MEBA, 15 OCB2d 25 (BCB 2022)

(Docket No. BCB-4355-19)

Summary of Decision: The Union claimed that DOT violated NYCCBL § 12-306(a)(1) and (3) when it demoted a Union Shop Steward serving provisionally as a ferry boat Captain and rescinded a practice of paying employees for trainings attended on their day off in retaliation for union activity. The City argued that the Captain was not demoted because of his union activity, but rather for DOT rule violations which led to a loss in confidence in his ability to safely perform his duties. The Board found that the Union established a *prima facie* case as to both of its claims and that DOT did not establish legitimate business reasons to justify its decision not to pay employees for attendance at a training or for the demotion. Accordingly, the petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO,

***Petitioner*,**

-and-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION AND THE NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

***Respondents*.**

DECISION AND ORDER

On October 11, 2019, the Marine Engineers' Beneficial Association, AFL-CIO ("Union" or "MEBA") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Transportation ("DOT"). The Union filed an amended petition on October 18, 2019, and a second amended petition on July 28, 2020, which added the New York City Department of Citywide Administrative Services ("DCAS") as a respondent. The Union

alleges that DOT 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 demoting Christian Ferraro, a Union Shop Steward serving provisionally as ferry boat Captain, and by rescinding its policy of paying for employees to attend training on their day off, in retaliation for Ferraro filing grievances and advocating for the Union. The City argues that it had a legitimate business reason to demote Ferraro because he was seen on more than one occasion looking at a cell phone while working, which violates DOT rules and led to a loss in confidence in his ability to safely perform his duties. The Board finds that the Union established a *prima facie* case as to both of its claims and that DOT did not proffer a legitimate business reason to justify its decision not to pay employees for attendance at a training. Additionally, the Board found that with respect to the demotion, the business reasons proffered by DOT were not legitimate and were instead pretext for retaliation. Accordingly, the petition is granted.

BACKGROUND

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

The Union represents U.S. Coast Guard-licensed officers in the titles of Captain (Ferry) ("Captain"), Assistant Captain (Ferry) ("AC"), Mate (Ferry) ("Mate"), Chief Marine Engineer, and Marine Engineer (collectively, "Licensed Officers"), employed by DOT and working at the Staten Island Ferry ("Ferry"). The head of the Ferry division is the Deputy Commissioner and Chief Operations Officer ("Deputy Commissioner"), who is assisted by a Director of Ferry Operations, Senior Port Officers, and a Director of Administration. At the time of the events

leading to the filing of the instant improper practice petition, the Deputy Commissioner was James DeSimone, and the Director of Ferry Operations was John Garvey.[1]

Christian Ferraro was hired by DOT in 2009 as a Deckhand. He then became a Mate, which is his permanent Civil Service title. After working as a Mate for approximately one year, Ferraro was appointed as a provisional Assistant Captain in 2011 and later a provisional Captain in 2014. Ferraro was elected as a Shop Steward for the Union in 2016. He testified that he was motivated to run for the position because he felt as though previous shop stewards were not familiar with the collective bargaining agreement ("Agreement") and that they were not aggressive and "allowed management to . . . basically do as they pleased." (Tr. 271) Ferraro stated he believed that the DOT was violating scheduling and overtime rules and that someone needed to "police" the Agreement. (*Id*.)

Ferraro's Union Activity

On March 19, 2018, Ferraro attended a labor-management meeting and discussed his concerns that certain scheduling and overtime provisions in the collective bargaining agreement ("Agreement") were being violated.[2] According to Ferraro, the meeting didn't go well, and members of management became upset and stated that "we can follow the contract too." (Tr. 274) Similarly, Director of Administration George Mahoney testified that the meeting was contentious

[1] When DeSimone retired in June 2020, Garvey was promoted to the Deputy Commissioner position.

[2] Also present at the meeting was Roland Rexha, the Union's Shop Steward for below deck officers, as well as DeSimone, Garvey, and Director of Administration George Mahoney on behalf of management.

and that the allegations that the contract was being violated surprised and "outraged" DOT Ferry management, because they "were following decades upon decades of past practice."[3] (Tr. 870)

Nevertheless, after that meeting ended, Ferraro was approached by Garvey, who asked him if he would be interested in taking a Port Officer position. Ferraro testified that it is considered a promotion to be assigned to a Port Officer position because it is an office job and Port Officers do not drive a vessel. Port Officers have more flexible schedules, access to more overtime, can take their vacations whenever they want, and are generally the highest-paid Captains. Ferraro stated that in the past, Shop Stewards have often been offered this position. However, Ferraro testified that he declined the offer because he felt that being a Port Officer would conflict with his duties as a Shop Steward.

