Local 376, DC 37, 14 OCB2d 22 (BCB 2021)

(IP) (Docket No. BCB-4403-20)

Summary of Decision*:** The Union alleged that DEP violated NYCCBL § 12-306(a)(1) when a supervisor disparaged the Union and told a unit member that seeking the Union's assistance with a time sheet issue would be futile, and violated NYCCBL § 12-306(a)(1) and (3) by bringing disciplinary charges against the member in retaliation for assisting the Union in filing an improper practice petition. The City argued that the Union has failed to establish that the supervisor engaged in activity that was inherently destructive of employee rights. It also argued that the Union has failed to establish a *prima facie* case of retaliation and that the decision to discipline the member was based on legitimate business reasons. The Board found that the supervisor's statements were inherently destructive of employee rights and violated NYCCBL § 12-306(a)(1). Further, it found that although the Union established a *prima facie* case of retaliation, the City proffered legitimate business reasons for the disciplinary charges. 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-

LOCAL 376, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On November 10, 2020, Local 376, District Council 37, AFSCME, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP") alleging that DEP violated § 12-306(a)(1)

of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when a supervisor disparaged the Union to a unit member and told him that seeking the Union's assistance with a time sheet issue would be futile. On February 16, 2021, the Union amended its petition to add that DEP violated NYCCBL § 12-306(a)(1) and (3) by bringing disciplinary charges against the member in retaliation for assisting the Union in filing the initial improper practice petition regarding the supervisor's anti-union statements. The City argues that the supervisor did not disparage the Union, but in fact encouraged the member to seek the Union's assistance with the time sheet issue, and therefore the Union has failed to establish that the supervisor engaged in activity that was inherently destructive of employee rights. It also argues that the Union has failed to establish a *prima facie* case of retaliation and that the decision to discipline the member was based on legitimate business reasons. The Board finds that the supervisor's statements were inherently destructive of employee rights and violated NYCCBL § 12-306(a)(1). Further, it finds that although the Union established a *prima facie* case of retaliation, the City proffered legitimate business reasons for the disciplinary charges. Accordingly, the petition is granted in part and denied in part.

BACKGROUND

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

DEP is a mayoral agency that manages and conserves the City's water supply. It operates numerous repair yards from which Construction Laborers ("CLs") are dispatched to perform repairs to DEP infrastructure, including sewers, water mains, and fire hydrants. The Union is the

certified bargaining representative for CLs employed by DEP. Shelton Johnson is employed by DEP as a CL and is assigned to the Brooklyn Water Maintenance Yard ("Yard").

At the outset of the COVID-19 pandemic, CLs were instructed to sign-in and out indicating their arrival and departure times at the Yard on paper instead of using a hand scanner.[1] For any given day, there are multiple time sheets to account for the Yard's three different shifts: day, evening, and late-night. Each CL's name is pre-printed only on the time sheet for their assigned shift. When CLs work overtime on a shift that they are not regularly scheduled to work, they are required to sign in and out next to their pre-printed name on the time sheet for their regularly-scheduled shift, indicating the number of hours worked on their overtime shift, even if the overtime worked falls on a different day than the regularly-scheduled shift.

In and around July and August 2020, Johnson was regularly assigned to work the Yard's evening shift, but frequently worked overtime on the late-night shift. However, Johnson did not follow the Yard's procedure for signing in and out of his overtime shifts. Rather than signing in and noting his overtime hours worked next to his pre-printed name on the time sheet for his regularly scheduled shift, Johnson wrote his name on the time sheet for the overtime shift, signed in, and indicated the number of overtime hours he worked. Johnson testified that he followed this method instead of the procedure outlined by the Yard because there is a "certificate of accuracy" at the bottom of the time sheets. Johnson believed it would not be accurate to record hours worked on the late-night shift on the time sheet for the prior day and was concerned about the health and safety implications "in case something should happen . . . [then] at least [management] know[s] who is in the building." (Tr. 16)

[1] Use of the hand scanner was eliminated to limit the possibility of surface cross contamination.

