DC 37, L. 2507 & 3621, 15 OCB2d 2 (BCB 2022)

(IP) (Docket No. BCB-4331-19)

Summary of Decision*:** The Union alleged that the FDNY violated NYCCBL §§ 12-306(a)(1), (2), and (3) by investigating and referring Union officials to the Department of Investigation regarding baseless accusations of privacy law violations, monitoring private union communications and investigating Union members and officials regarding such communications, sending Fire Marshals to question a Union member at his home without a warrant, deactivating the ID cards of a Union member and official, denying a Union official access to FDNY facilities without an escort, and attempting to interfere with a Union official's representation of his members during investigatory interviews. The City argued that some of the actions did not occur as alleged and that none of its actions violated the NYCCBL. The Board found that there was insufficient evidence to establish that monitoring private union communications or sending Fire Marshals to a Union member's home occurred as alleged. Further, it found that the City rebutted *prima facie* evidence of retaliation or demonstrated legitimate business reasons for its remaining actions. Accordingly, the petition was dismissed. ***(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 LOCALS 2507 & 3621,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On July 9, 2019, District Council 37, AFSCME, AFL-CIO ("DC 37") and its affiliated Locals 2507 and 3621 (collectively, the "Union") filed an amended verified improper practice

petition against the City of New York ("City") and the Fire Department of the City of New York ("FDNY" or "Department").[1] The Union alleges that the FDNY violated §§ 12-306(a)(1), (2), and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by investigating and referring Union officials to the City's Department of Investigation ("DOI") regarding baseless accusations of privacy law violations, monitoring private union communications and investigating Union members and officials regarding such communications, sending Fire Marshals to question a Union member at his home without a warrant, deactivating the ID cards of a Union member and official, denying a Union official access to FDNY facilities without an escort, and attempting to interfere with a Union official's representation of his members during investigatory interviews. Disputing that the facts occurred as alleged, the City argues that it did not violate the NYCCBL because the Department's investigation into privacy law violations and referrals were made pursuant to its statutory obligations, the Union communications at issue concerned potential threats against the FDNY, the decision to investigate and respond to potential threats was the proper exercise of its managerial prerogative, and no Union representative was ever barred from appearing in investigative interviews. The Board finds that there is insufficient evidence to establish that monitoring private union communications or sending Fire Marshals to a Union member's home occurred as alleged. Further, it finds that the City rebutted *prima facie* evidence of retaliation or demonstrated legitimate business reasons for its remaining actions. Accordingly, the petition is dismissed.

[1] The Union's initial petition was filed on May 23, 2019.

BACKGROUND

The Trial Examiner held eight 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.

The FDNY's Bureau of Emergency Medical Services ("EMS") covers the City's five boroughs and is responsible for the operation and staffing of all ambulances deployed utilizing the City's 911 system. DC 37 is the certified collective bargaining representative of FDNY employees in the civil service titles of Emergency Medical Specialist – EMT ("EMT"), Emergency Medical Specialist – Paramedic ("Paramedic"), Supervising Emergency Medical Service Specialist Level I ("Lieutenant"), and Supervising Emergency Medical Service Specialist Level II ("Captain"). Local 2507 is the DC 37 affiliate representing EMTs and Paramedics, while Local 3621 represents Lieutenants and Captains. Local 2507's President and Vice President are EMT Oren Barzilay and Paramedic Michael Greco. Local 3621's President and Vice President are Lieutenants Vincent Variale and Anthony Almojera.[2]

Since at least 2009, the Union has engaged in a public campaign to raise concerns related to the alleged disparate treatment by the City and the FDNY of EMTs and Paramedics compared with Firefighters and other FDNY employees regarding matters including pay and benefits, discipline, and interference with union activities. As part of this ongoing campaign, the Union officials have issued comments to the media, written editorials, and testified at City Council hearings. Local 3621 maintains various private members-only social media pages where issues related to the parity campaign and terms and conditions of employment are discussed by members.

[2] The Union officials are on release time pursuant to the Mayor's Executive Order 75 of 1973, which enables them to pursue their Union duties in a full-time capacity.

One of these pages is called the "Local 3621 Chat page," on a social media platform known as "GroupMe." The Local 3621 Chat Page features a disclaimer stating that the page is intended for active Local 3621 members and that any "[a]ny disrespectful comments or behavior, copies, printouts, sharing with a non-member or reproduction of comments or posts of [the] page are prohibited." (Union Ex. A) As part of its public relations campaign, the Union has also publicized current events regarding the work of their members in saving lives. The Union officials testified that they provide standard quotes to the media praising the work of their members, without disclosing patient information.

The FDNY maintains an Office of Public Information ("OPI"), led by Deputy Commissioner Frank Gribbon, which facilitates news stories and media communications on behalf of the Department. The FDNY's Office of Healthcare Compliance ("OHC"), led by Deputy General Counsel and Chief of Healthcare Compliance James Saunders, maintains the Department's Health Insurance Portability and Accountability Act ("HIPAA") compliance program and is responsible for identifying, investigating, and remediating conduct that fails to comply with applicable federal, state, and local rules and regulations related to the protection of patient health information ("PHI").[3] For the purposes of HIPAA compliance, the Department is a covered healthcare provider with respect to EMS operations, and all personnel with access to PHI are subject to HIPAA regulations.

At all relevant times, the Department maintained various policies and procedures governing the protection of PHI and prohibiting its unauthorized disclosure. The "Confidentiality, Use and Disclosure of Patient Health Information [Policy]" is applicable to all EMS employees.

[3] Saunders is the Department's privacy official and is responsible for overseeing the program and making sure that effective controls are in place to safeguard PHI.

(City Ex. 10) It states that "EMS personnel providing patient care are required to maintain the confidentiality of all . . . patient health information and documentation[,]" and that "patient health information shall not be disclosed to the press or other third parties, except as authorized by the Fire Department's Public Speaking and Press Policy." (*Id.*) Moreover, it provides that a violation of this policy "may result in disciplinary action, in addition to the penalties provided in the HIPAA privacy regulations for unauthorized use and disclosure of patient health information." (*Id.*)

The "HIPAA Policy and Operating Procedure [for] Uses and Disclosures of Protected Health Information for Media Interactions" states that all media requests for information, interviews, etc. "shall be directed to the facility OPI." (City Ex. 8) It provides that, "[w]ith the exception of designated spokespersons, other members of the FDNY workforce are prohibited from disclosing PHI regarding past and present patients to the media . . . ." (*Id.*) It notes that such spokespersons are limited to confirming the number of patients transported to the hospital and providing a "one-word condition description" such as "fair" or "good," and that "[a]ll other patient information is prohibited without an authorization." (*Id.*) Where the patient or the patient's representative provides a valid authorization to disclose more detailed information, a spokesperson will make the disclosure on behalf of the Department.

The "Patient Health Information Breach Reporting and Notification Policy" states that the Department's "Privacy Breach Response Team" shall promptly investigate and remediate any reported breaches of the confidentiality of patient health information. (City Ex. 11) It provides that in order to determine if a reportable breach has occurred, the Privacy Breach Response Team shall conduct "a risk assessment" assessing factors such as whether the security of patient health information was compromised, whether it was protected by HIPAA, whether there was risk of financial or reputation harm to the affected patients, and whether the person who gained

unauthorized access to the information would reasonably be able to retain it. (*Id.*) If the Privacy Breach Response Team determines that "identifiable patient health information was accessed, used or disclosed, and there is a significant harm of risk to the affected patient(s)," then a breach notification must be issued to the patient. (*Id.*) Further, the policy notes that "unauthorized access to, use or disclosure of, patient health information may be subject to disciplinary action, up to and including termination of employment, in accordance with the Fire Department's Confidentiality, Use and Disclosure of Medical Information policy, or other appropriate enforcement action." (*Id.*)

Relevant Background Information[4]

President Variale testified that in or around early 2018, the Union was actively engaged in its parity campaign and frequently spoke with the media about alleged disparities suffered by EMS personnel. Around the same time, he attended a ceremony at FDNY Station 58 that was also attended by members of the media. Variale testified that a media member sought to ask him a question, but Deputy Commissioner Gribbon told Variale that that the Union did not know what it was talking about and that he should not be speaking to the media. Variale also testified that Gribbon told him that he needed HIPAA training.

Thereafter, on February 8, 2018, Tracey Ziemba, Union Representative for Locals 2507 and 3621, received an email from David Zweifler, FDNY Director of Labor Relations, stating that he had been asked by Deputy General Counsel Saunders to schedule a meeting with Union leadership to "provide an overview of the HIPAA training that all members receive" and to "address some of the recent 'great save' newspaper articles wherein patient interventions were described without first obtaining a signed HIPAA [a]uthorization." (Union Ex. C)

[4] Events in this section that occurred prior to January 2019 are untimely pursuant to NYCCBL 12-306(e), but nonetheless provide necessary background and context for the timely events and claims discussed thereafter.

Saunders testified that two articles regarding EMS incidents came to his attention that featured patient identifying information.[5] The first article was published in the New York Daily News on November 18, 2017, regarding paramedic efforts that saved a young girl in the Bronx. President Barzilay was quoted in the article as stating, "[w]e are very pleased that this little girl and her family walked into an EMS station where she was able to receive immediate and critical care and we are very grateful that our EMTs and paramedics were able to save her life." (City Ex. 12) Saunders explained that the HIPAA concerns with this article included the fact that the patient's age, gender, and approximate address were identified, and health and treatment information was disclosed such as the fact that the patient was unconscious, could not breathe, and was in full cardiac arrest.

Saunders testified that he asked Deputy Commissioner Gribbon about the article and Gribbon told him that OPI did not "facilitate" the article and that there was no HIPAA authorization on file. (Tr. 482) He testified that Gribbon also speculated that President Variale may have been responsible for facilitating the article.[6] However, Saunders did not take further steps to investigate because he could not be sure.[7]

The second article was published in the New York Daily News on February 5, 2018, regarding paramedic efforts that revived a member of the Houston Rockets basketball team. Neither President Barzilay nor Variale was quoted in the article. Again, Saunders explained that the HIPAA concerns with this article included the fact that the patient's gender, employer, health

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[5] Saunders noted that he was unaware of the Union's parity campaign when the articles came to his attention.

[6] Saunders testified that Gribbon told him that Presidents Variale and Barzilay had contributed to news stories in the past without obtaining HIPAA authorizations and informing OPI.

[7] Saunders noted that reporters listen to police scanners and therefore PHI could have also been divulged that way.

condition, and treatment rendered were all disclosed. Specifically, he identified the fact that the article explained that the patient's status was checked every two minutes, his pulse returned after six minutes, and that medics could not shock him with a defibrillator.

Saunders testified that Deputy Commissioner Gribbon suggested that President Variale or Barzilay may have been responsible for the article. Additionally, Saunders testified that OPI contacted him because they received a call from the Houston Rockets complaining about information contained in the article. He testified that this article contained PHI that could only have been gleaned from one of the providers at the scene of the accident. As a result, Saunders explained that he called a meeting with Union leadership to provide them with HIPAA training so that they knew where the "bright lines" were and what they could not discuss regarding patient information and treatment. (Tr. 490-91)

In or around March 2018, President Barzilay testified that he attended a City Council budget hearing in which the issue of EMS pay parity was the subject of testimony. Barzilay explained that after testifying, Deputy Commissioner Gribbon told Barzilay that he should stop speaking with the media without him.

On May 17, 2018, a meeting was held between the Union officials and the OHC. During the meeting, the Department made a PowerPoint presentation regarding the OHC, HIPAA, patient rights, and prohibited disclosures. Copies of the articles regarding the Bronx girl and the Houston Rockets incidents were distributed and the Union officials were given a quiz about statements that allegedly contained PHI relating to the Houston Rockets article.[8] The Union officials became upset that the purpose of the meeting was to train them and not their members. President Variale

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[8] Saunders testified that the quiz was an attempt to educate the Union officials in "the nuances of HIPAA" by using "problematic areas" of the article as an example. (Tr. 515) He explained that it was simply a training tool and there was no plan to score quiz participants on their answers.

became agitated and argued with Saunders and Healthcare Law Unit Director Matthew Talty, accusing the OHC and Deputy Commissioner Gribbon of trying to silence the Union. The Union officials testified that Saunders and Talty told them the Union and EMS members could not speak to the media, but that Firefighters could. Saunders testified that the OHC did not state that the Union could not speak to the media but emphasized that HIPAA prohibits both EMS and Firefighters from sharing PHI. Further, he explained that a Firefighter who engages in patient care or treatment during the rescue, like an EMT, is prohibited from speaking about that care. According to Saunders, Talty told the Union officials that "facilitating" these news articles could expose them, their members, and the Department to civil and criminal liability, and that Variale replied by stating, "I did it and I'll do it again." (Tr. 545) It is undisputed that President Variale stated that he would "do it again." However, President Variale and Vice President Greco both testified that this statement referred to Variale contacting or speaking to the press.[9] According to Saunders, Variale's statement was an admission that was sufficient evidence to move forward with a further investigation regarding potential HIPAA violations.

In or around June and July 2018, OHC interviewed the EMTs involved with the two articles regarding their conversations with the media. Captain David Cira, a Local 3621 member who was a first responder to the Houston Rockets incident, was interviewed by OHC as part of the investigation. He testified that he spoke with a New York Daily News reporter about the incident, but had no contact with the Union or Variale and relayed this fact to OHC. He explained that the reporter appeared at his assigned EMS station a couple hours after the incident and stated that he

[9] Initially Variale testified that he told the OHC representatives that he posted the Houston Rockets article on the Local 3621's GroupMe page as a way of saying great job to his members, and that he "would do it again." (Tr. 43) Saunders stated that there was no discussion at all during the meeting about Variale posting articles on social media.

had learned about it on social media. The reporter asked Cira for a comment, and Cira consulted with a supervisor at the station. The supervisor told Cira that he could provide "very brief nonspecific information about the job," and then Cira, the supervisor, and another responding EMT spoke to the reporter. (Tr. 689)

Among those also interviewed by OHC were President Barzilay for the investigation about the Bronx girl article, and President Variale for the Houston Rockets article investigation. Saunders testified that "a number" of the EMTs stated they were contacted by Barzilay and Variale to participate in the stories. (Tr. 546) Ultimately, OHC concluded that there were HIPAA breaches in both articles and issued breach notifications to the affected patients. Moreover, OHC referred both matters to the FDNY's Bureau of Investigation and Trials ("BITS") for disciplinary action and determination.[10] After receiving the referrals from OHC, BITS referred the matters to DOI.[11] The Union, specifically Presidents Barzilay and Variale, did not learn about these referrals to DOI until in or around Spring 2019.

Facts in the Relevant Time Period[12]

In or around early-mid January 2019, Vice President Almojera wrote a post in Local 3621's GroupMe page discussing a City Council hearing at which President Variale and Vice President

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[10] Saunders testified that once OHC determines that there has been a privacy breach under HIPAA, BITS is responsible for deciding whether there needs to be discipline and/or whether it gets referred to DOI for potential criminal prosecution. He testified that once OHC refers the matter to BITS, OHC has no further involvement in the matter and plays no role in making referrals to DOI.

[11] Carlos Velez, BITS Assistant Commissioner, testified that BITS' first step after receiving a referral alleging violation of a federal law is to send the matter to DOI for review. He explained that BITS generally waits for DOI to conclude its investigation before moving forward with any disciplinary case referred to DOI.

[12] The following facts concerning events occurring on or after January 2019 are the subject of timely claims discussed hereafter.

Greco testified regarding EMS's staffing and compensation issues but were allegedly given insufficient time to make their case. In the post, Almojera called for ending the EMS and FDNY merger, and noted that "[u]ntil we get what we need . . . we should not be participating in any FDNY sponsored events, let alone enforcing policies that subject our workers to more malfeasance from a department that is obstinate about our needs." (City Ex. 18) In reply, Lt. John Emington, Local 3621 member, wrote, "I'm with you 100%. We need to do SOMETHING that'll get people[s]' attention. I've got my pitchfork ready, so what have you got in mind? I can somehow weasel my way up to the 7th floor at [FDNY Headquarters] and just start swiping things off of people[s]' desks if you think that would help." (City Ex. 19)

On January 16, 2019, Alvin Suriel, FDNY EMS Operations Chief, wrote an internal email with Almojera and Emington's GroupMe postings attached, which stated in pertinent part:

> The enclosed social media posting was forwarded to us.
>
> It is a response to a posting by 3621 VP Lt. Almojera where he encourages Officers not to enforce policies. Lt. Emington then makes comments that they "need to do something to get people[s]' attention" and states he is willing to come to the 7 floor to "swipe things off of people[s]' desk[s] if that will help."
>
> Though neither one of these postings are appropriate, and everyone is entitled to their opinion, the comments of Lt. Emington are concerning. Please ensure he is issued and signs for, a copy of the Department[']s Social Media Policy. A personal face to face would be appreciated.
>
> This will be forwarded up the chain of command, Fire Marshals etc.

(City Ex. 17)[13]

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[13] The Department's Social Media Policy governs the official and personal use of social media by FDNY employees. (*See* City Ex. 6) It provides that all employees are responsible for activities and statements made on social media even if they have created 'private' or 'limited access' accounts. (*Id.*) It prohibits engaging in harassing or discriminatory conduct and explains that engaging in such behavior online, even in a personal capacity, may subject an employee to

Chief Suriel forwarded the email to Carlos Velez, BITS Assistant Commissioner, and Thomas Kane, Chief Fire Marshal of FDNY Bureau of Fire Investigation. Suriel wrote, "[p]lease see below[.] For your review and I just want to make sure Lt. John Emington does not have access/clearance to enter HQ without having to stop at security first." (City Ex. 17) Kane forwarded the email to John Watkins, Supervising Fire Marshal, and Watkins forwarded it to Jack Medina, Fire Marshal at FDNY Headquarters. Medina testified that he did not know how Suriel obtained Almojera and Emington's GroupMe posts nor did he know who was responsible for implementing Suriel's request to restrict Emington's access. However, he explained that it is "common practice" for the Department to "flag" social media posts that come to their attention that implicate possible security issues. (Tr. 665) Moreover, he testified that it is customary for security-related referrals to come with requests to "flag" and disable the implicated employee's ID card. (*Id.* at 652)

Following Lt. Emington's post on the Local 3621's GroupMe page, President Variale testified that Fire Marshals arrived at Emington's home and left a message that they wanted to speak with him and search his home. Variale testified that Emington called to ask what was going on and to inform him that he no longer had access to his work location without first ringing a doorbell and someone opening the door for him.

Sometime after Chief Suriel's email to Assistant Commissioner Velez, BITS opened a disciplinary investigation against Emington related to the pitchfork post. Assistant Commissioner Velez testified that he did not know how Emington's post came to BITS' attention, but it "caught [BITS'] concern" because it was an "allegation of threats" "to go to a restricted area and start

disciplinary action. However, it notes that "nothing in this policy is meant to interfere with or limit any rights of any employee organization or its members to engage in protected union activity as defined in the Taylor Law and the New York City Collective Bargaining Law (NYCCBL)." (*Id.*)

swiping stuff off people[s]' desks."[14] (Tr. 605) During the BITS investigative interview, Emington was represented by President Variale and interviewed by Bianca Kodozman, BITS attorney, and Joseph Palazzolo, BITS Deputy Director. Variale testified that Emington was repeatedly asked about his GroupMe post and whether he meant to harm anyone with his pitchfork statement, whether he wanted to harm himself, and whether he planned to steal anything from the Department. Variale objected that Emington's post and speech were protected by "union privilege" and the Department's own Social Media Policy, but Kodozman and Palazzolo continued asking questions over his objections. (*Id.* at 80) Velez testified that Kodozman stopped the interview on at least two occasions so that she could speak with Velez about Variale's "comportment." (*Id.* at 588)

President Variale testified that after the interview was over and he started leaving, he returned to BITS to ask them to restore Emington's access to his work location. Variale testified that he overheard Kodozman stating that she "[could not] stand [Variale] because [he] constantly object[s] [and that] those union guys are out of control." (Tr. 89) Assistant Commissioner Velez testified that following Lt. Emington's interview, BITS conducted legal research regarding the pitchfork post, and the case was resolved without charges.[15]

On January 18, 2019, Vice President Almojera wrote an opinion article in the Chief-Leader newspaper in which he advocated for ending the EMS and FDNY merger and alleged that the FDNY has mismanaged the EMS workforce since the merger. Approximately one or two days after the article's publication, Almojera testified that he attended an EMS graduation event and

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[14] Velez testified that BITS does not monitor the Union's social media pages. He noted that he thought someone emailed the post to BITS, but he could not be sure.

[15] Variale noted that Emington's access was restored a few weeks after the interview.

Daniel Nigro, FDNY Commissioner, pulled him aside and asked whether the perspective in the article was the official Union position or his personal opinion. Almojera told Nigro that it was his personal opinion and that whether it became the official Union stance "[depended] on how [Nigro] responds to it." (Tr. 193) According to Almojera, Nigro replied that he did not believe EMS needed to be separated from the FDNY.

On January 25, 2019, Vice President Almojera arrived at FDNY Headquarters to discuss a Local 3621 member's disciplinary case at BITS. In order to proceed past the security turnstiles in the lobby, an ID card is required. However, Almojera's ID card did not work this morning, and he approached the security desk to inquire about it.[16] Almojera was told that he had to wait until the Fire Marshals came to speak with him. Almojera was met by two Fire Marshals, including Medina. The Fire Marshals told Almojera that he had to be escorted through the building and they escorted him to BITS on the fourth floor. Almojera testified that he asked them what was going on, but they did not know.

Upon arriving at BITS, the Fire Marshals left, and Vice President Almojera met with Assistant Commissioner Velez. Almojera testified that he told Velez about his exchange with Commissioner Nigro at the ceremony and that he thought his ID deactivation was retaliation for publishing the article in the Chief-Leader. Almojera testified that Velez told him twice that the deactivation was a mistake, but that it came from "upstairs" and that he would fix it. (Tr. 244) Almojera explained that based on Velez's prior use of the term "upstairs," he believed Velez was referring to Commissioner Nigro. Velez testified that although he told Almojera that the deactivation order came from "upstairs," he was referring to the Fire Marshals because they have

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[16] Almojera's ID card indicates that he is a Union official. (*See* Union Ex. F) He explained that he had no previous issues gaining access to the building with his ID card prior to this incident.

offices on the eighth floor.[17] (*Id.* at 614) Additionally, Velez testified that although he apologized for the ID card deactivation, he informed Almojera that he was not personally involved.

During the same meeting, Assistant Commissioner Velez also raised the issue of President Variale's behavior in BITS interviews.[18] Almojera testified that Velez told him that he had to "control what [Variale] says" because he gets "very excited" at BITS and "becomes a little uncontrollable and is hard to deal with." (Tr. 205) Almojera testified that this made him start to think that the reason his ID card was deactivated was not solely related to his article in the Chief-Leader, but was also "an overall action against the [U]nion." (*Id.* at 206) Velez testified that he was concerned about Variale's conduct because some of the BITS attorneys felt that Variale "could be disruptive, answer questions for his clients, become very loud, and it was not a good working environment." (*Id.* at 593)

Following the meeting that same day on January 25, 2019, Assistant Commissioner Velez emailed Chief Fire Marshal Kane and Supervising Fire Marshal Watkins stating that Vice President Almojera's access to Headquarters should not be restricted. He wrote, in pertinent part:

> Unless there is another reason for Lt. Anthony Almojera's restricted access to HQ, I do not believe his access to HQ needs to be restricted, and he does not need an escort. When EMS Lt. John Emington's access to HQ was recently restricted due to a Social Media posting, it appears that Lt. Anthony Almojera's access was also restricted because he was on the social media posting. I believe this to be a mistake. Lt. Almojera is Emington's union representative and his access to HQ should not be restricted.

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[17] Velez testified that he does not ordinarily refer to "upstairs" as meaning Commissioner Nigro. Further, he noted that this incident occurred less than one year into his tenure as BITS Assistant Commissioner, he had only met Almojera on a handful of prior occasions, and they had never discussed Commissioner Nigro or referred to him being "upstairs."

[18] Velez noted that although he was not scheduled to meet with Almojera on the day of the incident, he had intended to have a conversation with Variale about his behavior and so he brought it up with Almojera since he was there anyway.

(City Ex. 20)

Chief Fire Marshal Kane forwarded Velez's email to the Fire Marshal listserve for FDNY Headquarters, and Almojera's ID card was reactivated that same day. Fire Marshal Medina testified that he did not know who made the initial decision to deactivate Almojera's ID card, but that a restriction "that's possibly security related" would not be unusual.[19] (Tr. 656)

Following his meeting with Vice President Almojera, Assistant Commissioner Velez reached out to the Union to schedule a meeting with President Variale regarding his behavior in interviews.[20] The meeting occurred on or around February 20, 2019. Variale was joined by Representative Ziemba and Steven Sykes, DC 37 Associate General Counsel. Velez and Attorney Kodozman were present on behalf of BITS. Although both sides agreed that the meeting ended quickly, they disagreed about what was said. Ziemba testified that Velez spoke about how Variale was obnoxious in his representation of members with frequent objections and interruptions and that Sykes stated that Velez could not control how Variale represents his members. Velez testified that before he could even discuss Variale's behavior, Sykes started using vulgar language and speaking about historical inequities between EMS and the FDNY.

On February 26, 2019, Representative Ziemba emailed Director of Labor Relations Zweifler to follow-up regarding the January 25, 2019 incident and why Vice President Almojera's

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[19] Medina testified that generally "his boss," a "bureau head," or the NYPD has the authority to request a restriction. (Tr. 656-57) Medina noted that Commissioner Nigro would have the authority to request a restriction. However, Medina testified that he did not know of any involvement by Commissioner Nigro in Almojera's case.

[20] Velez testified that the issues with Variale's behavior that necessitated the meeting included claims that Variale would coach and answer for witnesses, slam his hands on the table, and laugh and/or make side remarks during questioning.

ID card was deactivated.[21] Ziemba testified that the only response she received from Zweifler was that the Department was still investigating.

Approximately one month later, in or around Spring 2019, Presidents Barzilay and Variale received letters from DOI stating that they were the subjects of a HIPAA investigation regarding the Bronx girl and Houston Rockets newspaper articles. Barzilay and Variale were both independently interviewed by DOI as part of this investigation and questioned about whether they participated in the articles.[22] Assistant Commissioner Velez testified that BITS received a referral back from DOI regarding the Bronx girl article and Barzilay's conduct, but never heard back from DOI regarding the Houston Rockets article and Variale's conduct.[23] Thereafter, BITS opened a formal disciplinary case against Barzilay.[24]

In or around December 2019, President Barzilay received a call at around 7:00 p.m. from Stanislav Skarbo, BITS Associate Disciplinary Counsel, offering him a 10-day suspension stipulation.[25] Skarbo told him that he violated HIPAA and the operations guide procedure relating

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[21] Ziemba noted that up until February 26, 2019, she had only heard that Almojera's ID card deactivation was an error.

[22] Captain Cira testified that he was also interviewed by DOI about the Houston Rockets article, and he told them that he never discussed it with Variale.

[23] Velez explained that because DOI never sent back a determination regarding Variale, he assumes DOI found no violation of law.

[24] In or around November 2019, Assistant Commissioner Velez called Vice President Greco to ask hypothetically how BITS should go about charging a Union official and who they should contact. Greco told Velez that the Union official should be served, and he should be copied. Greco is in charge of formal discipline for Local 2507. He testified that BITS is supposed to contact him first and then he contacts the member. Velez conceded that although BITS usually contacts the Union first, "it has happened" that they contact members directly. (Tr. 621)

[25] Greco testified that a stipulation in this context is an agreement between a member and the FDNY in which the disciplinary case is resolved without going to trial or the Office of Administrative Trials and Hearings.

to "articles in the paper." (Tr. 287) Barzilay informed Vice President Greco about the offered stipulation, and Greco subsequently met Velez at BITS within a few days to discuss it. Greco and Velez discussed whether Skarbo had followed proper procedure when making a settlement offer to Barzilay and not Greco. Greco asked Velez to produce specific charges against Barzilay but was merely told that it related to "engag[ing] in criminal conduct while on or off duty because HIPAA could be a federal crime."[26] (*Id.* at 334)

Ultimately, charges were never served. Although Velez usually makes the decision about whether BITS will serve charges, Barzilay was never served because he "received word . . . that [he] should hold off on prosecuting or serving [Barzilay] with charges."[27] (Tr. 624) However, there is still an open case on Barzilay at BITS.[28]

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[26] Greco testified that it is "not uncommon" for BITS to present a stipulation offer without presenting the formal charges. (Tr. 336) He added that it "happens all the time." (*Id.*)

[27] Velez testified that he could not recall who provided him with this instruction.

[28] Velez testified that BITS determined that the 18-month statute of limitations ("SOL") for bringing disciplinary charges pursuant to Section 75 of the Civil Service Law did not apply to Barzilay because the allegations against him involve a violation of HIPAA. In addition, he stated that the only impact an open disciplinary case could have on a member's continued employment is that a pending promotion could be delayed until the case was resolved. However, Velez testified that Barzilay is not on a promotional list.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the FDNY's actions constitute violations of NYCCBL § 12-305 and NYCCBL §§ 12-306(a)(1), (2), and (3).[29] The Union asserts that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by interrogating its members and officials about union-related activities and conversations in disciplinary meetings, making baseless accusations about privacy violations, and referring them to DOI; subjecting President Barzilay to a "perpetually pending investigation" at BITS; directing Fire Marshals to appear at Lt. Emington's home and deactivating his ID card; and directing Fire Marshals to escort Vice President Almojera around Headquarters and deactivating his ID card. (Union Br. at 25-27) The Union asserts that these actions were taken by the FDNY in retaliation for protected union activities of Presidents Barzilay and Variale, Vice President Almojera, and Lt. Emington. The Union avers that the FDNY had knowledge of its officials' and

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[29] 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;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization . . . .
>
> (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 . . . .

members' union activity. Specifically, it contends that the FDNY was aware of the Union officials' testimony and protected speech and responded to it on many occasions, including when Deputy Commissioner Gribbon told Presidents Barzilay and Variale to stop speaking with the media and Commissioner Nigro "expressed displeasure" at Vice President Almojera for his article in the Chief-Leader. (Union Br. at 24) It argues that the FDNY was aware of Lt. Emington and Vice President Almojera's protected activity on Local 3621's GroupMe page, as evidenced by the fact that it obtained copies of their statements and Chief Suriel forwarded them to the Fire Marshals. Further, it asserts that the FDNY was directly involved in all of Lt. Emington and President Variale's activities during Lt. Emington's investigation at BITS.

The Union contends that there is a strong causal link between Union members' and officials' protected activities and the adverse employment actions. Specifically, it avers that the timing of the protected activities and adverse employment actions provides a clear causal nexus. OHC and BITS admitted that they began investigating and seeking to discipline the Union Presidents and their members based on their speech with the media. Moreover, the FDNY sent Fire Marshals to intimidate Lt. Emington based on his speech on Local 3621's private GroupMe page and "at the same time" he was called into BITS for an interview related to these private union-related communications. (Union Br. at 28) The Department also deactivated Almojera's ID card and sent Fire Marshals to escort him through Headquarters following his speech on Local 3621's GroupMe page and the publication of the Chief-Leader article. The Union argues that the FDNY's "managerial comments" provide an additional indication of anti-union animus. (*Id.* at 29) It asserts that Commissioner Nigro told Vice President Almojera that he was upset with Almojera's advocacy for better terms and conditions for his members and that Deputy Commissioner Gribbon told Presidents Barzilay and Variale not to speak with the press. Further the Union avers that

Gribbon made false accusations that the Union Presidents violated HIPAA laws and caused the Department to investigate them and their members and refer them to DOI.