On April 10, 2018, Ferraro filed a grievance alleging that DOT's practice of appointing bargaining unit employees to Port Officer positions without allowing them to bid for the positions on the basis of seniority violated the Agreement. The grievance also alleged that the assignment of employees to "TBA" positions that do not have a weekly schedule, without regard to seniority, violated the Agreement.[4] The issues were separated into two grievances, which were denied at Step III, and the Union filed a request for arbitration of the grievances on January 11, 2019.[5]

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[3] Mahoney oversees all human resource and personnel matters at the Ferry. He is also involved in disciplinary matters, which includes coordinating with supervisors and directors for documentation of verbal and written warnings.

[4] "TBA" stands for "to be assigned," and employees in these positions have schedules that vary from week to week. This enables DOT to fill vacancies on boat crews with TBA employees who are paid straight time, instead of assigning open shifts to Union members who would earn overtime.

[5] Arbitration hearings were held on January 24, 2020, and February 28, 2020. On June 1, 2020, the arbitrator issued his opinion and award, which denied the grievances in their entirety.

In February 2019, Ferraro learned that an upcoming radar training course had been abruptly cancelled.[6] Ferraro testified that when he spoke with Garvey about the issue, Garvey said that "training is not in the contract and it is not required" and "if we have to abide by the contract then we don't have to provide this training." (Tr. 303) Garvey also told Ferraro that if he continued to advance the grievance, DOT would stop paying for the training.[7] On February 14, 2019, Ferraro sent DeSimone an e-mail, which stated:

> I am writing regarding last minute cancellation of a scheduled radar course. I was informed by Captain Garvey that if MEBA continues with the filed Arbitration that he wouldn't pay for training anymore. I am requesting that you reinstate the radar course for those that were already scheduled. It is only fair because no notice was given to the affected Officers and they could not schedule training on their own. If radar renewal courses will no longer be given I am requesting official notice so that I can inform the Deck Officers that they need to handle radar renewals on their own.

(Union Ex. 14) Ferraro testified that DeSimone reinstated the course, which took place the following day, but unlike in the past, Officers were not paid to attend if the course fell on their day off.[8]

On February 20, 2019, Deputy Commissioner DeSimone called the Union's office and asked to speak with MEBA's Atlantic Coast Vice President ("VP"). Because the VP was not in the office, the call was transferred to MEBA Patrolman Nico Sermoneta. Sermoneta testified that DeSimone had an "angry" tone and that because the call seemed so "abnormal" he immediately

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[6] Licensed Officers are periodically required to take the course to maintain their U.S. Coast Guard credentials.

[7] Garvey's testimony did not rebut Ferraro's testimony concerning this conversation.

[8] At some point later on, the DOT restored its practice of paying employees for their attendance at trainings on their regular day off, and the Union seeks only compensation for loss of pay for the February 15, 2019 training.

started taking notes, which he emailed that same day to MEBA officials, including its President and General Counsel.[9] (Tr. 58, 61) Sermoneta testified that the portion of the email in between the dotted lines or dashes was his attempt to transcribe what DeSimone was saying in real-time while on the phone call. He stated that he believed the "gist" of the phone call was that DeSimone "did not want certain union . . . members at the Ferry to pursue contract certain grievances" and that DeSimone was "making threats to take action against someone for pursuing union activity." (Tr. 60) The email record of the conversation states:

> On February 20, 2019
> James DeSimone of NYC DOT called the NJ/NY MEBA Union hall.
>
> After finding that ACVP Callahan wasn't present, he was put through to me, Nico Sermoneta. Mr. DeSimone was clearly upset. He says members had been coming to his office and complaining that our Deck Shop Steward was pursuing grievances that they didn't want pursued. He went on to berate me and to complain that Mr. Ferraro was pursuing grievances about the crewing/hiring practices. Below, I included what notes I could jot down on my computer during the call.
> ----------
>
> Jim De Simone
> Situation: Chris Ferraro has taken a number of measures with grievances that are now pending arbitration. "8 members are complaining to DeSimone."
>
> The stuff he's picking out: I'm going to go to the mat with it.
>
> It's going to blow up.
> Best case scenario is that everyone in the port office is going to be on the dock and no more overtime. If some arbitrator rules that past practice for 50 years isn't ... we're going to go to the mat.
>
> "We give our captains and chief engineers 1 week vacation bids? You know why? I can follow the letter of the contract too!

