of the terms and conditions of his employment. Therefore, shortly after the grievance hearing, Greene

[12] Greene testified that the Union is assisting him with filing a Step III appeal.

was terminated. The Union contends that although a probationary employee can be terminated for a legitimate reason, he or she cannot be terminated in retaliation for protected activity.

The Union also argues that the justifications provided for Greene's termination are not legitimate business reasons. It contends that although the City claims that Greene's work was deficient, Greene was never given an explanation for how he should have improved his work performance, nor was he ever informed that he was at risk of not passing his probation. Instead, the record shows that although Greene took initiative to improve his work performance by raising issues and requesting additional resources, he was denied or ignored at every attempt. He had no unsatisfactory ratings on his performance evaluations, and according to the Union, he was rated better than his former co-worker, the only other similarly situated employee, who supposedly had better productivity.

Regarding the January 29 e-mail, the Union asserts that Greene did not make any threats but merely referenced an investigation report from a DEP facility regarding management within the Department in an attempt to improve communication with his own supervisors. The Union contends that if the wording of Greene's e-mail was unclear, someone from DEP could have asked him to clarify its meaning or conducted an investigation. However, Baez never read the report the e-mail referenced or questioned Greene about what his comments meant. As such, the Union argues that there is no evidence to support DEP's *post hoc* justification for Greene's termination based on this e-mail. The Union claims that because the justifications given for Greene's termination are contradicted by the record evidence, there is no other conclusion than that the termination was in retaliation for Greene's protected union activity.

Finally, the Union argues that Greene's termination also constitutes an independent violation of NYCCBL § 12-306(a)(1) because it had the effect of interfering with and chilling

other bargaining unit members' participation in union-related activity and the exercise of their rights under the NYCCBL.

City's Position

The City argues that the Union has failed to establish a *prima facie* claim of retaliation and contends that the decision to terminate Greene was made for legitimate business reasons. According to the City, the Union relies only on the timing of Greene's termination as well as a few events that are uncorroborated or contested in order to prove the false narrative of retaliation. First, regarding Greene's request for PPE, the City contends that because Greene was not performing the same work as Inspectors, he had none of the safety risks associated with their jobs. Furthermore, the City asserts that Greene's accusation that Cooper told him there would be "trouble" if he requested PPE was credibly denied by Cooper. Additionally, Cooper testified that she passed Greene's request up the chain of command even though she told him she did not believe he needed PPE.

Second, with respect to the contention that Greene was assigned more work as a result of filing his grievance, according to the City, the evidence demonstrates that shortly before the grievance was filed, when Greene's only co-worker who also served summonses resigned, her workload was shifted to other titles to alleviate this issue. Next, regarding the Union's claim that Greene was denied properly functioning equipment, the City avers that Greene's complaints about his equipment were made weeks before he filed his grievance. Additionally, City witnesses testified that the equipment was in fact properly functioning. Finally, the City asserts that Greene's request for a schedule change and for religious accommodations are unrelated to his union activity and instead are purely personal to Greene. Furthermore, one of Greene's schedule requests was denied almost a month before his grievance was filed. Consequently, the City argues that the

Union has failed to provide any probative evidence that DEP's decision to terminate Greene's probationary employment was motivated by his filing a grievance.

The City also asserts Greene's termination would have occurred even in the absence of his filing a grievance due to his subpar performance as a probationary employee as well as his submission of what DEP considered to be an "extremely egregious" e-mail to Baez. (City Br. at 21) This e-mail, which was sent three days before Greene's termination, compared Baez's management style to that of managers at a DEP facility where an employee was shot to death by another employee. According to the City, Greene showed no remorse for sending the e-mail and blamed Baez for misinterpreting his intentions. The City asserts that, upon receiving this e-mail and learning that Greene had spoken with co-workers about his affinity for guns, DEP made the immediate decision to terminate Greene's employment. The City argues that this timing shows that it was Greene's threat of violence to his supervisor, and not his union activity, that prompted DEP to terminate Greene.

Additionally, the City asserts that it is likely Greene would have failed his probation and been terminated based on his performance alone. His performance evaluations, in which he was given overall ratings of "conditional," show that he was doing the bare minimum required of him. Moreover, the record demonstrates that Greene struggled to perform his duties, complained incessantly, and made excuses for everything. The City contends that this, coupled with his "dishonesty and disobedience," would be more than enough to justify DEP exercising its managerial right to terminate Greene's probationary employment. (City Br. at 22)

Finally, the City asserts that there is no independent violation of NYCCBL § 12-306(a)(1) because Greene's termination had no connection to his union activity.