Curvin Hamilton, the Yard's District Supervisor for Water and Sewer Systems and Johnson's supervisor, testified that DEP timekeepers only track the overtime hours noted and signed for next to the CLs' pre-printed names on the time sheets for their regularly scheduled shifts. Hamilton testified that Johnson's failure to follow the Yard's instructions for signing in led to problems with Johnson receiving payment for his overtime hours worked. Hamilton noted that he spoke with Johnson and reminded him about the proper procedure on several occasions in late July and August 2020.

On or around July 30, 2020, Johnson and Hamilton had a verbal confrontation about the overtime time sheet procedure in the Yard's office. Anthony Marchese, a DEP Deputy Chief who works out of the Yard's office, was sitting at a desk five or six feet away from Hamilton and overheard the conversation. Johnson, Hamilton, and Marchese each offered different versions of this exchange. Johnson testified that Hamilton instructed him to sign in on a Friday time sheet, although he had worked overtime on a Saturday.[2] Hamilton told Johnson that if he did not sign in on the Friday time sheet, he would not be paid. Johnson testified that Hamilton became belligerent, and Johnson proceeded to walk out of the office. According to Johnson, Hamilton followed him out of the office, into the corridor, and said, "if you don't sign in on this sheet you're not going to get paid," and further, "this is my fucking yard and if you don't fucking sign in on this sheet, alright, then contact your union and your union ain't going to do shit for you because your union ain't shit." (Tr. 22-23)

[2] Johnson did not want to sign in on the Friday time sheet because he did not work on Friday, and he was concerned about the time sheet's certificate of accuracy.

According to Hamilton, Johnson approached him in the Yard's office and stated that he would not sign in on a "fraudulent" time sheet before he first consulted the Union.[3] (Tr. 47) Hamilton testified that he told Johnson that the time sheet was not fraudulent and that if he did not sign on the correct time sheet, he would not be paid. According to Hamilton, he did not disparage the Union, but in fact advised Johnson to contact the Union.[4] Hamilton testified that he advised Johnson to contact the Union "due to the fact that he was having problems with his pay."[5] (*Id.* at 50)

Marchese corroborated Hamilton's testimony that Johnson approached Hamilton in the Yard's office and stated that he would not sign in on a fraudulent time sheet. However, his recollection of the remainder of the conversation was limited. He testified that the only thing he remembered Hamilton telling Johnson was that he was "try[ing] to call the timekeeper up and [that] we'[re] going to rectify this." (Tr. 82) Marchese testified that he did not hear Hamilton

[3] While Johnson did not testify that he told Hamilton that he would not follow his instruction before he consulted with the Union, the Union's amended petition asserted that Johnson made that statement. (*See* TE Ex. 1, ¶ 3)

[4] In response to several different questions about statements made by or to Johnson, Hamilton did not admit or deny the alleged statements but merely repeated his testimony that he advised Johnson to contact the Union.

[5] Hamilton's affidavit submitted with the City's amended answer contained greater detail of his conversation with Johnson than he provided in his testimony. First, he affirmed that he told Johnson that, "if he did not like [the] instruction [regarding the time sheet protocol], *or the way I manage the Yard*, that he should take it up with the Union." (TE Ex. 2A) (italics added) He also stated that Johnson brought up the issue several times throughout the day, and each time he advised Johnson to contact his Union. However, when asked at the hearing by counsel on cross examination, "did you say anything about him disagreeing with the way you managed the Yard," Hamilton testified, "No, sir. I advised [Johnson] to contact his Union." (Tr. 49) At the hearing, Hamilton also could not recall whether Johnson raised the issue again after their initial exchange.

make any anti-union statements nor did he recall any mention of the Union in the conversation at all.[6]

Marchese also testified that immediately following the exchange between Johnson and Hamilton, he called Johnson over to his desk and told him that if there was a problem, they could call his Union representative down to the Yard to assist in resolving the issue with respect to the sign in sheets and not getting paid correctly. However, Marchese testified that Johnson replied that he did not need the Union and that there was no reason for the Union to get involved.[7]

On the evening of July 30, 2020, Jerry Fragias, DEP Director of Field Operations for the Bureau of Water Sewer Operations, testified that the Union President called him and informed him that there were several CLs who were having issues with their time sheets and getting paid, including Johnson. Fragias explained that following the call, he, along with Marchese, Hamilton, and the timekeepers, worked together for approximately one month to sort out the issues with Johnson's timesheets and reimburse him for the overtime pay that he was owed.[8]

Johnson testified that following the verbal confrontation with Hamilton, he started being treated differently by Hamilton at the Yard. Specifically, Johnson testified that Hamilton started ignoring him and that he was assigned "the worst vehicles in the Yard to take out."[9] (Tr. 23)

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[6] Additionally, Marchese did not recall hearing Hamilton mention anything about Johnson disagreeing with the way he managed the Yard.

[7] Marchese's testimony regarding his conversation with Johnson was unrebutted.

[8] Following an August 25, 2020 email from the timekeeper to Hamilton instructing that Johnson "needs to sign in next to his name no matter what shift he is working," Fragias emailed Marchese on August 28, 2020, instructing him to set up a meeting with Johnson and the Union to review Johnson's sign in sheets and the proper procedure for signing in during the pandemic. (TE Ex. 2D) Fragias later emailed the Union President on September 3, 2020, stating that Johnson's overtime concerns had been resolved with assistance from Marchese.

[9] No other testimony or evidence was offered regarding Hamilton's change in behavior or describing Johnson's vehicle assignments after the incident on or around July 30, 2020.

Further, Johnson testified that he discussed filing an improper practice petition with the Union regarding the verbal confrontation. He stated that after the Union filed the improper practice petition on November 10, 2020, supervisors at DEP retaliated against him by "acting certain ways" and telling other employees at the Yard not to listen to him.[10] (Tr. 25, 29)

On December 7, 2020, Johnson was scheduled for work at the Yard, but failed to report or to give anyone at DEP notice that he was not reporting for work. Johnson testified that he mistakenly believed that he was off duty on December 7, 2020, and that he was instead scheduled to report for work on December 8, 2020. Johnson testified that when he reported for work on December 8, 2020, he was sent home because he was not on the schedule. Hamilton was on vacation during the week of December 7, 2020, and both Hamilton and Marchese testified that Hamilton did not know that Johnson was absent without leave ("AWOL"). Marchese testified that he filled out a disciplinary report and wrote Johnson up on charges for being AWOL on December 7, 2020. He testified that being AWOL for one day merited disciplinary charges and that the filing of the initial improper practice petition in this matter was not a consideration in the issuance of the charges.[11] Further, Marchese testified that Hamilton played no role in preferring the charges.

Johnson testified that he had not previously missed a day of work in his 28 years at the Yard and that it was not standard procedure to be written up on charges for a one-day absence. He

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[10] Other than an AWOL incident described here, no specific testimony or evidence was offered describing allegedly retaliatory actions taken by supervisors against Johnson or instances in which supervisors told employees not to listen to Johnson.

[11] Aaron Feinstein, DEP's Executive Director of Labor and Discipline, testified that he conducts DEP's supervisory training with respect to labor relations and discipline and that he instructs supervisors to refer AWOL instances for discipline. He testified that there are certain types of infractions for which a warning memorandum or verbal warning would be issued first, but being AWOL is not one of them. Moreover, Feinstein testified that DEP's Code of Discipline ("Discipline Code") prohibits being AWOL and if his office learned that a supervisor or manager was not enforcing a disciplinary rule, his office "would look at that." (Tr. 91)

testified that he observed similar situations with colleagues more than five times in which they missed work and came in for work on the wrong day, and in those situations, DEP always allowed them to change their days without sending them home. Johnson testified that he knows that these colleagues did not receive charges or discipline for their one-day absences because when they arrived for work on the days following their absences, Johnson asked them what happened, and they never mentioned that they were brought up on charges. According to Johnson, if they were brought up on charges, they "would have said, oh, you know I got brought up on charges for AWOL. But they don't mention it then that means I know they didn't ever get brought up on charges."[12] (Tr. 34)