The Union argues that these acts were also inherently destructive of protected rights and violated NYCCBL § 12-306(a)(1) independently. Additionally, it asserts that the Department monitored the Union's use of private union-related communications and attempted to control the way President Variale represents his members in violation of NYCCBL § 12-306(a)(1) independently. The Union contends that the only reason the FDNY engaged in these retaliatory and illegal actions was to limit the Union officials' speech in representing their members and to limit its members' discussion of the terms and conditions of their employment. It avers that the Department was unable to provide evidence that there was any legitimate justification for these actions. The Union argues that the FDNY failed to prove that any Union official or member violated healthcare privacy laws, or that any discussion on Local 3621's GroupMe page was so threatening or obviously harmful as to require intervention and investigation of Lt. Emington. Instead, the "sole logical reason" to take these actions was to intimidate and silence the Union officials and to chill discussion on Local 3621's GroupMe page. (Union Br. at 33) The Union contends that as a result of the FDNY's actions, it will be forced to limit its use of the GroupMe page and that its members will be less willing to communicate with the Union and request its assistance with representation.

The Union argues that the Department also violated NYCCBL § 12-306(a)(2). Specifically, it asserts that the FDNY attempted to interfere with the Union's operations and activities when Deputy Commissioner Gribbon prevented President Variale from speaking with the press at the ceremony at Station 58, told Presidents Variale and Barzilay that they should not speak with the media without clearing it with him, and made baseless accusations that Presidents

Variale and Barzilay violated healthcare laws and provided protected information to the media. Further, the Union contends that OHC attempted to provide HIPAA training to the Union Presidents and Representative Ziemba, who is not an FDNY employee and whom the Department has no authority to train. It argues that the FDNY has diminished the ability of President Variale to represent his members by ignoring his objections to the questioning of his members about their union-related communications.

Moreover, the Union avers that after threatening Vice President Almojera by deactivating his ID card and sending Fire Marshals to escort him around Headquarters, the Department "attempted to favor" Almojera and "pit him against his President [Variale]" by promptly "reactivating" his ID card and expressing displeasure with President Variale's behavior. (Union Br. 36) Additionally, it contends that by monitoring the Union's private communications and threatening discipline and referrals to DOI over statements made by its members during the course of union-related speech, the Department has sent a message that its membership should not communicate with their current leadership.

It asserts that these actions, taken in the context of statements made to Vice President Almojera by Commissioner Nigro regarding the Chief-Leader article and Assistant Commissioner Velez regarding President Variale's behavior, show that the FDNY has "directly and specifically sought to interfere with the operations of the EMS Unions in order to suppress the ability of the current officials to represent their members and install new officials who will be less zealous in their advocacy." (Union Br. at 37)

As a remedy, the Union seeks an order directing that the FDNY cease and desist from engaging in the specified improper practices, post notices of the improper practices, and any such other further relief as may be just and proper.

City's Position

The City argues that the FDNY did not discriminate or retaliate against the Union or its members in violation of NYCCBL § 12-306(a)(1) and (3). It asserts that Lt. Emington's threatening statements on Local 3621's GroupMe page were not in furtherance of the collective welfare of Union members and is not entitled to protection under the NYCCBL. Further, the City contends that Lt. Emington was subject to an investigation, related interviews, and ID deactivation because his statements suggested violent and disruptive actions in the workplace. It avers that the investigation and related actions were an appropriate exercise of its authority to maintain order in the workplace and investigate potential employee misconduct. However, it asserts that there is no factual support in the record to establish that Fire Marshals were sent to Lt. Emington's home. Moreover, the City avers that there is no evidence to suggest an improper motive underlying the investigation or related actions beyond the fact that Lt. Emington was expressing support for Vice President Almojera's initial post, which is "no more than a generalized and unsupported allegation of anti-union animus." (City Br. at 27)

The City contends that there is no credible evidence that the deactivation of Vice President Almojera's ID card or accompanying Fire Marshal escort at Headquarters was motivated by union activity. Instead, the City avers that it resulted from an administrative error by the Fire Marshals after Vice President Almojera's name and GroupMe post was referred to in Chief Suriel's email request for Lt. Emington's access restriction. It argues that Vice President Almojera's unsupported speculation that the deactivation of his ID card was ordered by Commissioner Nigro and "part of an overall action against the Union" is not probative evidence of discrimination or retaliation. (City Br. at 31)

The City asserts that any investigations into Union officials or members, including President Barzilay, relating to potential HIPAA violations found in newspaper articles were conducted pursuant to the FDNY's statutory obligation to determine whether a HIPAA breach occurred. It contends that the Department has an "affirmative obligation" to refer cases to DOI when it appears that a violation of law, like HIPAA, may have occurred. (City Br. at 32) It avers that all Union officials or members who were investigated are also full-time employees of the FDNY and were credibly linked to a possible release of protected health information. Moreover, it argues that statements made to the media that compromise patient information, even if made during an otherwise protected activity, are still liable to investigation and appropriate discipline. The City asserts that there is no evidence that these investigations were improperly motivated to discourage the Union's parity campaign.

Further, the City contends the FDNY did not engage in actions that were inherently destructive of important rights in violation of NYCCBL § 12-306(a)(1). It avers that the Department does not monitor the Union's social media websites. It argues that Assistant Commissioner Velez refuted this allegation and that the Union has proffered no evidence in support of it other than the fact that the Department ended up in possession of Lt. Emington's potentially threatening GroupMe post. Moreover, it asserts that although Assistant Commissioner Velez was concerned about President Variale's demeanor during investigative interviews at BITS, there was no allegation that any Union representative was prevented from appearing. Moreover, the City asserts that each action was taken in the legitimate exercise to maintain the efficiency of government operations and determine the means by which government operations are conducted under NYCCBL § 12-307(b).

The City also argues that the FDNY's actions did not dominate or interfere with the formation or administration of the Union in violation of NYCCBL § 12-306(a)(2). It avers that the Union has provided no factual basis for its allegation that the Department sought "to install new officials who will be less zealous in their advocacy" or even identified who these new officials might be. (City Br. at 34)

Accordingly, the City asks that the improper practice be dismissed.

DISCUSSION

As a threshold matter, we address the timeliness of the Union's claims. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). The statute of limitations for filing an improper practice petition is set forth in NYCCBL § 12-306(e), which provides, in relevant part, as follows:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence . . . .

See also OCB Rule § 1-07(b)(4).

Consequently, "[a]ny claims antedating the four-month period preceding the filing of the [p]etition are not properly before the Board and will not be considered." *Rondinella*, 5 OCB2d 13, at 15 (BCB 2012) (quoting *Okorie-Ama*, 79 OCB 5, at 13 (BCB 2007)) (internal quotation marks omitted). Pursuant to NYCCBL § 12-306(e) and OCB Rule § 1-12(f), the four-month period begins to accrue on the day after the alleged violation(s) occurred.

The initial petition in this matter was filed on May 23, 2019. Based on this filing date, the Union's claims must have arisen on or after January 22, 2019, in order to be timely. Accordingly,

to the extent the Union alleges claims arising on or before January 21, 2019, such claims are untimely and will not be discussed.[30] All timely claims arising on or after January 22, 2019, are addressed here.

Claimed Violations of NYCCBL § 12-306(a)(2)

The Union alleges that the Department violated NYCCBL § 12-306(a)(2) by, *inter alia*, deactivating Vice President Almojera's ID card, sending Fire Marshals to escort Almojera around Headquarters, "attempting to favor" Almojera and "pit him against" President Variale by reactivating his ID card and criticizing Variale's behavior in BITS interviews, ignoring Variale's objections to the questioning of his members about union-related communications, and monitoring the Union's private social media communications.[31] (Union Br. 35-37) The actions taken by the Department did not affect the Union's formation or administration or interfere with the Union's operation to the extent necessary to demonstrate domination under the NYCCBL.

NYCCBL § 12-306(a)(2) provides that it is an improper practice for an employer to "dominate or interfere with the formation or administration of any public employee organization." We have held that an employer violates NYCCBL § 12-306(a)(2):

> [if it] has interfered with [a union's] formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges, or recognizing a favored union

[30] Events occurring on or before January 21, 2019, are considered only as relevant background information. *See Local 376, DC 37*, 13 OCB2d 3, at 13 (BCB 2020); *Buttaro*, 12 OCB2d 23, at 13 (BCB 2019).

[31] To the extent the Union alleges that Deputy Commissioner Gribbon's conduct in 2018 and OHC's conduct during the May 27, 2018 HIPAA meeting violated NYCCBL § 12-306(a)(2), such allegations are untimely and are dismissed.

> when another union has raised a real representation claim concerning the employees involved.

Feder, 5 OCB2d 14, at 30 (BCB 2012) (quoting *Moriates*, 1 OCB2d 34, at 11 (BCB 2008), *affd.*, *Matter of Moriates v. NYC OCB*, Ind. No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010)) (Sherwood, J.) (citation and quotation marks omitted). However, we have also held that the "disfavoring of a union delegate by management will not constitute a violation of this provision, provided that management's actions cannot be construed as domination and does not rise to the level of interference with the actual administration of the union's internal structures." *DC 37*, 1 OCB2d 5, at 52 (BCB 2008); *see also DC 37, L. 376*, 73 OCB 6, at 12 (BCB 2004). Accordingly, we do not find that management statements to Vice President Almojera criticizing President Variale's behavior in BITS interviews is conduct that interfered with the Union's operations in violation of NYCCBL § 12-306(a)(2). Similarly, we do not find that ignoring Variale's objections in BITS interviews establishes interference in violation of NYCCBL § 12-306(a)(2). In addition, the temporary deactivation of Vice President Almojera's ID card, the related use of Fire Marshals to escort Almojera to a meeting with management within Headquarters, and the prompt ID reactivation thereafter does not rise to the level of domination or interfere with the formation or administration of the Union within the meaning of NYCCBL § 12-306(a)(2). Therefore, the Union did not present any evidence demonstrating that the administration of its internal structures had been interfered with to the extent necessary to establish a violation of the NYCCBL.

Finally, the Union alleges that the FDNY violated NYCCBL § 12-306(a)(2) by monitoring the Union's private social media communications. We find that there is insufficient evidence to conclude that monitoring occurred as alleged. Although it is undisputed that Chief Suriel obtained copies of Vice President Almojera's and Lt. Emington's GroupMe post from January 2019, there is no evidence that the communication was obtained by Suriel through management surveillance.

Chief Suriel's January 16, 2019 email to Assistant Commissioner Velez and Chief Fire Marshal Kane regarding the post only notes that it was "forwarded to us," and the factual record does not establish that it was forwarded as part of any Department effort to monitor the Union's social media communications. (City Ex. 17) Accordingly, we dismiss all claims related to this allegation.

Therefore, we dismiss the Union's claims under NYCCBL § 12-306(a)(2).

Claimed Violations of NYCCBL § 12-306(a)(1) and (3)

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)).

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).

Once *prima facie* evidence of retaliation has been established, our analysis shifts to whether the employer has refuted the *prima facie* evidence and/or established a legitimate business reason for its action. *See Local 30, IUOE*, 8 OCB2d 5, at 23 (BCB 2015); *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006). If the employer refutes the *prima facie* evidence or establishes a legitimate business reason, the retaliation claim is dismissed. *See SSEU, Local 371*, 12 OCB2d 15, at 11-12 (BCB 2019).

Claims relating to Lt. Emington

The Union alleges that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by directing Fire Marshals to appear at Lt. Emington's home. However, we find that there is insufficient evidence in the record to establish that this action occurred as alleged. Lt. Emington was not called to testify in this matter. The only record evidence of this allegation is President Variale's testimony regarding what Emington told him during a phone conversation, an uncorroborated hearsay statement. Accordingly, we dismiss all claims related to this allegation.

The Union also alleges that the Department violated NYCCBL § 12-306(a)(1) and (3) by temporarily deactivating Lt. Emington's ID card and interviewing him at BITS regarding his post on Local 3621's GroupMe page in retaliation for making that post.[32] Regarding the first prong of the *prima facie* case, the Union asserts that Lt. Emington was engaged in protected union activity when he posted on the Local 3621's GroupMe page. The Board has previously held that protected employee rights under NYCCBL § 12-305 includes participation in a union-sponsored social media forum where the forum is exclusively available to union members and the statements relate to the employment relationship. *See CWA, L. 1182*, 8 OCB2d 18, at 13 (BCB 2015) (finding that a union member's post on an exclusive union-sponsored Facebook page was "akin to statements made during a union meeting" and was protected activity under the NYCCBL where the member's statements pertained to the collective welfare of the bargaining unit).

We find that Lt. Emington's post on Local 3621's GroupMe page was protected union activity. Emington's post was made on Local 3621's private GroupMe page, with access restricted

[32] We note that although the evidence suggests that these actions occurred sometime between January 16 and 25, 2019, the record does not establish exactly when they occurred. As we are unable to definitively conclude on the record before us that these allegations are untimely, we address them.

to Local 3621 members. Therefore, it was expressly intended for the exclusive use of Union members to communicate. Moreover, we find that the content of Lt. Emington's GroupMe post was related to the employment relationship and the collective welfare of his colleagues. Specifically, Emington's statements were made directly in response to, and in support of, Vice President Almojera's post regarding the Union representatives' testimony at a City Council hearing about EMS's staffing and compensation issues, his opinion about ending the EMS and FDNY merger, and his belief that Local 3621 members should not be enforcing other Department policies. *See CWA, L. 1182*, 8 OCB2d 18, at 13-14 (finding that a union member's Facebook post stating, "someone needs to do something about those lying ass supervisors," demonstrated that she was seeking assistance from other union members in addressing a workplace issue, and therefore related to the collective welfare of the bargaining unit).

With Lt. Emington's protected union activity established, the remaining elements of the *prima facie* case concerns whether the Department had knowledge of his protected activity and whether the union activity was a motivating factor in its decision to act. It is undisputed that Chief Suriel obtained Emington's GroupMe post, reported it to the Fire Marshals and Assistant Commissioner Velez, and that as a result, the Department temporarily deactivated Emington's ID card and questioned him at BITS. Therefore, both prongs of the *prima facie* case are satisfied, and the Union has shown *prima facie* evidence of retaliation.

However, we find that the City has established legitimate business reasons for its actions. Although Lt. Emington engaged in protected union activity when he posted on the Local 3621's GroupMe page, there is direct evidence that Department personnel, including Chief Suriel, Assistant Commissioner Velez, and Fire Marshal Medina, found Emington's specific statements to be threatening and/or worthy of further investigation as a potential security risk. Specifically,

the City points to Emington's statement that, "We need to do SOMETHING that'll get people[s]' attention. I've got my pitchfork ready, so what have you got in mind? I can somehow weasel my way up to the 7th floor at [FDNY Headquarters] and just start swiping things off of people[s]' desks if you think that would help." (City Ex. 19) Assistant Commissioner Velez, who received a referral directly from Chief Suriel about the post, testified that it was concerning because it was an "allegation of threats." (Tr. 605) Fire Marshal Medina, who was forwarded the post by Supervising Fire Marshal Watkins, testified that it is common practice for the Department to flag social media posts like Emington's that implicate possible security issues and for security-related referrals to the Fire Marshals to request ID deactivation. Accordingly, the record evidence shows that Emington's ID was deactivated in the regular course of business until BITS was able to question him and determine that no security risks were present. *See CSTG, L. 375*, 7 OCB2d 16, at 26 (BCB 2014) ("[A]n employee is not immunized against otherwise appropriate and proper disciplinary procedures merely because the actions leading to discipline occurred during otherwise protected activity.") (citing *Ornas*, 65 OCB 12, at 7 (BCB 2000)).