DISCUSSION

The Union claims that DEP terminated Greene because of his Union activity in violation of NYCCBL § 12-306(a)(1) and (3). 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 Feder*, 4 OCB2d 46, at 42 (BCB 2011).

Regarding the first prong, the evidence demonstrates that Greene complained about out-of-title duties in August 2018 and filed an out-of-title grievance in October of 2018, which was heard at a Step II hearing in January 2019, and thereafter denied. Thus, Greene was engaged in union activity and DEP had knowledge of these actions. Therefore, the first prong of the *Bowman* test is established.

As to the second prong of the *Bowman* test, "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions which are the subject of the complaint." *OSA*, 7 OCB2d 20, at 19 (BCB 2014) (quoting *DC 37, L. 376*, 79 OCB 38, at 16) (BCB 2007) (internal quotation marks omitted). "The petitioner may carry its burden of proof by deploying evidence of proximity in time, together with other relevant evidence." *CTSG, L. 375*, 7 OCB2d 18, at 15 (BCB 2014) (citing *CWA, L. 1180*, 77 OCB 20, at 14 (BCB 2006)) (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 26 (BCB 2006**)**). "Claims of improper motivation must be based on statements of probative facts, rather than speculative or conclusory allegations." *Feder*, 9 OCB2d 33, at 29 (BCB 2016) (citing *DC 37, L. 983*, 6 OCB2d 10, at 29 (BCB 2013)).

If the Union is able to proffer a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements, or may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU*, 77 OCB 35, at 14 (BCB 2006) (citation omitted); *see also Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011) (quotation omitted).

We find that there is temporal proximity between Greene's complaints of out-of-title duties, his grievance, and his termination. Greene initially complained to his supervisors that he believed he was working out-of-title in August of 2018. Then in October of 2018, with the Union's assistance, Greene filed a grievance based on this claim. The Step II hearing for this grievance was held on January 22, 2019, and Greene was informed of his termination on February 1, 2019. Thus, there is close proximity in time between Greene's union activity and the alleged retaliatory action.

"However, such proximity, absent some other link between the protected activity and the adverse action, is not enough in and of itself to establish a *prima facie* case." *Howe*, 79 OCB 19, at 12 (BCB 2007) (citing *Howe*, 77 OCB 32, at 24 (BCB 2006); *CWA, L. 1180*, 77 OCB 20, at 14 (BCB 2006). Here, the Union argues that other incidents preceding Greene's termination, which it refers to as "adverse actions," establish that DEP acted with anti-union animus. All of these actions occurred more than four months prior to the filing of the instant improper practice and are

therefore untimely as separate claims. *See* NYCCBL § 12-306(e). Nevertheless, we will consider evidence relating to these incidents for the purpose of determining whether they establish animus for Greene's termination. Specifically, we examine the facts surrounding Greene's performance evaluations, equipment complaints, claims of increased workload, denial of his religious accommodation request, and his PPE request.

First, with respect to the assertion that Greene was evaluated on tasks he did not perform, we find that the evidence clearly demonstrates that this was not the case. While it is true that Greene was never assigned to serve summonses on corporations in Albany, this task was listed as "not ratable" on both of his evaluations and was not considered in his overall rating.[13] (City. Ex. 1) Also unsupported by the record is Greene's allegation that he was prevented from taking a lunch break on days that he worked at OATH. Greene's supervisor testified that he was never at OATH alone and he was instructed to coordinate his lunch break with other DEP employees. There was no evidence to rebut this testimony.

With regard to the remainder of the incidents that preceded Greene's termination, these incidents simply do not establish anti-union animus.

First, we find insufficient support for the Union's allegation that DEP's failure to remedy dysfunctional equipment demonstrated anti-union animus. While it is undisputed that Greene had complaints about his equipment, there is simply no evidence to show that either he was assigned defective equipment as a result of his union activity or that other similarly-situated employees were provided with different or better equipment. Further, it is undisputed that his supervisors responded and took certain actions to remedy his complaints regarding radio power and tablet

[13] Moreover, Greene's co-worker was also only rated on four tasks and also received overall ratings of "conditional." However, since she resigned shortly after receiving these evaluations, we cannot determine what effect they would have had on her employment.

navigation. Therefore, we cannot conclude that DEP's inability to cure the equipment's purported imperfections demonstrated anti-union animus.