Marchese testified that after he wrote up the charges, he sent them to Fragias. Fragias received the disciplinary request for charges in early-mid December 2020, signed off on them, and forwarded them to Human Resources. Fragias testified that his handling of the charges was not motivated by the improper practice petition.[13]

Feinstein, DEP's Executive Director of Labor and Discipline, testified that he received the referral for Johnson's charges from the Bureau of Water and Sewer Operations and directed that a case be opened against Johnson. Feinstein testified that DEP has standard penalties for AWOL violations and that the agency seeks to impose a one-day suspension for every day that an employee is AWOL, although the policy is not in writing.[14] Therefore, Feinstein explained that DEP sought

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[12] No additional testimony or evidence was offered to show that other CLs were AWOL for one day and were not disciplined.

[13] When asked by counsel if he was "aware in the history of his tenure at DEP . . . of anybody not coming to work, [and] not calling in, being AWOL and not being written up for formal discipline," Fragias noted, "I'm certain there may have been, yes." (Tr. 70)

[14] Feinstein noted that although the Discipline Code prohibits being AWOL, it does not set specific penalties for AWOL violations, and penalties are left to the discretion of his office. When asked

a one-day suspension against Johnson because he was AWOL for one day. Feinstein testified that his decision to pursue the disciplinary case against Johnson was not related to the improper practice petition in this matter.

On January 8, 2021, Johnson was issued a Notice of Step I Informal Teleconference and Statement of Charges ("Statement of Charges") stating that his failure to report for work on December 7, 2020, violated Discipline Code Rules E. 12 and E. 24.[15] On February 1, 2021, Johnson was issued a Notice of Determination After Step I Informal Teleconference ("Notice of Determination") recommending a one-day suspension. On February 2, 2021, the Union filed a grievance at Step II, arguing that there are "mitigating factors that [Johnson's] discipline is unlawful [and that there are] underl[ying] issues surrounding the discipline of [Johnson]." (TE Ex. 2I)

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DEP violated NYCCBL § 12-306(a)(1) when Hamilton disparaged the Union on or around July 30, 2020, and told Johnson that seeking the Union's assistance with the overtime time sheet issue would be futile. It asserts that Hamilton's anti-union statements interfered with, restrained, and coerced Johnson in the exercise of his protected rights. The Union

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if there are circumstances in which he would deviate from the standard AWOL penalties, Feinstein noted that "if we found out there are mitigating factors maybe[,] but not that I'm aware of." (Tr. 90)

[15] Discipline Code Rule E. 12 provides that, "[e]mployees shall not neglect their assigned duty or duties." (TE Ex. 2G) Discipline Code Rule E. 24 provides that, "[e]mployees shall not, except when authorized, absent themselves from nor leave their assigned work location and/or tour of duty." (*Id.*)

contends that Hamilton's statement to Johnson that "your union ain't shit" was expressly intended to deter Johnson and its membership from assisting, or seeking assistance from, the Union. Moreover, it avers that Hamilton's efforts to deny making these anti-union statements were "robotic" and "ritualistic," and that there were significant inconsistencies between his testimony and his affidavit in the record. (Union Br. at 4-5) Accordingly, the Union argues that Hamilton's denials should not be credited.

Further, the Union asserts that DEP violated NYCCBL § 12-306(a)(1) and (3) by charging and seeking to suspend Johnson in retaliation for assisting the Union in filing the initial improper practice petition in this matter regarding Hamilton's anti-union statements.[16] It contends that the City failed to rebut Johnson's testimony that other DEP employees had similarly failed to report for work without receiving discipline. Moreover, it avers that Fragias admitted that there "may have been" AWOL employees who had not been disciplined, and Feinstein agreed that DEP "maybe" would deviate from a purported standard AWOL penalty "if [they] found out there were

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

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

NYCCBL § 12-305 provides, in pertinent part:

> 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 . . . .

mitigating factors." (Union Br. at 6-7) The Union argues that Johnson is a 28-year employee who had never previously been AWOL, and "[o]nly in a workplace where Hamilton can openly declare his contempt for [the Union], [would] management jump on Johnson's mistake, and issue formal discipline against [him]." (*Id.* at 7)

As a remedy, the Union seeks an order directing DEP to make Johnson whole in every respect, including but not limited to lost pay and benefits, to post a notice of the improper practices, and any such other further relief as may be just and proper.

City's Position

The City argues that the Union has failed to establish that DEP violated NYCCBL § 12-306(a)(1). The City asserts that Hamilton did not interfere with Johnson's right to seek union representation during their verbal confrontation. To the contrary, it contends that Hamilton encouraged Johnson to seek union assistance with respect to the overtime time sheet procedure and his issues getting paid for overtime. Moreover, it avers that Marchese and Fragias actively encouraged union activity, with Marchese asking Johnson whether he wanted to call his Union representative to the Yard and Fragias communicating with the Union President about ensuring that Johnson received his overtime payments on time.

However, even assuming the truth of Johnson's version of events, the City argues that the statements attributed to Hamilton were not inherently destructive of employee rights. At most, it asserts that Hamilton expressed that the Union would not be able to make an exception to the time sheet procedure just for him and that neither Hamilton nor Marchese tried to prevent Johnson from contacting the Union or threatened him with retribution for doing so. The City contends that any frustration exhibited by Hamilton resulted from the fact that he had already instructed Johnson to follow the time sheet procedure. It avers that that Hamilton's alleged statements, when considered

in the context that DEP and the Union worked together to resolve Johnson's issues, were not a visible or continuing obstacle to the exercise of employee rights.

Further, the City argues that the Union has failed to establish a *prima facie* case that DEP retaliated against Johnson in violation of NYCCBL § 12-306(a)(1) and (3). It asserts that there is no evidence that Johnson's union activity was a motivating factor in DEP's decision to file charges against Johnson for his unexcused absence on December 7, 2020. The City contends that Hamilton, whose allegedly anti-union statements gave rise to the initial improper practice petition, was not even present at the Yard on the day of Johnson's unexcused absence and played no role in writing up the charges. The City avers that any circumstantial evidence of an anti-union motivation is limited to solely temporal proximity. However, it argues that to the extent the date Johnson was charged for being AWOL is temporally proximate to the date that the Union filed the initial improper practice petition, it is merely coincidental because Johnson's unexcused absence on December 7, 2020, occurred less than one month after the Union filed the petition.

Moreover, the City asserts that even if the Union succeeded in establishing a *prima facie* case, it has established that it had legitimate business reasons to discipline Johnson and the discipline would have occurred in the absence of any protected union activity. It contends that Johnson being AWOL on December 7, 2020, was a violation of DEP policy and that Feinstein and Marchese's testimony demonstrated that discipline for being AWOL has been consistently imposed in the past. The City avers that there is no evidence that Marchese or Hamilton are known to arbitrarily discipline employees who file grievances or improper practice petitions, nor is there evidence that the time and leave policy is arbitrarily enforced at the Yard. Accordingly, it argues that DEP would have taken the same course of action in the absence of any protected union activity. Consequently, the City asserts that the petition should be dismissed in its entirety.

DISCUSSION

NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter[.]" The Board has long recognized 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." *DEA*, 4 OCB2d 35, at 9 (BCB 2011) (quoting *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010)). Further, a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions. *See L. 1180, CWA*, 71 OCB 28, at 9-10 (BCB 2003).

We have previously found that speech that has the potential to chill or discourage an employee from participating in union activities is a violation of NYCCBL § 12-306(a)(1). For example, in *DC 37, L. 1087*, 11 OCB2d 41 (BCB 2018), an employee and supervisor had a heated verbal exchange after the employee told the supervisor that he would need to talk to his union steward before he could submit vacation picks. The supervisor told the employee, "There's no one else to talk to," "This has got nothing to do with your shop steward," "your vacation pick has nothing to do with the shop steward," and "No, you can't talk to the union." *Id.* at 6. However, the supervisor eventually said, "Obey my order, then go." *Id.* The Board held that although part of the supervisor's statements "may have merely been a legitimate directive to obey his order now and seek the union's counsel later," the statements regarding conferring with the union, "[a]t a minimum . . . conveyed that it would be futile to seek the Union's assistance" and therefore "interfered with and discouraged union activity." *Id.* at 17-18; *see also OSA*, 6 OCB2d 26, at 9 (BCB 2013) (finding that although an agency email to employees about an ongoing leave issue

acknowledged their right to file grievances, its instruction to "disregard" the union's advice discouraged the employees from engaging in union activity); *SSEU, L. 371*, 3 OCB2d 22, at 15-16.