[9] Sermoneta testified that he had only spoken to DeSimone one time, a few days earlier in a phone call that he had initiated.

> Tell your members to stay out of my office. And you don't ever call me again."
> ---
>
> I'm passing this on, because it's clear to me that Mr. DeSimone is upset, and he's said some things that indicate he may already be retaliating for or planning to retaliate for lawful union activity.

(Union Ex. 1) (reprinted in original format).

Mahoney testified that he spoke with DeSimone after this call and that "it was very clear" that DeSimone's comment about going to the mat meant that "management would not roll over on this arbitration issue and they would utilize all means to prevail in the arbitration because we took the matter very seriously due to all these potential changes that could occur at the [F]erry with hiring scores of new employees to the cost of millions of dollars per year, significantly changing our crewing and [F]erry operation scheduling." (Tr. 874)

Chris DeFonce, a Chief Marine Engineer and MEBA member, testified that on February 25, 2019, he emailed his direct supervisor, Senior Port Engineer Brad Hopper, to ask if he could attend training that was necessary to maintain his license. The following day Hopper responded, writing:

> I will take a look and see what can be done. I do know that in light of MEBA's demand to go to arbitration over what are deemed 'violations to the contract', management has taken a closer look to ensure what is and is not in the contract. Unfortunately STCW is not a requirement of [employment] and STCW training is one of the things that has been provided outside of the collectively bargained contract.[10] With Capt. Ferraro requesting that both sides merely "follow the contract" word for word, any non-required training may once again become the responsibility of the mariner. I personally heard a conversation where this was told to Capt. Ferraro and he more or less said it doesn't affect him and [it's] not required to work

[10] The record does not make clear what "STCW" stands for. However, DeFonce testified that it is a certificate that is required for international shipping, which is a license that Licensed Officers were "highly encouraged" to maintain. (Tr. 95)

> at SIF then closed with "but at least [SIF management] will be following the contract." In my opinion, he has overstepped his bounds as Shop Steward in fighting for his own agenda rather than for things which truly matter to the majority of which [on] behalf of the rank and file members. I certainly could be mistaken and not being able to bid a March vacation or an appointed position have the MEBA membership up in arms, but these things were in place before I took this position and they weren't an issue back then.
>
> I only say these things because I think [MEBA's East Coast Vice President] needs to know that Chris [Ferraro] is on a personal crusade (again, unless I'm out of touch) which could potentially affect the membership. I will look at [] your previous message and do what I can to make you whole, you have my word on that.

(Union Ex. 7) DeFonce responded in an email reiterating his need to attend the training and stating that he was not trying to argue for or against the grievances but that he felt he was entitled to receive the training. Hopper replied by stating that he understood DeFonce's concerns and that he would do whatever he could to "make [him] whole." (*Id*.) The email also stated, "I know [Garvey] feels like Chris is putting a stick in his eye with demanding arbitration after losing the grievance on three (3) separate occasions and I do understand where human nature can come into play when things become or are perceived to be personal." (*Id*.)

DeFonce testified that Ferraro was the first Shop Steward to take action to address Union members' frustrations "in an official capacity through the grievance process." (Tr. 102) He stated that management did not like this because "they were forced to have to actually answer for certain decisions that were basically made by them with no counter from anybody that represented us in the past." (*Id*.) This led to a relationship between Ferraro and management that DeFonce described as "more adversarial" than the relationship with previous Shop Stewards. (Tr. 103)

Demotion of Ferraro

Ferraro testified that on September 9, 2019, he was on his way to the DOT Advocate's office for some Union business when he was handed a letter informing him that he was being

suspended. He was not provided with any reason or explanation for the suspension. Ferraro later learned that the suspension was due to allegations that he had used his cell phone while working.[11] On October 3, 2019, Ferraro received a letter dated September 30, 2019, which stated that his provisional services as a Captain were being terminated and that he was being reassigned to his permanent Civil Service title of Mate. Also on October 3, Ferraro received a second letter, dated that day, stating that his suspension without pay was being lifted as of close of business, October 8, 2019.

On October 9, 2019, Ferraro returned to work as a Mate. Ferraro testified regarding a heated exchange he had in the pilothouse of the boat with Garvey on that day. According to Ferraro, Garvey approached him and asked him in a condescending manner, "How do you feel?" (Tr. 309) Referring to the night that he was captured on video looking at his cell phone, Ferraro responded that he had done Garvey a favor by working the midnight shift, and then Ferraro asked, "and this is what you do to me[?]" (Tr. 308) Ferraro testified that Garvey insisted that he had nothing to do with Ferraro's suspension and when Ferraro responded that he didn't believe him, Garvey got angry and said, "oh fuck you," among other things. (Tr. 311) Captain Tom Harvey testified that he witnessed this encounter and heard Garvey tell Ferraro to go "fuck" himself more than once. (Tr. 123) Harvey stated that he had never heard Garvey yell or curse at an employee like that before. According to Harvey, Ferraro and Garvey were both "a little heated," and the conversation ended with Ferraro telling Garvey "I'll see you in court." (Tr. 122, 126)

On or about January 15, 2020, Ferraro was served with disciplinary charges for allegedly using his cell phone during arrival and/or departure procedures while on duty on the Ferry boat

[11] As will be discussed in further detail below, the alleged cell phone use was discovered when video taken from the Ferry boat pilothouse was reviewed by DOT in connection with an investigation of allegations of a Mate sleeping on the job.

John Noble on August 7, 2019. On July 16, 2020, Ferraro applied to take the Qualified Incumbent Examination for permanent appointment to Captain. However, his application was denied because he did not meet the minimum qualification for this examination since he was not currently employed as a provisional Captain.[12] In April 2021, DOT withdrew the disciplinary charges and restored 30 days' pay to Ferraro. The City did not provide any explanation as to how or why the decision to withdraw the disciplinary charges or restore Ferraro's pay was made.

August/September 2019 Investigation

City witnesses Garvey, Mahoney, and Senior Port Captain Barry Torrey testified regarding how the discovery of Ferraro's alleged cell phone use came about as well as the basis for the decision to demote Ferraro.[13]

According to all three witnesses, in August of 2019, Garvey observed what he believed was a Mate sleeping in the pilothouse of a vessel. The DOT therefore commenced an investigation that included reviewing video footage of a particular Captain and his crew over various dates to

[12] The last Civil Service Exam for Captain was administered in 2005. While the 2020 Qualified Incumbent Examination required applicants to be currently employed as a provisional Captain and to have served as a provisional Captain for at least two years, we note that the Job Specification for Captain states that the minimum requirements include one year of satisfactory service as an AC, Mate, or Deckhand, or equivalent experience, and provides that the direct lines of promotion are from AC, Mate, and Deckhand.

[13] During the time period leading up to Ferraro's discipline, Torrey was the Senior Port Captain for the Ferry division. At the time of his testimony, Torrey retained this title but had also since been promoted to Director of Ferry Operations. As Senior Port Captain, Torrey is responsible for the supervision of Captains and any allegation of conduct with the potential for discipline would be reported to him. As Director of Ferry Operations, Garvey was responsible for oversight of all Ferry operations and the supervision of Captains and ACs, among others. If he learned of alleged misconduct, Garvey would either ask the Port Captain to address the issue informally or, if the issue was more severe, he would consult with Deputy Commissioner DeSimone. DeSimone would then generally decide whether to refer a particular incident to the DOT Advocate's office for formal discipline.

determine whether sleeping was a systemic issue. During the course of this review, on one shift Ferraro was seen on video using or looking at his cell phone a number of times during the midnight shift on August 7, 2019.[14] Video clips of the date in question show Ferraro sometimes scrolling through his phone, looking at music videos at times, reading a text message or an email, putting on his reading glasses so that he could see the phone better, and in general failing to observe the passenger transfer procedures. In one clip, Ferraro is seen looking intermittently at his phone for approximately a seven-minute period. The majority of these incidents occurred when the boat was moored, or what is referred to as "on the hooks."

Garvey testified that based on this video, DeSimone made the recommendation that Ferraro be stepped down to the title of Mate. When asked if he was involved in this decision to demote Ferraro, Garvey responded: "To some degree I was. I was asked about it, and I agreed with the decision." (Tr. 836) DeSimone sent his recommendation to the Human Resources department, and Mahoney assisted with gathering and sending the necessary paperwork and evidence to the Advocate's Office. Mahoney testified that the decision was "based on a culmination of previous incidents with Mr. Ferraro" that led to "lost confidence in his ability to safely operate a [F]erry boat that carries thousands of people every half hour . . . ."[15] (Tr. 879)

There is no written summary of the specific incidents that DOT relied upon in its demotion of Ferraro. However, the City's witnesses testified that the incidents considered included: a

[14] In particular, the disciplinary charges filed against Ferraro state that he was observed looking at his cell phone during the implementation of arrival and/or departure proceedings at 12:26 a.m., 2:29 a.m., 4:25 a.m., 5:27 a.m., and 6:48 a.m.

[15] Mahoney testified that other people involved in the ultimate decision to demote Ferraro were the Agency Advocate, Deputy Commissioner for Human Resources, the Director of Personnel, the DOT Legal department, and the DOT Chief Operations Officer.

February 9, 2017 incident in which Ferraro inadvertently bumped a joystick, causing damage to the boat slip and vessel; a March 4, 2017 Letter of Warning that Ferraro received for briefly looking at his cell phone while he was supervising an AC who made what is known as an "ugly landing"; and Ferraro's performance in a Navigational Safety Assessment Program ("NSAP") training in April 2017.

Garvey testified that the video showing Ferraro's cell phone use in August 2019 represented a "third strike" against Ferraro that led to his demotion. (Tr. 833) He clarified that Ferraro had "failed to listen on prior occasions about paying attention in the pilothouse and so in this particular case we didn't want him to be operating in the pilothouse anymore. He was demoted to Mate." (*Id*.) Garvey stated that in general, if there is a loss of confidence in the ability of a Captain or AC to perform his duties, a demotion is appropriate.[16]

The nature of the incidents upon which DOT relied to demote Ferraro are briefly described below.

February 9, 2017 Joystick Incident

On February 9, 2017, Ferraro was working on the Barberi vessel when there was a blizzard warning. He testified that the boat's wipers were not working correctly and so he grabbed a stick and reached out to try and get them to touch the windshield.[17] In the process of doing this, he

[16] When given a hypothetical about a Captain or AC reading a newspaper while the boat is on the hooks and passengers are loading or unloading, Garvey said that the first time this was witnessed he would probably talk to the employee verbally. If the employee did not accept the counselling and did it again, Garvey would issue a written warning. If it happened a third time, Garvey testified that "we'd probably lose confidence and have them demoted to their lowest title that we can demote them to." (Tr 844)

[17] Retired Chief James Capelonga testified this is the method generally used to get the wipers to touch the windshield and that doing so was not considered misconduct.

inadvertently bumped up against the boat's joystick, which caused the boat to abruptly shift while it was moored and attached to the hooks, and it hit the slip. Ferraro testified that it took him a minute or so to get the vessel into position and then he immediately called Garvey to report the incident. According to Ferraro, Garvey responded by stating "shit happens" and asking Ferraro if he could continue working that day. (Tr. 342) Ferraro testified that he finished his shift that day and was not disciplined for the incident.

Torrey described the incident and videos depicting it that were entered into the record. According to Torrey, using a stick to adjust the wipers was "typical," although trying to adjust them while they are moving "would not be recommended" because it could be distracting. (Tr. 621-622) Torrey noted that the incident occurred at 3:30 a.m., at a time when there are fewer than usual passengers. The abrupt shifting of the boat occurred shortly after the last passenger had disembarked from the vessel, and Torrey testified that had the incident occurred a few seconds earlier, or a few hours later when there were more passengers on board, there could have been serious injuries. Torrey testified that the incident caused damage to parts of the vessel and the slip, and documents show that repairs cost approximately $280,000 in outside contractor charges as well as $16,000 in additional DOT labor costs. (*See* City Exs. 2, 3)

March 4, 2017 Incident and Letter of Warning

Approximately one month after the joystick incident, on March 4, 2017, Ferraro was working as a Captain when the AC driving the boat began to have some trouble as he was approaching the slip in Staten Island. According to Ferraro, he got up and stood next to the AC to observe him and noted that the boat was "getting set very quickly to the left." (Tr. 356) Ferraro began directing the AC into the slip but as the boat got closer to the slip it got hit with a strong current. As a result, the boat made initial impact with the port at a perpendicular angle, then it

proceeded toward the wall where there was additional contact. Ultimately, the AC was able to maneuver the boat into the slip, however, some boards were broken in the process.[18] After the incident, Ferraro reported the incident to Torrey and sent him a picture of the broken boards.