With respect to the Union's allegation that Greene's workload increased as a result of his union activity, we find no facts to show animus surrounding this claim. The parties dispute whether and to what extent Greene's workload increased and other than their respective claims, no direct evidence was presented to show a change in workload. However, even assuming his workload did increase, we find no support for the conclusion that it resulted from his complaints regarding out-of-title duties. The evidence shows that any workload increase resulted from the only other employee in his position resigning in late October 2018.

Similarly, the denial of Greene's request for a religious accommodation does not demonstrate animus toward Greene's union activity. The evidence demonstrates that while Greene's request was pending before the DEP's Office of EEO & Diversity, he was granted permission to leave work early, as long as he used his own time. Moreover, the record does not show that any of the reasons given for the denial—that Greene's superiors did not work during the hours of the requested schedule change and that there were no overtime opportunities available — were illegitimate. As a result, we do not find the denial of his religious accommodation request established animus towards Greene's union activity.

Finally, we find that the evidence does not establish that DEP discouraged Greene from requesting PPE due to anti-union animus. Greene testified that it was his belief that if DEP gave him the PPE it would bolster his allegation that he was doing the work of another title, and this is why his request was denied. The facts do not support this assertion. Instead, the evidence shows that Greene did not perform the same tasks as other titles that were issued PPE. In particular, Greene worked during the day and was not required to go inside of properties or businesses to

conduct inspections, so there was little danger that he would hit his head or would he need a flashlight or reflective vest to see or be seen in the dark. Additionally, while it may be true that PPE could help identify Greene as a DEP employee, he was issued a DEP badge for this purpose.

Moreover, we do not credit Greene's assertion that Cooper said "something to the effect that there would be trouble" if he submitted a written request for PPE. (Tr. 32) Cooper denied that she made such a statement. Further, her testimony that she told Greene that PPE "really wasn't necessary for his job," is consistent with the evidence showing that Greene's job duties did not require PPE. (Tr. 173) We do not find that Greene's vague and uncorroborated recollection is sufficient to overcome Cooper's credible testimony that she never made the alleged statement. *See SSEU, L. 371*, 3 OCB2d 47, at 18 (BCB 2010) (employee's assertion that Director told her the reason she was not promoted was "something about not being loyal" not credited where employee could not recall with specificity the remark allegedly made and Director credibly denied making the statement). While it is possible that Greene may have interpreted Cooper's statements as discouraging him from submitting the PPE request, we cannot determine on this record that she told him that there would be "trouble" for doing so, or that her statements related to his grievance or complaints that he was working out-of-title. Rather, we find that any perceived discouragement likely resulted from Cooper's statements that Greene did not need the requested PPE.

In light of the above, we find that the Union has not demonstrated that any of the alleged actions establish that DEP had animus against Greene's union activity or that it acted with anti-union animus when it terminated Greene. *See Kalman*, 11 OCB2d 32, at 13 (BCB 2018) (citing *DC 37*, 3 OCB2d 40, at 17 (BCB 2010); *COBA*, 2 OCB2d 7, at 42 (BCB 2009); *Colella*, 79 OCB 27, at 55 (BCB 2007) (the Board is "unable to find that [an employer] acted with an improper motive based on temporal proximity alone.").

Moreover, we find that the City has rebutted any claimed improper motivation by establishing that Greene's January 29, 2019 e-mail to Baez was the actual motivation for his termination. It is undisputed that the e-mail referenced an investigative report that was conducted following a fatal shooting at a different DEP facility. In it, Greene compared Baez's style of management to that of management at the facility where the shooting took place. Baez testified that both she and her supervisor felt that Greene's statements were inappropriate, that she felt scared and threatened by the e-mail, and that she therefore forwarded it to the Labor Relations and Workplace Violence departments. Three days later, Greene was informed that he was being terminated. None of these facts are in dispute, and we find that they demonstrate that the e-mail was the impetus for Greene's termination. Consequently, we find that the Union has failed to establish a *prima facie* claim of retaliation.

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, docketed as BCB-4333-19, filed by District Council 37, AFSCME, AFL-CIO, Local 1549, hereby is dismissed in its entirety.

Dated: December 2, 2020
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER