

DC 37, Local 1505, 15 OCB2d 27 (BCB 2022)

(IP) (Docket No. BCB-4419-21)

Summary of Decision: The Union alleged that the City retaliated against two bargaining unit members whose workplace complaints were discussed at a labor management meeting by giving them more onerous assignments, denying them access to equipment, and subjecting them to greater scrutiny and discipline than other workers. The City argued that the Union did not establish a *prima facie* case because there was no anti-union animus and the alleged retaliatory actions were not adverse employment actions. The Board found that a *prima facie* case was not established because the allegedly retaliatory acts began prior to the employer's knowledge of the Union activity. Accordingly, the Board denied the petition. (*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,
LOCAL 1505,**

Petitioner,

-and-

**THE CITY OF NEW YORK & NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,**

Respondents.

DECISION AND ORDER

On March 1, 2021, District Council 37, AFSCME, AFL-CIO, Local 1505 (“Union”) filed a verified improper practice petition against the City of New York (“City”) and the New York City Department of Parks and Recreation (“DPR”). The Union claims that the City and DPR violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by retaliating against two bargaining unit

members whose complaints were addressed at a July 2020 labor-management meeting. The Union alleges that the two members were subjected to harassment and discriminatory interference with their work assignments and denied necessary equipment. The City argues that the Union did not establish a *prima facie* case because there was no anti-union animus and the alleged retaliatory actions were not adverse employment actions. The Board finds that a *prima facie* case was not established because the allegedly retaliatory acts began prior to the employer's knowledge of the Union activity. Therefore, we find no violation of NYCCBL § 12-306(a)(1) or (3). Accordingly, the petition is dismissed in its entirety.

BACKGROUND

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

DPR is the principal provider of public recreational and athletic facilities and programs in the City. It operates public parks and spaces throughout the City including athletic fields, playgrounds, pools, golf courses, and beaches, and oversees many programs and activities in these spaces. The Union represents various DPR employees including City Park Workers (“CPWs”) and their supervisors.

The Workforce Development Program (“WDP”), is one of several programs, including the Parks Opportunity Program (“POP”), that DPR operates in Flushing Meadows Corona Park. POP provides seasonal employment to individuals who are referred to DPR by the City's Department of Social Services, affording participants work experience and on-the-job training. POP workers perform cleaning and maintenance of all types of DPR facilities and are trained and supervised by

CPWs serving in the position of Crew Chief.¹ Normally, there are approximately 15 Crew Chiefs assigned to the POP program. Crew Chiefs are divided into groups of three to five, with each group assigned 15-20 POP workers and to a different zone in the park. Each Crew Chief is assigned a smaller group of POP workers to supervise and takes a complement of POP workers to a different zone in the park. POP workers are trained in one of four areas each day: “conditions,” which encompasses cleaning up litter, painting, etc.; “custodial,” including cleaning and maintaining the bathrooms; “landscaping,” such as cutting grass, planting flowers, etc.; and “hardscaping” which is cleaning and maintaining the artificial built environment of the park. (Tr. 211-212, 615)

Crew Chiefs are directly supervised by a Park Supervisor Level 1, who in turn reports to a Park Supervisor Level 2. Park Supervisor Level 1s, who work on site, are responsible for the daily work assignments. The Park Supervisor Level 2, who at all relevant times was Mike Mancuso, reports to the On-Boarding Manager. The On-Boarding Manager in turn reports to the Director of Administration. The Director of Administration reports to the Deputy Chief of Development Operations, a position held by Jason Deo starting in May 2020. The Deputy Chief of Development Operations reports to the Chief of Operations, a position held at all relevant times by Elizabeth Ehrlich.

The Union’s claims here concern actions allegedly taken against two Crew Chiefs employed at Flushing Meadows Corona Park, Angela Cordoba and Peter Reyes, because of their complaints about certain workplace issues and an overall hostile and tense work environment, that

¹ Pursuant to a 1995 agreement between the City and the Union, CPWs assigned as Crew Chiefs earn over \$14,000 more than regular CPWs.

were discussed at a July 6, 2020, labor management meeting.² Cordoba and Reyes were assigned to Group 5 along with three other Crew Chiefs. Five Union witnesses testified at length concerning a variety of longstanding issues that WDP Crew Chiefs in Flushing Meadows Corona Park experienced.

Union President Dilcy Benn testified that there is a history of DPR retaliating against employees who complain. As a result, Benn maintained that many employees are unwilling to put their complaints in writing. Benn testified that as early as 2018 and continuing thereafter she received complaints from many Crew Chiefs over the phone, but only Reyes, Cordoba, and Pagan were willing to put their complaints in writing. For example, in early 2019, Benn spoke to WDP Chief of Operations Ehrlich regarding assigning Crew Chiefs to conduct trainings for which they were not certified and that were outside the scope of their job duties. Benn testified that Ehrlich assured her that the training assignments would stop. However, within weeks of that discussion Benn received a message from Cordoba reporting that she and other Crew Chiefs were required to sign statements saying they were willing to conduct trainings. Cordoba shared the statement she had signed with Benn. Thereafter, the Union filed an out-of-title grievance regarding the training assignments.