After receiving this report, Torrey viewed the video of the incident and noticed that Ferraro was looking at his cell phone somewhere past the KV Buoy, which is the point at which arrival procedures begin and cell phone use is specifically prohibited. Torrey testified that at this point he became less concerned about the broken boards and more concerned that there was a "situational awareness issue" due to Ferraro's cell phone use. (Tr. 639) Torrey reported his concerns to Garvey and DeSimone and the decision was made to issue Ferraro a Letter of Warning.

A Letter of Warning dated March 6, 2017, was given to Ferraro by Torrey at a meeting held in Torrey's office. The letter states in relevant part:

> Upon review of video regarding reported damage to Slip 5 St. George on March 4, 2017, you were observed using a personal hand-held device during the implementation of arrival procedures. This is a violation of the SMS Standing Orders (OPM 4.2), Personal Hand-held Devices (SPM 7.16), memos issued by COO Desimone (enclosed) and the DOT Code of Conduct.
>
> This conduct is unacceptable and unbecoming of a Staten Island Ferry Captain. As Captain, you are responsible to ensure the safety of passengers and crewmembers through compliance with safety management system procedures and USCG regulations at all times. Furthermore, the Captain shall ensure watchstanding is coordinated in accordance with requirements of the management system, and shall ensure clear communication of orders and instructions onboard. Future non-compliance to this effect may result in your case being forwarded to the Advocate for disciplinary action.

(City Ex. 1)

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[18] When asked whether it was normal or acceptable practice, when dealing with a strong current, to use the boards to help guide the boat into the vessel, retired Captain James Capelonga testified "Yes. Exactly why those boards and that rack is there." (Tr. 197)

According to Ferraro, at the meeting about the incident, Torrey and Mahoney, who was also present, 'grilled' him and asked why he didn't direct the AC to bring the boat into a different slip. (Tr. 357) Ferraro stated that he was taken aback by this, particularly since this wasn't what is known as a "hard" landing but was just an "ugly" landing, which is something that happens all the time. (Tr. 357) He explained that while it was unfortunate that a couple boards were broken, this is also something that happens routinely.[19] Torrey testified that the discussion at the meeting focused on avoiding distractions in the pilothouse. Contrary to Ferraro, he stated that the conversation did "not a focus on damage, that does happen, but unfortunately the distractions, you know, play a part in them." (Tr. 653) Torrey testified that he was not aware of any incidents in which boards were broken by a Captain or AC docking a boat that led to discipline.

Torrey also created a "Memorandum to File," dated March 6, 2017, which recapped in detail the March 4 incident as well as the subsequent meeting with Ferraro in which he was given a Letter of Warning. (City Ex. 5) The memo ended by stating:

> After Captain Ferraro departed, Director Mahoney and I both agreed that although Captain Ferraro seemed to have an answer for everything, it was evident that he did not get the [gravity] of his mistakes nor did he appear to be grasping the big picture. It [is] apparent that there was a disconnect between the reality of the video and what the consequences would have been if there had been people injured versus how Captain Ferraro viewed the event.

(*Id*.) Additionally, on March 17, 2017, Torrey created another "Memorandum to File" with the subject "Captain Ferraro- Performance as Captain."[20] (City Ex. 7) That memo began by stating:

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[19] Multiple witnesses testified that broken boards were not an unusual occurrence and that the Ferry employs dock builders to fix them.

[20] Torrey testified that the March 4, 2017 incident combined with the joystick incident the previous month led him to conclude that "there was still an overarching issue here of distractions to the pilothouse and not focusing on the tasks at hand." (Tr. 652)

> Recently I have witnessed actions by Captain Christian Ferraro which have brought in to question his judgment, advanced proficiency in vessel operations, advanced proficiency in vessel maneuvering and watch keeping, and adherence to the Safety Management System (SMS). It should be noted that these criteria are some of the key fundamentals used in appraising a potential Captain.

(*Id*.) The memo then summarized the joystick incident and the March 4 landing incident in detail, and ended by stating that:

> Later during the week of March 6, 2017, Deputy Commissioner DeSimone requested that DFO Garvey and I meet with him to discuss Captain Ferraro's performance and recent events where which damage was sustained. During this meeting it was agreed that Captain Ferraro and his A/C Gary Rose would be enrolled in the initial [Navigational Safety Assessment Program ("NSAP")] Ferry class, which included a Legal Primer, to be scheduled in April. Additionally, Deputy Commissioner DeSimone suggested that we schedule a private session between the Blank Rome attorney and Captain Ferraro to drive home the reality of the repercussions to Captains involved in marine casualties involving distractions such as cell phones.

(*Id*.)