Moreover, there is no reliable evidence to suggest that the Department's asserted security rationale for its investigation and related actions was pretextual. To the contrary, President Variale testified that questions during Emington's BITS interview focused on legitimate security-related issues such as whether he meant to harm anyone with his pitchfork comment and whether he planned to steal anything from the Department. Further, Vice President Almojera, whose initial post was also critical of the FDNY, was not questioned about his comments.

Therefore, for the reasons stated above, we find that the City has demonstrated legitimate business reasons for temporarily deactivating Lt. Emington's ID card and interviewing him at

BITS regarding his post on Local 3621's GroupMe page. Accordingly, we dismiss all related claims under NYCCBL § 12-306(a)(1) and (3).[33]

Claims Relating to Vice President Almojera

The Union alleges that the Department violated NYCCBL § 12-306(a)(1) and (3) by temporarily deactivating Vice President Almojera's ID card and directing Fire Marshals to escort him around Headquarters on January 25, 2019.

Regarding the first prong of the *prima facie* case, Almojera is a known, elected Union official. Like Lt. Emington, he was engaged in protected union activity when he made the initial January 2019 post on the Local 3621's GroupMe page regarding the Union's testimony at a City Council hearing, his opinion about ending the EMS and FDNY merger, and enforcement of Department policies. Moreover, Almojera wrote an opinion article that appeared in the Chief-Leader newspaper on January 18, 2019, in which he advocated for ending the EMS and FDNY merger and alleged that the FDNY has mismanaged the EMS workforce. *See DC 37, L. 2507*, 11 OCB2d 18, at 17 (BCB 2018) ("[T]his Board has previously found that public testimony that is critical of a public employer constitutes protected union activity.") (citing *Local 1757, DC 37*, 6 OCB2d 13, at 16-17 (BCB 2013)) (additional citations omitted). In addition to the Department's knowledge of his position as a Union official, it is undisputed that Chief Suriel obtained Almojera's GroupMe post, and Almojera provided unrebutted testimony that Commissioner Nigro asked him about the opinion he expressed in his Chief-Leader article during an EMS graduation event.

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[33] We decline to analyze these allegations as independent violations of NYCCBL § 12-306(a)(1) as the Union asserts because such claims rely on the same underlying facts and arguments as its discrimination claims. *See DC 37, L.* 983, 6 OCB2d 10, at 21 n. 13 (BCB 2013); *SSEU, L. 371*, 79 OCB 34, at 14 (BCB 2007). Inasmuch as we find the conduct was not discriminatory under NYCCBL § 12-306(a)(3), we find no derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 1549*, 13 OCB2d 20, at 21 (BCB 2020).

Accordingly, we find that the Department had knowledge of Almojera's protected union activities in January 2019, and therefore the Union has satisfied the first prong of the *prima facie* case.

Regarding the second prong of the *prima facie* case, the Union asserts that the temporary deactivation of Vice President Almojera's ID card and resulting Fire Marshal escort on January 25, 2019, at Headquarters, was motivated by anti-union animus. Specifically, the Union points to the close temporal proximity between Almojera's January 2019 union activities, his ID deactivation, and Fire Marshal escort on January 25, 2019. Additionally, it maintains that Commissioner Nigro's questioning of Almojera regarding his opinion in the Chief-Leader article is an indication of anti-union animus.

While the deactivation of Vice Almojera's ID card and Headquarters escort occurred shortly after his January 2019 GroupMe post and opinion article, we find that the City produced evidence that refutes an anti-union motivation for the actions against Almojera. The totality of the record demonstrates that Almojera's temporary ID card deactivation and Fire Marshal escort resulted from a Department error that occurred while investigating Lt. Emington and deactivating his ID card. Indeed, Chief Suriel's January 16, 2019 email to Assistant Commissioner Velez and Chief Fire Marshal Kane requesting Emington's ID deactivation does not mention Almojera, despite the fact that Suriel also knew about his GroupMe post. (*See* City Ex. 17) Moreover, it is undisputed that Velez stated during the January 25, 2019 meeting with Almojera that he believed any limitation on Almojera's access to Headquarters was a mistake and that he would fix it. This is consistent with the undisputed fact that on the same day following the meeting, Velez promptly emailed Chief Fire Marshal Kane and Supervising Fire Marshal Watkins stating that Almojera's access to Headquarters should not have been restricted, that he did not need an escort, and that he

believed it was a mistake made while restricting Emington's access.[34] (*See* City Ex. 20) Further, it is undisputed that Almojera's ID card was reactivated that same day on January 25, 2019, and there is no allegation that Almojera had any further issue with his ID card or Fire Marshal escorts thereafter.

Therefore, we find that the City has rebutted any evidence that the temporary deactivation of Vice President Almojera's ID card and resulting Fire Marshal escort on January 25, 2019, was retaliation for engaging in protected union activities. Accordingly, we dismiss all related claims under NYCCBL § 12-306(a)(1) and (3).[35]

Claims Relating to Presidents Barzilay and Variale

The Union alleges that the Department violated NYCCBL § 12-306(a)(1) and (3) by referring Presidents Barzilay and Variale to DOI and opening a formal disciplinary case against Barzilay at BITS in Fall 2019 for alleged HIPAA violations.[36]

[34] It is undisputed that when Velez told Almojera that he believed his ID deactivation was a mistake during their January 25, 2019 meeting, Velez stated that it came from "upstairs." (*See* Tr. 244, 614) Almojera testified that he believed "upstairs" referred to Commissioner Nigro, whereas Velez testified that he was referring to the Fire Marshals. Because Velez directed his corrective email to the Fire Marshals, and not Commissioner Nigro or anyone else, we credit Velez's testimony that the reference to "upstairs" meant the Fire Marshals.

[35] Like the previously discussed claims pertaining to Lt. Emington, we decline to analyze these allegations as independent violations of NYCCBL § 12-306(a)(1) as the Union asserts because such claims rely on the same underlying facts and arguments as its discrimination claims. *See DC 37, L.* 983, 6 OCB2d 10, at 21 n. 13; *SSEU, L. 371*, 79 OCB 34, at 14. Inasmuch as we find the conduct was not discriminatory under NYCCBL § 12-306(a)(3), we find no derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 1549*, 13 OCB2d 20, at 21.

[36] The Department's referrals to DOI and the Fall 2019 disciplinary case against Barzilay at BITS ultimately resulted from OHC's initial HIPAA investigation in Summer 2018. Although the evidence suggests that the Department's decision to refer Barzilay and Variale to DOI also occurred in 2018, we find that the Union's related allegations are timely because Barzilay and Variale were not notified of the referrals until in or around Spring 2019. However, any allegations specifically related to OHC's initial HIPAA investigation, interviews, etc., in Summer 2018 are untimely and are not addressed.

Regarding the first prong of the *prima facie* case, we find that, in general, the Department had knowledge that Presidents Barzilay and Variale were elected Union officials. In addition, Barzilay and Variale engaged in protected union activity when they spoke with the media about the successful work of their members. *See DC 37, L. 3621*, 11 OCB2d 35, at 24 (BCB 2018) ("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") (quoting *Local 1087, DC 37*, 1 OCB2d 44, at 25 (BCB 2008)) (internal quotation marks omitted). These communications were part of a Union public relations campaign concerning the terms and conditions of employment of bargaining unit members and were intended to elevate and promote the important work of these employees. It is undisputed that the Department knew about this public relations campaign based on Barzilay's and Variale's unrebutted testimony that Deputy Commissioner Gribbon made separate statements to them in early 2018 that they should not speak with the media.