Other complaints that Crew Chiefs made to Benn between 2018 and July 2020 included being assigned to pick up dead animals and used syringes left around the park; alleged HIPAA violations from supervisors' disclosure of employees' medical information, on-duty drug use by

² A third Crew Chief, Ray Pagan, raised complaints about workplace issues with the Union, but his complaints are not included in Petitioner's claims. However, Pagan, who left the POP program prior to the July 2020 labor management meeting, testified regarding incidents involving himself, Cordoba, and Reyes that occurred prior to his departure. He testified that he left WDP because supervisors were "backstabbing," showing favoritism, constantly changing assignments, reprimanding employees, failing to respond to complaints, and because there was bickering among Crew Chiefs and the overall atmosphere was "toxic." (Tr. 499, 514).

WDP employees including supervisors, and sexual harassment of a Crew Chief by a Park Supervisor.

According to Benn, complaints she received regarding the management of WDP increased in 2020, with “just about all” Crew Chiefs having complaints.³ (Tr. 53) This increase in the number of Crew Chief complaints coincided with the beginning of the COVID-19 pandemic, which resulted in a pause in the regular hiring and training of POP workers. Prior to the start of the pandemic, there were as many as 60 POP workers per week. However, between March 2020 and September 2020, when hiring resumed, there were as few as three to six POP workers at a time who were brought in solely for re-training purposes. In particular, Benn testified that the number of complaints she received regarding assignment changes increased in this period. She stated that prior to April or May 2020 she had occasionally heard about assignment issues, but “it got really bad when it came to Angela [Cordoba] and Peter [Reyes] around that time.” (Tr. 668) These complaints included failure to post zone assignments two weeks in advance and daily assignment changes that were not reflected in the Skedulo scheduling software, uneven distribution of work, and failure to rotate assignments. Reyes testified that he complained to the Park Supervisors about the assignment changes. In addition, on or before June 30, 2020, Cordoba sent an email to Benn complaining about Park Supervisors showing favoritism to certain Crew Chiefs.⁴ Benn, Pagan and Union representative Chandler Henderson testified that a “clique” of WDP supervisors favored some Crew Chiefs over others. (Tr. 102, 143-145) Crew Chiefs in “good

³ Similarly, Cordoba testified that the problems at WDP escalated in 2020 when Anthony Sierra, a Park Supervisor Level 1, started working in the program.

⁴ In this email, Cordoba attributes the Park Supervisors’ disfavoring of her to their belief that “they were accusing me about reporting them to EEO. Which I never did. I think that’s where all the hostile[ity] comes from.” (Union Ex. F)

favor” with management were treated well and given easier assignments, while disfavored Crew Chiefs, including Cordoba, Reyes, Pagan, and another Crew Chief named Fidel Martin were mistreated. (Tr. 186) This favoritism included allowing favored employees to leave the office late and clock each other out, failing to supervise the favored employees’ work, allowing them to leave work to buy breakfast for supervisors and others, failing to discipline them for taking home the keys for DPR vans, and destroying and misusing DPR property.⁵ Cordoba complained in her June 30, 2020 email that disfavored employees, including herself, were being assigned to work alone in large zones that would usually be assigned to a group, and were not being assigned gators. (Union Ex. F) Cordoba testified that on an unspecified date she specifically discussed the issue of supervisor/employee theft of time with Tonia Robinson, a Parks Supervisor Level 1.⁶

Cordoba, Reyes, and Pagan consistently testified that starting sometime in summer 2020, last minute assignment changes became far more frequent, particularly for their assignments. Reyes testified that the last-minute assignment changes began after they complained to the Union. However, all three witnesses acknowledged that prior to summer 2020, assignments were occasionally changed at the last minute. Pagan testified that certain Crew Chiefs’ assignments were changed more than others including those of Reyes, Cordoba, and himself, as well as Crew

⁵ Pagan testified that prior to leaving WDP in June 2020, he also witnessed supervisor favoritism in assigning gators (utility vehicles similar to golf carts used by DPR employees to transport themselves and their work supplies within parks), bathroom use, permitting certain Crew Chiefs to not perform their assignments, and failure to discipline employees for damaging vehicles. Pagan stated that he complained to Mancuso, the Park Supervisor Level 2, about these issues on multiple unspecified dates and that Mancuso told him, Cordoba, and Reyes that it would be taken care of. Pagan testified that shortly before his departure from WDP, the allegations of favoritism were discussed at a Union meeting at WDP premises.

⁶ Cordoba also testified about issues she had with co-workers prior to July 2020 relating to the favoritism issues. This testimony included employees scratching her car, and an alleged threat and stalking by a co-worker, which Park Supervisor Level 1 Laura Strickland, Deo and Ehrlich did not address to Cordoba’s satisfaction.

Chiefs Mary Campbell, Anthony Cox, and Martin.

Ehrlich confirmed that last minute changes to assignments became more frequent beginning in summer 2020, attributing the change to the need for added flexibility during the pandemic to address special projects and zone conditions. As a result of the pandemic, staff absences were greater, and there were no POPS in WDP for several months, requiring Crew Chiefs and supervisors to perform all the cleaning and maintenance work. To address transparency issues regarding assignment changes, the changes began to be posted on a board in the park office sometime in late June.⁷ Similarly, WDP Deputy Chief of Development Operations Deo acknowledged that Crew Chiefs had complained to him about frequent assignment changes in the summer of 2020. He testified that it was challenging for Crew Chiefs to conduct the necessary maintenance work without the assistance of the POP workers and that this may have caused the rise in complaints and conflicts between employees.