NSAP Training

Sometime after the March 4, 2017 incident, Ferraro was sent to NSAP training.[21] While Ferraro may have been one of the first Captains sent to the training, there is no dispute that all Captains and ACs were sent to the same NSAP training around this same time. Torrey testified that, separate from the NSAP training, Captains at the MITAGS training also took an FSM- fatigue,

[21] NSAP was designed by the Maritime Institute of Technology and Graduate Studies ("MITAGS"), which is the maritime school for National Mates and Pilots Union ("NM&P"). Torrey explained that major companies, as well as the U.S. NAVY, have adopted the NSAP training, and that the NM&P requires its applicants to successfully complete it in order to become a full member. NSAP uses a computer simulation of a mock ship where the trainee appears to be in the pilothouse controlling the ship. It is "a risk assessment tool for mariners so that companies can assess the skill levels of their officers in [] disciplines such as bridge resources management, their use of tools such as radar and other tools, effective communications, and their knowledge of the rules of the road." (Tr. 660)

sleep, and medication- class. As part of this, the DOT had a maritime attorney speak with the Captains to discuss their "overriding authority [and] overall responsibilities." (Tr. 679) Unlike the other Captains, Ferraro also met separately with an attorney to discuss the use of handheld devices and what the outcomes of distractions could be.

At the end of the NSAP training, a "Session Report" for each trainee was created, which provided scores and recommendations for each trainee. (City Ex. 30) Torrey testified that he discussed the reports that year with each Captain during their annual Captain's review. Torrey stated that when he met with Ferraro, he explained that he adjusted some of the raw scores each Captain received based on some of the graded criteria either not being very relevant or not providing any positive feedback.[22] Torrey explained that although this methodology changed Ferraro's score, it did not change the recommendation from MITAGS that he complete additional training. According to Torrey, Ferraro was the only Captain that the DOT sent back to complete a full Bridge Resource Management class.[23]

Rules Concerning Cell Phone Use

Torrey testified that the Ferry employs policies and procedures that are known as the Safety Management System ("SMS"). The SMS was put into place in 2005 at the recommendation of

[22] The report shows that Ferraro's corrected raw score was a 12. Two other Captains also received corrected scores of 12, one received a 24, and one other Captain scored a 7. (*See* City Ex. 29)

[23] Apparently, Ferraro had general objections to the NSAP course. He testified that he told Garvey that the simulation had no real-life bearing on the job of Ferry Captain and that the instructors were not qualified because they did not have the qualifications to be a pilot or Ferry Captain. In addition, Ferraro thought that the DOT was trying to develop a new training program and employees were being sent to test it out. So, he also told Garvey that since the NSAP was not a requirement of the job, to make it one DOT would have to negotiate a change in job description, a mandatory subject of bargaining. Torrey testified that Ferraro was "adamantly against" the NSAP training "to the point during it he – his kind of aggressive nature and . . . disdain for the operation actually worked against him in the simulation." (Tr. 678)

the National Transportation Safety Board after a fatal crash involving a Staten Island Ferry boat. Ferry employees are informed of the SMS procedures upon their hire, and DOT has regular SMS trainings. There are specific rules relating to cell phone use under the SMS, one of which is contained in the Support Procedure Manual ("SPM"). Section 7.16 of the SPM describes when handheld devices can or cannot be used. Subsection 5 states:

> 5) Onboard Operational Vessels – personal hand-held device use is prohibited:
>
> a. At all times during the implementation of arrival and departure procedures.
> b. At all times in an operational Pilothouse during restricted visibility.
> c. At all times during any emergency response, drills and training.
> d. At all times in any passenger cabin space.

(City Ex. 11) Torrey explained that arrival and departure procedures begin at certain points in the route, which is past what is known as the "Castle" going into the Whitehall terminal in Manhattan, and then past the "KV Buoy" approaching St. George terminal in Staten Island. (Tr. 598) He stated that past these points, cell phone use is strictly prohibited, including when the boat is moored on the hooks and passengers are loading or disembarking.[24] Garvey testified that the Captain or AC who is on the hooks on the non-operational end of the boat is supposed to be paying attention to the operation of the vessel because "he still has control of [it]."[25] (Tr. 842)

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[24] The City also entered into the record three memos from DeSimone to Licensed Officers, dated September 30, 2011, January 29, 2013, and August 29, 2013, stating that he has witnessed cell phone use and reiterating the importance of employees following the SMS rules regarding handheld devices. Additionally, the City submitted two "Safety Matters" newsletters reiterating the rules. (City Exs. 15, 16)

[25] The record reflects that other activities Captains may need to attend to while the boat is on the hooks include making entries in an E-logbook and answering a radio or a boat phone, which is typically used when Ferry management needs to ask the Captain a question about operations or personnel matters.