In this case, although the testifying witnesses each offered their own versions of the events that occurred on or around July 30, 2020, Johnson and Hamilton both agreed that there was a verbal exchange in which Johnson told Hamilton that he did not want to sign in for overtime on a time sheet for a day that he did not work, that Hamilton told Johnson that he would not be paid if he did not sign in on the time sheet, and that Hamilton told Johnson to contact his Union about the issue.[17] However, Johnson and Hamilton's testimonies diverge with respect to whether Hamilton also stated that, "this is my fucking yard and if you don't fucking sign in on this sheet, alright, then contact your union and your union ain't going to do shit for you because your union ain't shit." It is these statements that the Union alleges violated the NYCCBL, and Hamilton expressly denied making them.

For the following reasons, we find that Hamilton made the disputed statements to Johnson. Johnson's testimony regarding the verbal exchange with Hamilton was detailed, and he recalled with specificity and consistency the disparaging statements made about the Union. *See SBA*, 4 OCB2d 50, at 23 (BCB 2011) (detailed and consistent testimony supports finding that a witness is credible). On the other hand, we find that Hamilton was less credible. While testifying about the overtime time sheet procedure, the verbal exchange with Johnson, and the anti-union statements attributed to him by Johnson, Hamilton was often evasive and failed to respond directly to the

[17] Based on assertions made in the Union's amended petition and during Hamilton's testimony, we also conclude that Johnson was the first person to mention the Union during the verbal exchange and that he told Hamilton that he would not sign the time sheet before first consulting the Union.

questions posed by counsel on cross examination. *See Local 376, DC 37*, 13 OCB2d 3, at 16-17 (BCB 2020) (evasive testimony supports finding that a witness is not credible). Moreover, Hamilton's testimony regarding the statements he made during the verbal exchange was not detailed and in some instances was inconsistent with his affidavit. *See DC 37, Local 375*, 2 OCB2d 26, at 18 (BCB 2009) (inconsistencies between live testimony and affidavit supports finding that a witness is not credible). Accordingly, we credit Johnson's testimony and find that Hamilton made the disparaging statements about the Union and its ability to assist Johnson.

Based on these facts, we find that Hamilton's statements violated NYCCBL § 12-306(a)(1) because they interfered with, restrained, and discouraged union activity, and thus had a potentially chilling effect on Johnson's right to engage in union activity. Although Hamilton told Johnson to "contact [his] union," the statement that "your union ain't going to do shit for you because your union ain't shit" discouraged Johnson from contacting the Union by conveying that it would be futile to seek its assistance.[18] *See DC 37, L. 1087*, 11 OCB2d 41, at 17-18. Further, although Hamilton may have been frustrated by Johnson's failure to follow his instructions or may not have intended to dissuade Johnson from contacting the Union, Hamilton's subjective intent or motivation is immaterial and does not negate the inherently destructive nature of his statements. *Id.* at 20; *see also L. 1180, CWA*, 71 OCB 28, at 9 ("Actions which are inherently destructive of important employee rights may constitute unlawful interference even in the absence of proof of improper motive.") (citations omitted). Accordingly, we find that Hamilton's inherently destructive statements violated NYCCBL § 12-306(a)(1).

[18] We note that it is immaterial whether Hamilton's statements actually deterred Johnson from participating in protected union activity. *See OSA*, 6 OCB2d 26, at 10 ("'[t]he standard is not whether a specific employee was actually chilled in the exercise of protected rights, but rather whether the employe[r's] action has the necessary effect of chilling employees in the exercise of protected rights'") (quoting *Greenburgh #11 Union Free Sch. Dist.*, 33 PERB ¶ 3018 (2000)).