In addition, Reyes and Cordoba testified that they were reassigned to larger zones requiring more work. They cited examples of being assigned to cover three zones in one day, while other crews were only assigned to cover one zone.⁸ Reyes sent Benn an email on July 4, 2020, complaining that Supervisor Strickland harassed him by observing him four times on July 2, 2020 and did not observe anyone else, and that Supervisor Robinson assigned only him to three zones on June 29, 2020.⁹

⁷ Assignments for the week were made in advance in Skedulo and posted on the board, and employee zones assignments were rotated.

⁸ Reyes testified that supervisors threatened to write him up if he did not complete his assignments. He gave no specific testimony as to the dates on which the threats were made, which supervisors were involved, or what they specifically said.

⁹ In the same email, Reyes acknowledged that only three Crew Chiefs were on duty on the day Robinson assigned him to three zones, and that at the end of the day, one of the other Crew Chiefs

Cordoba, Reyes, and Pagan also consistently testified that commencing in the summer of 2020, they frequently would not be provided a gator to transport themselves and their tools to their assigned work zone.¹⁰ Gators were distributed to crews each morning by a Park Supervisor. Park Supervisor Sierra oversaw gator distribution in 2020. Reyes and Cordoba claimed that each morning Sierra would check the battery level of each gator and assign those with the least charge to Cordoba and Reyes or leave their assignment to last when there were no operative gators left. Gators with a low battery level generally could not be used at all because they would not be able to make it back to base at the end of the shift. Pagan testified that he, Cordoba, and Reyes frequently had their assigned gators taken away and given to other crews. Without gators, Reyes, Pagan, and Cordoba were required to pull wagons full of their work equipment when moving around the park.

Cordoba testified that she spoke to her supervisors about these issues. Specifically, one day she asked Sierra why other Crew Chiefs were receiving gators while she did not, and he told her it was “first come, first served.” (Tr. 237-38) Cordoba maintained that this explanation was absurd because she and Reyes were among the first Crew Chiefs to report for duty on that day and every other day.¹¹ Reyes acknowledged that there were instances when there were not enough

helped him complete the assignments. He also complained about having to disclose personal information to supervisors in public, that the work environment was hostile, and that tensions were high. Reyes testified that on an unspecified date he reported to Strickland that Sierra was following him. From mid-October 2020 until February 2021, Reyes was out of work on a medical leave.

¹⁰ Pagan, who began as a Crew Chief in 2017, testified that he was sometimes assigned to use non-motorized carts instead of gators as early as three months after he began in the program. He stated that most often gators were not assigned to him, Reyes, Cordoba, and a couple of other Crew Chiefs.

¹¹ Cordoba asserted that Sierra assigned gators to Crew Chiefs he favored. However, she conceded that there were occasions when Crew Chiefs other than herself, Pagan, and Reyes were also not assigned gators.

gators for all Crew Chiefs, however he testified that generally he and Cordoba were the only Crew Chiefs that were not given gators.

Reyes, Cordoba, and Pagan testified that discipline and threats of discipline were administered in a discriminatory manner in retaliation for their having brought complaints about workplace issues to the Union. In his June 29, 2020 resignation letter, Pagan complained that he and “a few” other coworkers were forced to report their bathroom usage, made to work in the rain without a vehicle or shelter, denied access to vehicles that were provided to other Crew Chiefs, kept under close observation, and written up for trivial infractions such as wearing shirts untucked that other Crew Chiefs and supervisors also committed without consequence. (Union Ex. O) He described it as a situation that has been ongoing “for the last 3 years and has just progressively gotten worse with each passing day” and later reiterates that the issues he “mentioned have been going on for a VERY LONG TIME.” (*Id.*) (emphasis in original) Reyes, Cordoba, and Pagan testified that in early 2020 supervisors told them verbally that they would have to report their bathroom usage while in the field to supervisors so that the supervisors could ensure coverage of the POP workers assigned to that Crew Chief while they were away.¹² Pagan testified that on one occasion a supervisor reprimanded him for leaving his crew and failing to call supervision before taking a bathroom break, and another time Strickland admonished him for not calling before using the bathroom.

Deo and Reyes both testified that all the Crew Chiefs were told that they had to call a supervisor before leaving their crews to use the bathroom. However, Cordoba and Reyes claimed that the requirement was only ever enforced against them and Pagan. Cordoba testified that she

¹² Both Ehrlich and Deo testified that Crew Chiefs were not permitted to leave POP workers unattended and that to take a bathroom break, they needed to call for a supervisor. However, Deo acknowledged that there may be instances when a supervisor is not available.

checked with other crews and discovered they had not received the same instructions regarding bathroom breaks. Benn testified that the complaints she received from Cordoba, Reyes, and Pagan were the first she had heard of Crew Chiefs having to arrange coverage during bathroom breaks and that as far as she knew there was no written policy requiring that they do so.

A labor-management meeting was held to discuss the complaints raised by Crew Chiefs at WDP on July 6, 2020, via conference call. The meeting was attended by WDP Chief of Operations Ehrlich, WDP Deputy Chief of Development Operations Deo, DPR Director of Labor Relations Joseph Trimble, Assistant Commissioner David Stark, Union President Benn, and others. Cordoba and Reyes did not attend the meeting, nor did any on-site Park Supervisors. However, Benn testified that Cordoba, Reyes, Pagan, and Cox, as well as the complaints these employees had made to the Union, were all specifically discussed at the meeting.¹³ According to Benn, those complaints included: Pagan's June 29, 2020 resignation letter, statements submitted by Cordoba on June 30, 2020, and Reyes on July 4, 2020, Crew Chief concerns about the disposal of dead animals and used syringes, an increase in last minute scheduling changes made by onsite supervisors not reflected in the online scheduling system, alleged HIPAA violations involving supervisor disclosure of employee's medical information, employee and supervisor drug use while on-duty, and complaints about alleged unfair application of a new bathroom break policy. Ehrlich testified that at the conclusion of the meeting she told Benn that she would look into the issues discussed and "take steps to make it better." (Tr. 569) Benn testified that she left the July 6 meeting reassured that "everything would go back to normal," particularly regarding restoring the

¹³ An October 2, 2020, email from Union representative Henderson to Ehrlich specifies that "issues raised on behalf of Peter Reyes and Angela Cordoba" were discussed at this meeting. (Union Ex. G) The City's witnesses did not rebut the assertion that they were informed of the source of the complaints.

online scheduling system and ending last minute assignment changes. (*Id.* at 63) However, Benn further testified that, after the July 6 labor-management meeting, DPR did not follow up with the corrective actions discussed at the meeting. Ehrlich testified that as early as June 2020 and throughout that summer, DPR began responding to the Union's concerns. She began working out of the DPR office near Flushing Meadows Corona Park two to three days a week, and Deo was stationed there full time. They began having daily check-ins with the supervisors to discuss any assignment changes and had supervisors send them photos of the assignment changes on the board daily. Later they switched to monthly meetings with supervisors to discuss the flow of POP workers and assignments.

On July 17, 2020, Reyes and Cordoba were sent to begin work before the other Crew Chiefs. They were not assigned gators, and soon after they left the building it began raining. According to Reyes, they called Sierra and requested to return to the building to pick up rain gear but were instead told that a supervisor would deliver it to them. No rain gear was delivered to Cordoba or Reyes. However, they testified that other Crew Chiefs were given rain gear before they left the building. Reyes stated that they later returned to the office and asked Sierra about the rain gear, and that he and Cordoba were told that they knew it was going to rain and should have taken the coats before they left. Deo testified that DPR provides uniforms, including raincoats, only to POP workers and not to Crew Chiefs. While discussing the incident via text, Deo told Benn that Crew Chiefs were allowed to use raincoats from the supply designated for POP workers.

On August 6, 2020, Benn and Henderson held a Union shop meeting that was attended by all but one of WDP Crew Chiefs. Henderson testified that his takeaway from the meeting was that Cordoba and Reyes were being mistreated due to their having raised issues with the Union, while other Crew Chiefs who were closer to management and did not cooperate with the Union received preferential treatment. He further testified as to his belief that the disparate treatment by

management had resulted in rifts and animosity among Crew Chiefs, which he described as “divide and conquer” tactics. (Tr. 143-45)

Reyes and Cordoba testified that they were also singled out for an assignment to conduct COVID-19 screenings of employees and members of the public entering a DPR building. On August 25, 2020, Sierra approached Reyes and assigned him to take the temperatures of everyone entering the DPR building. On August 25 and 26, 2020, Reyes complained to Benn that he was assigned to conduct COVID-19 screenings. In his email to Benn, Reyes reported that he was told that the duty would be rotated among the Crew Chiefs, but instead the next day he was assigned to do it again. After Reyes complained to Benn, DPR removed him from the assignment. Cordoba testified that she was assigned to conduct temperature screenings at the same time as Reyes and conducted the screenings for approximately three weeks before the task was reassigned to another DPR employee. Ehrlich testified that she stopped the screening assignment to Cordoba and Reyes the same day that it was reported to her.

In a September 2, 2020, email to Benn, Reyes claimed that Sierra and Deo followed him around while he worked on September 1, 2020. Reyes testified that he was threatened with write-ups over not reporting his bathroom use to supervisors. He reported this to Benn by email and stated that Sierra and Deo told his supervisor that he wasn't doing anything for 40 minutes, but that was “a lie.” (Union Ex. D) Reyes and Henderson testified that Cordoba and Reyes were being scrutinized more closely than other Crew Chiefs by supervisors and were being singled out for reprimands over minor issues such as their shirts being untucked. Deo acknowledged that supervisors may have threatened Crew Chiefs with write-ups over untucked shirts but claimed that no such write-ups were actually issued.

On September 16, 2020, Cordoba was assigned both an in-house job and responsibility for maintenance of Zone 16. She claimed that she was the only Crew Chief assigned more than one

duty that day. That same day, Cordoba sent an email to Benn complaining about the two assignments, concluding that “I guess today is ‘Fuck with Angela day.’” (Union Ex. E) Cordoba testified that she also complained about this assignment to Park Supervisor Mancuso. Benn reported to Henderson that she had spoken to Cordoba’s immediate supervisor, Billy Hall, who told her that Sierra ordered him to give Cordoba the assignment as a way of picking on her.

Reyes testified that he was stalked and harassed by Park Supervisor Sierra during the summer and fall of 2020. Reyes repeatedly complained to Henderson that Sierra was following him. On August 4, 2020, Henderson visited Reyes in the field to discuss the issues he and Cordoba were having. While walking with Reyes in his zone, Henderson observed Sierra drive up to them in a gator, check in on Reyes, and drive away. Reyes complained at the time that Sierra had been following him around the park and observing him even on days when Sierra was not his assigned supervisor for months. A series of complaints about this issue, including an EEO complaint, culminated in a September 21, 2020, follow-up labor-management meeting. This meeting was attended by City representatives including DPR Assistant Commissioner Stark and his staff, a representative from DPR Labor Relations, Ehrlich, and others. Henderson and other Union representatives attended. The primary topic discussed at the meeting was Sierra’s alleged harassment of Reyes. The Union representatives requested that Sierra be transferred out of the program. The DPR representatives did not agree to transfer Sierra but did agree to remove him from supervisory responsibility over Reyes and limit his supervision of Cordoba to the degree possible. Cordoba’s September 16, 2020, double job assignment was also discussed at this meeting.

On September 23, 2020, the Union received a call from Reyes reporting that Sierra had nevertheless been assigned to supervise him and changed his zone assignment. On subsequent days Sierra was seen following and observing Reyes even when he was no longer his assigned

supervisor. Henderson reported these incidents to management and his supervisor at the Union, Barbara Terrelonge, discussed the situation with Ehrlich. Deo acknowledged that Sierra sometimes gave assignments to Reyes even after having been removed as his supervisor and claimed that this was because on some days Sierra was the only supervisor on site and had to handle all assignment distribution. Deo further testified that he was aware of the complaints that Sierra was violating the agreement not to interact with Reyes and asked Sierra about them. Sierra told Deo that he was not observing Reyes in particular, just checking in with all crews, and Deo took no further action. Reyes testified that soon afterwards he requested and received a transfer away from WDP “because I got sick... because of the stress, the down talking, the harassment that was going on at the workforce program, I couldn’t take it. It wasn’t healthy for me.” (Tr. 331)

Benn testified that since 2018 at least ten Crew Chiefs requested to leave WDP altogether, even though that meant a greater than 25% reduction in salary. Pagan left WDP in or around late June 2020, citing discriminatory actions taken by supervisors against himself, Reyes, and Cordoba, including being given unfavorable assignments and being denied gators. Reyes left WDP in October 2020, citing harassment and discriminatory actions by supervisors, which he claimed were so severe as to affect his health. Cordoba left WDP in November 2020, which she testified was a response to harassment and discriminatory treatment by supervisors and co-workers. Benn claimed that she continued to receive complaint calls from CPWs at Flushing Meadows Corona Park through the date she testified in June 2021, but none of the remaining Crew Chiefs were willing to put their complaints in writing.

POSITIONS OF THE PARTIES

Union’s Position

The Union argues that DPR violated NYCCBL § 12-306(a)(1) and (3) by engaging in a

pattern of retaliation and harassment against Cordoba and Reyes based on their union activity.¹⁴ In assessing the credibility of Union and City witnesses, the Union notes that it offered consistent testimony from three Crew Chiefs with firsthand knowledge of the situation, while the City offered no testimony from supervisors or managers closer to the shop floor than Deputy Chief of Operations Deo, who had four levels of supervision between himself and the Crew Chiefs.

The Union alleges three retaliatory actions were taken against Cordoba and Reyes. First, assignments were issued in a discriminatory fashion including adding to their workload and forcing them to conduct risky health screenings. Second, the pair were improperly denied access to rain gear, gators, and other work equipment that was provided to other Crew Chiefs. Third, the two Crew Chiefs were subject to harassment, including threats of discipline, stalking, and discriminatory application of the bathroom break policy. In addition to the alleged retaliatory acts above, the Union claims that management repeatedly promised and failed to take action in response to complaints by Cordoba, Reyes, and the Union. Most significantly, DPR failed to act on repeated complaints made regarding Sierra's harassment of Reyes. The Union argues that DPR was aware

¹⁴ 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

of Cordoba and Reyes's union activity, pointing to the July 6, 2020, labor-management meeting at which their "ongoing issues" were discussed by Union representatives and DPR management. (Union Br. at 43) The Union claims that a retaliatory motive should be inferred because Cordoba and Reyes were Union activists, they were the exclusive targets of the retaliatory mistreatment, and no explanation was presented for their mistreatment other than their union activity. Thus, it argues that it has established a *prima facie* case. It asserts that interpersonal issues between the Crew Chiefs, the alternate explanation that DPR offered for the mistreatment of Cordoba and Reyes, is not supported by the evidence and is illogical since Cordoba and Reyes were the targets of the adverse actions taken. The Union argues that DPR's failure to take action to remedy the workplace issues was not based on any legitimate business reason, and DPR has not presented one.

The Union further argues that DPR's retaliatory actions constitute an independent violation of NYCCBL § 12-306(a)(1) because these actions were taken as a result of the Union's advocacy, and DPR's failure to resolve the issues served to undermine the efficacy of the Union and thus chill all Union activity. The Union therefore claims that those actions were inherently destructive of protected rights.

As a remedy, the Union asks that DPR be ordered to cease and desist from engaging in the specified improper practices. It additionally asks that DPR be directed to post a notice of the improper practice physically and electronically at the employees' worksite. Finally, the Union requests any further relief that may be just and proper.

City's Position

The City argues that the petition should be denied because the Union has failed to prove the necessary elements of a *prima facie* claim of retaliation under NYCCBL § 12-306(a)(1) or (3). The City claims that the Union has failed to demonstrate a causal link between any protected activity and any adverse action taken by DPR in violation of NYCCBL § 12-306(a)(1) or (3). It

asserts that the Union relies solely on the temporal proximity of the July 6, 2020 labor-management meeting to complaints made by Reyes and Cordoba to establish a claim of retaliation and that all other arguments for the existence of anti-union animus are conclusory, with no underlying factual support. The City ascribes the problems complained of to personal animus between co-workers, rather than any retaliatory action based on union status or activity. The City further claims that the record does not establish that either Cordoba or Reyes were subject to adverse employment actions in violation of NYCCBL § 12-306(a)(3). It argues that none of the incidents complained of, i.e., last minute assignment changes, assignment of extra workload, failure to provide rain gear or motorized vehicles for work use, discriminatory application of workplace rules, and assignment of undesirable duties such as checking temperatures of incoming personnel, constitute adverse employment actions.

The City additionally argues that there is no independent violation of NYCCBL § 12-306(a)(1). It asserts that the Union's claim of interference under NYCCBL § 12-306(a)(1) does not rise to the level of "inherently destructive" required for such a finding. If the Board were to find that some or all of the alleged retaliatory acts did meet that threshold, the City argues that there is nevertheless no violation because WDP management was either unaware of those acts or was actively working to address them once they were brought to its attention.

DISCUSSION

The Union alleges that DPR violated NYCCBL §12-306(a)(1) and (3) by subjecting Cordoba and Reyes to onerous working conditions, including denial of necessary equipment, imposing stricter discipline on them than on their coworkers, and selectively subjecting them to harassment, discriminatory interference with their work assignments, and denial of necessary

equipment.¹⁵

To determine if an employer's 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 this Board in *Bowman*, 39 OCB 51 (BCB 1987). Pursuant to the test, a petitioner must demonstrate that:

1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also DC 37*, 1 OCB2d 6, at 27 (BCB 2008).

If a petitioner shows facts concerning these two elements sufficient to establish a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements, or may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU*, 77 OCB 35, at 18 (BCB 2006).

Regarding the first prong of the *Bowman* test, we have long held that an activity that falls within the protection of NYCCBL § 12-305 must be related, even if indirectly, to the employment relationship between the City and bargaining unit employees and must be in furtherance of the collective welfare of employees. *See Local 1087*, DC 37, 1 OCB2d 44, at 25 (BCB 2008); *COBA*, 53 OCB 17, at 11 (BCB 1994). If management has knowledge of the protected union activity, then the first prong of the *prima facie* case is met. *See Local 376*, DC 37, 73 OCB 15, at 13 (BCB 2004).

In the instant case, the City did not dispute that Cordoba and Reyes engaged in union

¹⁵ While the claims at issue arose prior to November 1, 2020, the statute of limitations under NYCCBL § 12-306(e) was tolled until November 4, 2020, pursuant to an order from the Governor regarding the COVID-19 pandemic. The claims are therefore timely.

activity by seeking the Union's assistance. Further, the record established that Cordoba and Reyes discussed concerns about workplace issues at WDP with the Union. These issues were not unique to Cordoba and Reyes but concerned matters that affected all or many other Crew Chiefs. For example, in early 2019, Cordoba complained to the Union about a training Crew Chiefs had been ordered to conduct. This complaint resulted in the Union filing an out-of-title grievance regarding the training assignments. Additional workplace issues that Cordoba and Reyes raised with the Union included concerns about the disposal of dead animals and used syringes, last minute changes to assignments, alleged HIPAA violations, and the bathroom break policy.

The record further establishes that Cordoba and Reyes were identified as the source of workplace complaints at the July 6, 2020, labor-management meeting. These complaints included alleged violations of medical privacy, orders to the Crew Chiefs about the improper burial of dead animal carcasses, the issue of bathroom use, and changes to the scheduling and posting of assignments. In addition, Henderson noted in an October 2, 2020 email to Ehrlich that "issues raised on behalf of Peter Reyes and Angela Cordoba" were discussed at the July 6, 2020 meeting. (Union Ex. G) City witnesses did not rebut those claims. Therefore, we find that as of July 6, 2020, the City had knowledge of Cordoba and Reyes' union activity.

We do not find sufficient evidence of DPR's knowledge of Cordoba and Reyes' union activity prior to July 2020. Cordoba and Reyes gave unrebutted testimony that they had complained to supervisors about being given more work than other Crew Chiefs and denied gators prior to that date. The Board has held that protected employee rights under NYCCBL § 12-305 include participation in union activity such as holding a union position, acting at the union's request, filing a grievance, or advocacy on behalf of other union members.¹⁶ Actions that appear

¹⁶ The NYCCBL's protections apply only to union activity and do not include concerted activity

to have only an individual purpose and are not union-sponsored or do not promote the collective welfare of the bargaining unit may not be protected. *See, e.g., Archibald*, 57 OCB 38, at 19-20 (BCB 1996) (letter to Mayor threatening legal action if a supervisor did not apologize to a co-worker who was allegedly mistreated was not protected activity). We therefore find that to the extent Cordoba and Reyes may have complained directly to their supervisors about their assignments, workload, or other issues prior to the July 6, 2020 labor-management meeting, these complaints did not constitute protected union activity and do not demonstrate that DPR had knowledge of their protected activity prior to July 2020. Similarly, although Reyes and Cordoba testified that they had been making complaints to the Union for years prior to that date, we find no evidence that the Union relayed the source of these complaints to management earlier than July 6, 2020, or that DPR was otherwise aware of Cordoba and Reyes' union activity prior to that date.¹⁷

The second prong of the *Bowman* test requires that “a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management’s actions [that] are the subject of the complaint.” *OSA*, 7 OCB2d 20, at 19 (BCB 2014) (quoting *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007)) (additional citation and internal quotation marks omitted). It “is a rare case where there is direct evidence of the employer’s improper motivation.” *Local 30, IOUE*,

as more broadly defined under the National Labor Relations Act (“NLRA”). *See Washington*, 71 OCB 1, at 17-19 (BCB 2003) (citing *Rosen v. PERB*, 72 N.Y.2d 42, 49-50 (1988)); *see also CIR*, 67 OCB 45, at 7 (BCB 2001) (noting that “concerted activity that falls short of the exercise of rights enumerated in NYCCBL § 12-305 does not support a claim of protected activity”) (citations omitted). Similarly, Civil Service Law Article 14 (“Taylor Law” or “CSL”) § 202 includes the right to form, join, or assist a labor organization, but does not include the right to engage in “concerted activity.” *See Rosen*, 72 N.Y.2d 42, at 49.