With respect to the second prong of the *Bowman* test, it is undisputed that Presidents Barzilay and Variale were implicated in the HIPAA investigation based on the Department's belief that they spoke with the media for the Bronx girl and Houston Rockets articles. Accordingly, we find that Barzilay and Variale's protected union activity was a motivating factor in the Department's decision to refer HIPAA violations to DOI based on Barzilay and Variale's alleged statements to the media and its decision to open a formal disciplinary case against Barzilay at BITS in Fall 2019 for alleged HIPAA violations.

However, despite the *prima facie* evidence that these actions were motivated by the Union Presidents' union activity, we find that the City has established legitimate business reasons for its actions. Deputy General Counsel Saunders testified regarding the Department's obligation under

HIPAA and applicable federal, state, and local privacy rules and regulations to protect against the disclosure of confidential PHI. At all relevant times, the Department maintained policies and procedures governing the protection of PHI, prohibiting its unauthorized disclosure, and requiring the investigation of breaches of the confidentiality of PHI. With respect to the Bronx girl and Houston Rockets articles, Saunders testified to specific HIPAA-related concerns with disclosed PHI such as patient age, gender, employer, health condition, and treatment rendered. The legitimacy of these purported concerns is buttressed by the undisputed fact that the Department received a complaint from outside the agency regarding the Houston Rockets article and issued breach notification letters to the affected patients in both articles. The evidence also establishes that Saunders and OHC had specific reasons to believe that Presidents Barzilay and Variale may have been responsible for facilitating the articles. It is undisputed that Barzilay spoke to the media because he was quoted in the Bronx girl article. Moreover, while the Department did not have any direct evidence that Barzilay or Variale spoke to the media about the Houston Rockets incident, they were aware of the Union's public relations campaign and had discussed the Union officials' statements to the media at the May 2018 meeting in which Variale had stated that he would speak to the media again.

Further, upon opening its HIPAA investigation in 2018, the record evidence demonstrates that the Department acted pursuant to its standard operating procedure. Saunders testified that OHC interviewed the EMTs referenced in the two articles, along with Barzilay and Variale. Saunders reported that during these interviews, "a number" of EMTs told OHC that they were contacted by Barzilay and Variale to participate.[37] (Tr. 546) Based on these interviews, OHC

[37] We note that although Captain Cira credibly testified that he had no contact with Variale or the Union about the Houston Rockets incident, this does not preclude the possibility that his supervisor

concluded that there were HIPAA violations by staff in both articles, and both matters were referred to BITS. Saunders testified that the referral from OHC to BITS was standard procedure. Similarly, BITS' first step upon receiving the referrals was to forward the matters to DOI, and Assistant Commissioner Velez testified that this was also standard procedure for incidents that involve an alleged violation of federal law. No evidence was offered to the contrary. Thereafter, DOI independently investigated both matters, sent a referral back to BITS for only Barzilay's conduct, and BITS opened the formal disciplinary case against Barzilay based on the Bronx girl article in Fall 2019 only.[38]

Therefore, for the reasons stated above, we find that the City has demonstrated legitimate business reasons for referring Presidents Variale and Barzilay to DOI and opening a formal

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or another responding EMT told OHC that they had. Similarly, Cira's assertion that the reporter told him that they learned of the incident on social media does not foreclose the possibility that staff other than Cira spoke to the reporter.

[38] The Union suggests that BITS' handling of Barzilay's disciplinary case has been irregular, including with respect to the offered stipulation in December 2019 and the "perpetually pending" nature of the investigation. We note that such irregularities do not negate the legitimate business decision to refer Presidents Variale and Barzilay to DOI and open a formal disciplinary case against Barzilay. Nevertheless, we acknowledge that failure to promptly process discipline can be threatening and coercive as well as serve to undermine the integrity of the disciplinary appeal process. However, while the potential for future claims exists since no disciplinary action has yet been taken, on this record we do not find sufficient evidence upon which to conclude that BITS' dilatory processing of Barzilay's disciplinary case was retaliatory. *Compare, DC 37, L. 3621*, 11 OCB2d 35, at 30 (BCB 2018) (finding that the FDNY's delay in processing discipline was based on an employee's union activity).

disciplinary case against Barzilay for alleged HIPAA violations.[39] Accordingly, we dismiss all related claims under NYCCBL § 12-306(a)(1) and (3).[40]

Claimed Independent Violation of NYCCBL § 12-306(a)(1)

Finally, we address the Union's claim that the Department violated NYCCBL § 12-306(a)(1) by attempting to interfere with and/or control the way President Variale represents his members in BITS interviews.

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[.]" We have found that "an attempt by an employer to decide which union representative it chooses to deal with in connection with contractual grievances [is] inimical to the rights of employees and to the entire collective bargaining process." *Lehman*, 29 OCB 23, at 11 (BCB 1982); *see also Malverne Police Benevolent Association*, 43 PERB ¶ 4602 (2010) (explaining that a union's choice of representative is protected from employer interference by the Taylor Law and that an employer's interference with such matters has a chilling effect on the free exercise of employees' protected rights). Accordingly, we have held that such attempts violate NYCCBL § 12-306(a)(1). *See DC 37, L. 376*, 73 OCB 6, at 10-11 (BCB 2004); *Local 420, DC 37*, 69 OCB 11, at 5 (BCB 2002); *Lehman*, 29 OCB 23, at 11.

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[39] In reaching this conclusion, we note that this Board lacks jurisdiction to interpret or apply HIPAA and has not evaluated whether there was sufficient evidence that the Union Presidents' actions violated HIPAA. Our findings here are limited to the showing that there were legitimate business reasons to investigate them and later to seek to discipline Barzilay for alleged violations.

[40] Again, we decline to analyze these allegations as independent violations of NYCCBL § 12-306(a)(1) as the Union asserts because such claims rely on the same underlying facts and arguments as its discrimination claims. *See DC 37, L.* 983, 6 OCB2d 10, at 21 n. 13; *SSEU, L. 371*, 79 OCB 34, at 14. Inasmuch as we find the conduct was not discriminatory under NYCCBL § 12-306(a)(3), we find no derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 1549*, 13 OCB2d 20, at 21.

For instance, in *DC 37, L. 376*, 73 OCB 6, 2-7 (BCB 2004), the agency's director of labor relations, *inter alia*, attempted to stop a union vice president from representing employees at a disciplinary hearing. The director voiced concerns about the vice president's "well-known" behavior and asked a union representative if there was any way to avoid the vice president's attendance. *Id.* at 2. Ultimately, the Board found that the director's statement was an attempt "to avoid dealing with [the vice president]," and was just one part of a course of conduct that discouraged and inhibited employees from choosing the vice president as their representative in violation of NYCCBL § 12-306(a)(1). *Id.* at 11.

In this case, it is undisputed that during his meeting with Vice President Almojera on January 25, 2019, Assistant Commissioner Velez raised the issue of President Variale's conduct during BITS interviews. Velez acknowledged he was concerned because some of the BITS attorneys felt that Variale "could be disruptive, answer questions for his clients, become very loud, and it was not a good working environment." (Tr. 593) In addition, he told Almojera he had to "control what [Variale] says" because he gets "very excited" at BITS and "becomes a little uncontrollable and is hard to deal with." (*Id.* at 205) Subsequently, it is undisputed that Velez reached out to the Union and scheduled a meeting to discuss Variale's behavior. However, although the substance of the discussion at that February 2019 meeting is disputed, there is no allegation that the Department attempted to prevent President Variale from representing his members. Moreover, unlike in *DC 37, L. 376*, there is no evidence that the Department otherwise engaged in conduct to discourage or inhibit Variale's members from selecting him as their representative in BITS interviews. Therefore, we dismiss the Union's claim under NYCCBL § 12-306(a)(1).

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-4331-19, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 2507 and 3621, against the City of New York and the Fire Department of the City of New York, is hereby dismissed in its entirety.

Dated: February 9, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER

I dissent. PETER PEPPER
MEMBER