We now address the Union's retaliation claim. NYCCBL § 12-306(a)(3) provides that it shall be an improper practice for a public employer or its agents "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization." A violation of NYCCBL § 12-306(a)(3) is also a derivative violation of NYCCBL § 12-306(a)(1). *See Kalman*, 11 OCB2d 32, at 11 (BCB 2018); *Local 621, SEIU*, 5 OCB2d 38, at 2 (BCB 2012).

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. The test states that, 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 Kalman*, 11 OCB2d 32, at 11.

The first prong of the *prima facie* case is satisfied where "the employer is shown to have knowledge of the protected union activity." *CSTG, L. 375*, 7 OCB2d 16, at 20 (BCB 2014) (citing *Local 376, DC 37*, 4 OCB2d 58, at 11 (BCB 2011); *Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004)). In this case, it is undisputed that DEP was served with the Union's initial improper practice petition on or around November 10, 2020, nearly two months before the Statement of Charges were issued against Johnson on January 8, 2021. *See Kalman*, 11 OCB2d 32, at 12 (explaining that for the purposes of establishing the first prong of the *Bowman*/*Salamanca* test, "the employer's general knowledge of union activity may be established by demonstrating the employer's participation in the grievance process") (citation and internal quotations omitted). Therefore, DEP

had knowledge of Johnson's union activity in November 2020. Accordingly, the Union has satisfied the first prong of the *prima facie* case.

To satisfy "the second prong of the *Bowman*/*Salamanca* test requires proof of a causal connection between the alleged improper act and the protected [u]nion activity." *Kalman*, 11 OCB2d 32, at 12. Typically, causation is "proven through the use of circumstantial evidence, absent an outright admission." *Benjamin*, 4 OCB2d 6, at 16 (BCB 2011) (quoting *Local 2627, DC 37*, 3 OCB2d 37, at 16 (BCB 2010)); *see also CWA, L. 1180*, 43 OCB 17, at 13 (BCB 1989). However, a "petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22 (BCB 2005). Such "allegations of improper motivation must be based on statements of probative facts." *Feder*, 5 OCB2d 14, at 25 (BCB 2012). It is well-established that while "temporal proximity alone is not sufficient to establish causation, the temporal proximity between the protected union activity and the alleged retaliatory action, in conjunction with other facts supporting a finding of improper motivation, [may be] sufficient to satisfy the second element of the *Bowman*/*Salamanca* test." *Feder*, 4 OCB2d 46, at 44 (BCB 2011); *see also SSEU, L. 371*, 75 OCB 31, at 13 (BCB 2005), *affd., Matter of Soc. Serv. Empl. Union, Local 371 v. N.Y.C. Bd. of Collective Bargaining*, Index No. 116054/05 (Sup. Ct. N.Y. Co. May 30, 2006) (Stallman, J.), *affd.*, 47 A.D.3d 417 (1st Dept 2008).

We find that the Union presented sufficient evidence of an improper motivation for the decision to issue charges against Johnson and seek a one-day suspension for him being AWOL on December 7, 2020, and has satisfied the second prong of the *prima facie* case.[19] Hamilton's

[19] We do not address Johnson's testimony that Hamilton assigned him "the worst vehicles in the Yard" following their verbal exchange and that supervisors at DEP retaliated against him by "acting certain ways" and telling other employees at the Yard not to listen to him after the Union filed the initial improper practice petition. There was insufficient testimony or evidence to support

statements to Johnson that, "this is my fucking yard and if you don't fucking sign in on this sheet, alright, then contact your union and your union ain't going to do shit for you because your union ain't shit," are direct evidence of anti-union animus.[20] Further, we find temporal proximity between Johnson's union activity and the issuance of the Statement of Charges. The Statement of Charges was issued on January 8, 2021, approximately two months after the Union filed the improper practice petition with Johnson's assistance on November 10, 2020. Accordingly, we find that the Union has demonstrated sufficient evidence to show an improper motivation for the decision to issue charges against Johnson and seek a one-day suspension for his AWOL on December 7, 2020. Therefore, we find that the Union has established a *prima facie* case of retaliation.