¹⁷ While Benn identified Cordoba as the source of her information for the 2019 grievance concerning training assignments, there was no evidence that this was communicated to DPR supervisors or management.

8 OCB2d 5, at 21 (BCB 2015). Thus, “typically, motivation is proven through the use of circumstantial evidence, absent an outright admission.” *Colella*, 7 OCB2d 13, at 22 (BCB 2014) (quoting *Burton*, 77 OCB 15, at 26 (BCB 2006)) (internal quotation and editing marks omitted). The Board, therefore, considers “whether the temporal proximity between the protected union activity and the retaliatory action, in conjunction with other facts, supports a finding of improper motivation.” *Id.* (citing *DC 37, L. 376*, 6 OCB2d 39, at 19 (BCB 2013)) (additional citation omitted). Claims of improper motivation, however, “must be based on statements of probative facts, rather than speculative or conclusory allegations.” *Local 30, IOUE*, 8 OCB2d 5, at 21 (citing *DC 37, L. 983*, 6 OCB2d 10, at 29 (BCB 2013); *Morris*, 3 OCB2d 19, at 15 (BCB 2010)).

Here, there is no direct or circumstantial evidence of union animus. Instead, the record shows evidence of supervisors’ mistreatment of some Crew Chiefs, including Cordoba and Reyes, but does not establish that the mistreatment was connected to their union activity. The alleged harassment of Reyes, onerous work assignments and schedule changes, and denial of necessary equipment all occurred within a few weeks after the July 2020 labor management meeting. However, these alleged retaliatory actions do not suggest improper motivation because the record is clear that they were a continuation of mistreatment and a “toxic” work environment that predated DPR’s knowledge of the union activity. (Tr. 499); *see Leiva*, 9 OCB2d 11, at 16 (BCB 2016) (finding no anti-union animus when the alleged harassment predated petitioner’s earliest union activity); *DEA*, 79 OCB 40, at 22 (BCB 2007) (no anti-union animus and thus no *prima facie* case found where alleged retaliatory actions predated management knowledge of protected activity) (citing *L. 237, IBT*, 69 OCB 12 (BCB 2002) (no *prima facie* case made out where management’s knowledge of protected activity could not be shown to have reached decision-maker prior to allegedly retaliatory act); *Wilson v. New York City Housing Auth.*, 2007 U.S. Dist. LEXIS 25258 at *30 (S.D.N.Y. April 2, 2007) (“Where the decision to take adverse employment action is reached

prior to a plaintiff's protected activity, the causal connection necessary to link the adverse action to that protected activity is lacking”)).

The Union argues that union animus can be inferred because “union activists” Reyes, Cordoba, and Pagan were singled out for mistreatment that occurred soon after the July 6, 2020, meeting. (Pet. at 8) However, the record reflects that those were not the only employees to be mistreated at WDP and that the types of mistreatment Cordoba and Reyes experienced after the July 6, 2020, labor-management meeting also occurred long before that date. For example, the timing of Cordoba and Reyes’ allegations of discrimination in the issuance of assignments does not suggest a causal connection to Cordoba and Reyes’ union activity. Cordoba and Reyes testified that their assignments were frequently altered at the last minute, they were assigned to more difficult zones, they were given undesirable assignments such as conducting health screenings, and they were given multiple assignments in one day when other Crew Chiefs had only a single assignment. However, while Reyes testified that the last-minute assignment changes began after he and Cordoba brought complaints about other issues to the Union, there is no evidence in the record that DPR was aware of those other complaints.¹⁸ Further, the frequency of assignment changes began to rise before the July 6, 2020, labor-management meeting, and the assignment changes did not apply only to Cordoba, Reyes, and Pagan. Both Benn and Ehrlich testified that the frequency of assignment changes increased after the start of the pandemic. In addition, Pagan, who left the program prior to the labor-management meeting, testified that in addition to Reyes, Cordoba, and himself, other Crew Chiefs including Campbell, Cox, and Martin also received more frequent assignment changes.

¹⁸ Cordoba complained that, at the inception of the pandemic, she was singled out to work with POP workers, putting her at a greater health risk than other Crew Chiefs. Similar to the increased frequency of assignment changes, we find this assignment pre-dated DPR’s knowledge of her union activity.

Cordoba and Reyes also testified that they were denied the use of equipment that was supplied to other Crew Chiefs, including the use of gators to transport themselves and their equipment across the park. Without a gator, they had to pull heavy equipment around the park in a wagon. Cordoba and Reyes were also denied access to rain gear on a rainy day and required to work outside with no rain jackets. However, as with the assignment changes, equipment-related issues began prior to the July 6, 2020, labor-management meeting and affected other Crew Chiefs as well. In Pagan's June 29, 2020 email to Benn explaining his departure from WDP, he complained of being denied the use of a gator for assignments that would usually require one, and of having to work in the rain without proper gear or support.