Once a *prima facie* case of retaliation has been established, "the burden shifts to the employer who may refute a petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *CSTG, L. 375*, 4 OCB2d 61, at 24-25 (BCB 2011) (citations omitted); *see also SBA*, 75 OCB 22, at 21-22 (BCB 2005).

In this case, we find that the City has established legitimate business reasons for the decision to issue charges against Johnson and seek a one-day suspension. It is undisputed that Johnson was AWOL on December 7, 2020, that he failed to give DEP notice that he was not reporting for work, and that DEP's Discipline Code proscribes such conduct. Feinstein credibly

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these claims and the Union did not plead or otherwise argue that these alleged actions violated NYCCBL § 12-306(a)(1) and (3).

[20] We have consistently found that statements by a supervisor may establish anti-union animus for the purpose of finding a *prima facie* case. *See Local 376, DC 37*, 13 OCB2d 3, at 14, 16 (BCB 2020); *SSEU, Local 371*, 12 OCB2d 15, at 11-12 (BCB 2019); *Local 376, DC 37*, 9 OCB 2d 21, at 17-18 (BCB 2016); *Colella*, 7 OCB2d 13, at 23-24 (BCB 2014).

testified that he trains supervisors to refer instances of AWOL for discipline, and Marchese testified that being AWOL for one day is misconduct worthy of discipline. Moreover, no reliable evidence was offered to rebut Feinstein's credible testimony that DEP has standard penalties for AWOL violations and that the agency seeks to impose a one-day suspension for every day that an employee is AWOL.[21] Therefore, we find that the City has demonstrated that it would have issued charges against Johnson and sought a one-day suspension for his AWOL on December 7, 2020, even in the absence of protected activity. Accordingly, we dismiss the Union's retaliation claim under NYCCBL § 12-306(a)(1) and (3).

[21] Johnson testified that several unspecified employees were not disciplined for similar one-day AWOL violations. The basis for his assertion was that those co-workers did not tell him that they were disciplined when they returned to work. This testimony was insufficient to rebut Feinstein and Marchese's more reliable and consistent testimony regarding the standard practice and the legitimacy of issuing charges for a one-day AWOL. Further, Fragias' assertion that at some point during his 36-year tenure with DEP there may have been an employee who was not disciplined for a one-day AWOL does not speak to the current practice or establish that Johnson's discipline was disparate from other similarly situated CLs who were AWOL for one day.

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-4403-20, filed by Local 376, District Council 37, AFSCME, AFL-CIO, against the City of New York and New York City Department of Environmental Protection, is hereby granted as to the claim that the City of New York and New York City Department of Environmental Protection violated NYCCBL § 12-306(a)(1) when a supervisor disparaged the Union to a unit member and told him that seeking the Union's assistance would be futile; and it is further

ORDERED, that the improper practice petition is hereby denied as to the claim that the City of New York and New York City Department of Environmental Protection violated NYCCBL § 12-306(a)(1) and (3) by bringing disciplinary charges against the member in retaliation for assisting the Union in filing an improper practice petition regarding the supervisor's anti-union statements; and it is further

ORDERED, that the City of New York and the New York City Department of Environmental Protection cease and desist from making statements that disparage the Union and its ability to assist its members; and it is further

ORDERED, that the New York City Department of Environmental Protection 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: August 17, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O' BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

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Monu Singh
Steven Star

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 14 OCB2d 22 (BCB 2021), determining an improper practice petition between Local 376, District Council 37, AFSCME, AFL-CIO, and the City of New York and New York City Department of Environmental Protection.

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-4403-20, filed by Local 376, District Council 37, AFSCME, AFL-CIO, against the City of New York and New York City Department of Environmental Protection be, and the same hereby is, granted in-part; and it is further

DETERMINED, that the City of New York and New York City Department of Environmental Protection violated NYCCBL § 12-306(a)(1) when a supervisor disparaged the Union to a unit member and told him that seeking the Union's assistance would be futile; and it is further

ORDERED, that the New York City Department of Environmental Protection 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.

The New York City Department of Environmental Protection

(Department)

Dated: _____ (Posted By)

(Title)