Finally, Cordoba and Reyes testified that they were subject to harassment by supervisors. Cordoba, Reyes, and Pagan testified that they were subject to increased scrutiny and threats of discipline relative to other Crew Chiefs. For example, they described being threatened with discipline for not having their shirts tucked in, while other Crew Chiefs and supervisors did the same with no consequences. Similarly, they described being made to report their bathroom usage to supervisors, while other Crew Chiefs were not required to do so. In addition, Reyes was followed and observed by Sierra, behavior which continued even after promises by WDP management that Sierra would stop and not be assigned as Reyes' supervisor. Once again, while there appear to have been real and problematic supervision issues, there is simply no evidence that the increased scrutiny and threats of discipline were motivated by Cordoba and Reyes' union activity. To the contrary, these actions appear to have occurred prior to July 2020. For example, in Pagan's June 29, 2020, resignation email, he describes a broken system in which he and "a few" other coworkers were subject to more scrutiny and harsh discipline than others and singled out for mistreatment by supervisors. (Union Ex. O) Pagan described the mistreatment he and other Crew Chiefs were subject to as a situation that had been ongoing "for the last 3 years and has just

progressively gotten worse with each passing day” and later reiterated that “[m]ost if not all” of these issues “have been going on for a VERY LONG TIME.” (*Id.*) (emphasis in original) Pagan also testified that he was verbally reprimanded twice prior to July 2020 for using the bathroom without calling a supervisor. While the Union alleges that the frequency of these incidents may have increased following the labor-management meeting, there is no evidence that this increase was tied to Cordoba and Reyes’ seeking Union assistance. Deo testified that many problems were exacerbated by the absence of POP workers as a result of the pandemic commencing in March 2020. Cordoba testified that the problems at WDP escalated with Sierra’s hiring, which also predated the labor/management meeting.

Moreover, the record does not reflect that it was only Pagan, Reyes, and Cordoba who were subjected to differential treatment by supervisors. Benn testified that she began receiving more complaints regarding the management of WDP in 2020, and that complaints regarding assignment changes in particular accelerated around April or May of 2020. Benn claimed that “just about all” the Crew Chiefs in the program complained to her about the same issues, including many who left the program prior to summer 2020 as a result of those conditions. (Tr. 53) Benn further testified that she continued to receive complaints from other Crew Chiefs in WDP after the departure of Cordoba and Reyes.

All of the alleged adverse employment actions, discriminatory distribution of assignments and equipment and excessive scrutiny and discipline of certain Crew Chiefs, began prior to the July 6, 2020 labor/management meeting when WDP management first learned of Cordoba and Reyes’ union activity. As a matter of proof, acts that predate knowledge of union activity cannot be motivated by that union activity. *See Leiva*, 9 OCB2d 11, at 16; *DEA*, 79 OCB 40, at 22. Therefore, the timing of the alleged adverse actions does not suggest that they were motivated by union animus. There is no other circumstantial evidence in the record that the Union relies upon

to demonstrate that the mistreatment of Reyes and Cordoba was connected to union activity. Moreover, testimony from the Union's witnesses suggests that union activity was not the motivation for the alleged discriminatory actions. Pagan's letter does not ascribe the mistreatment he experienced to his contact with the Union, but instead to generalized favoritism unconnected to union activity. Benn, Pagan and Henderson testified that a "clique" of WDP supervisors were perceived to favor some Crew Chiefs over others. (Tr. 102, 143-145) Crew Chiefs in "good favor" with management were treated well and given easier assignments, while disfavored Crew Chiefs, including Cordoba, Reyes, Pagan, and Martin were mistreated. (Tr. 186) Although we can conclude that the disfavored Crew Chiefs suffered more onerous working conditions, we cannot conclude that those conditions were a result of Cordoba and Reyes' union activity.¹⁹ The Board may consider allegations of wrongdoing only insofar as they involve retaliation based on union activity, a violation of provisions of the NYCCBL.

In the absence of sufficient evidence that the treatment of Cordoba and Reyes was based on their seeking the Union's assistance, we cannot find discrimination in violation of the NYCCBL. Thus, we find that the Union has failed to establish a *prima facie* case. Accordingly, the Union's claim that DPR violated NYCCBL §12-306(a)(1) and (3) is dismissed in its entirety.²⁰

¹⁹ To some degree, Cordoba and Reyes may have suffered more onerous working conditions than other Crew Chiefs, i.e., they were given the temperature-taking assignment, Sierra failed to bring them raincoats, and they had more frequent schedule changes. However, due to a lack of specificity in witness testimony as to the dates, duration, or frequency of assignments, we cannot conclude a clear increase in onerous work assignments for only Cordoba and Reyes after July 2020. Regardless, there remains a lack of sufficient proof that anti-union animus motivated any increase in these actions.

²⁰ 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, for which we have found no merit. *See DC 37, L. 2507 & 3621*, 15 OCB2d 2, at 33 n. 33 (BCB 2022) (citing *DC 37, L. 983*, 6 OCB2d 10, at 21 n. 13 (BCB 2013); *SSEU, L. 371*, 79 OCB 34, at 14 (BCB 2007)).

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-4419-21, be and the same hereby is, dismissed as to any claims arising under NYCCBL § 12-306(a)(1) and (3).

Dated: August 3, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLINES
MEMBER

I dissent. CHARLES MOERDLER
MEMBER

I dissent. PETER PEPPER
MEMBER