Evidence of Cell Phone Use in General

Captain Donald Russell testified that after he learned about Ferraro's demotion, he asked Port Captain Kenny Meurer to see the video of Ferraro's cell phone use because he and other Captains were "perplexed" as to why Ferraro was being disciplined. (Tr. 132) He testified that he watched the videos in a conference room with Meurer, Torrey, and a few Captains. Russell stated that prior to Ferraro's demotion, cell phone use in the pilothouse was not uncommon, and he admitted that he and other Captains were guilty of it. He said that the predominant use of cell phones was to stream music or a podcast and that the video he saw of Ferraro "didn't seem like an abuse, you know. I was kind of miffed by the video that I had saw." (Tr. 138) Likewise, Capelonga testified that it was common for Captains or ACs to look at their cell phone while the boat was on the hooks and that this was not considered punishable misconduct.

Russell testified that the Captains questioned management about Ferraro's punishment and that Torrey said he thought it was "a little over the top" but that it was out of his hands and in DeSimone's. (*Id*.) Additionally, at some point Garvey entered the conference room, and Russell testified that all the Captains basically said "are you kidding me with this . . . he's getting demoted for this[?]" (Tr. 135) According to Russell, Garvey said "don't shoot the messenger, this is Captain DeSimone's thing." (*Id*.) Overall, Russell testified that it appeared as though Torrey and Garvey did not agree with the punishment and that they said they were trying to "talk [DeSimone] down," but it was essentially out of their hands.[26] (Tr. 137)

[26] Neither Torrey nor Garvey rebutted Russel's testimony about what they said about Ferraro's demotion on this date.

Other Cell Phone Use in July and August 2019

After the Union filed the improper practice petition, it requested and received video clips of the 17 shifts from July and August 2019 that the DOT reviewed as part of the investigation it conducted that led to Ferraro's demotion. Throughout the course of the hearings, the Union presented clips of this video, which showed other Captains or ACs using their phones while working. It is undisputed that none of these Captains or ACs were issued any verbal or written warnings, or otherwise disciplined for their cell phone use.

One AC was seen on video on August 13, 2019, on multiple occasions looking at or texting on his phone both while the boat was on the hooks and as the boat was leaving the slip. On August 12, 2019, another AC is seen using his phone while the boat is on the hooks and in the presence of a Captain. He is also seen using his phone while passengers are loading. On July 12, 2019, a Captain is seen using his phone after passing the KV Buoy, including at least one instance while driving the boat. He is also seen using his phone past the KV Buoy while an AC drives the boat and while the boat is on the hooks and passengers are unloading. Also on that date, that AC is seen driving the boat past the KV Buoy and looking at his Apple watch in the Captain's presence as well as using his phone while on the hooks as passengers are loading.[27]

Cell Phone Use in January and February 2020

As part of discovery in these proceedings, the Union requested additional video of shifts of its choosing. In response to the Trial Examiner's ruling, the City produced an additional 17 shifts of footage on various dates in January and February 2020.

[27] The same AC was also seen on August 4, 2019, looking at his phone while the boat is on the hooks as passengers are boarding at the same time that a Mate is also seen on his phone.

The video clips from January and February 2020 show nine additional Captains and ACs using their cell phones in a manner similar to those described above. As a result of this additional footage, which the City reviewed prior to turning over to the Union, some Captains and ACs received verbal or written warnings for their cell phone use. In particular, three Captains who were observed using their cell phones while driving the boats received written warnings. One other Captain and an AC who were looking at their cell phones while the boat was on the hooks, including while passengers were loading or unloading, received verbal warnings. Three other Captains and an AC did not receive any warning for their cell phone use.[28]

Torrey testified that DOT gave verbal warnings to Captains seen on these videos when it was the first time they had been observed violating the cell phone policy. Written warnings were given to Captains who had been advised of the dangers of cell phone use during their Captain's reviews and the legal primer given during the NSAP training. He also stated that ACs, Mates, and Deckhands received verbal warnings because they were in lower titles with lower expectations.[29]

Evidence of Disparate Treatment

The Union also presented evidence of incidents involving other Licensed Officers that raised safety concerns. Only the most relevant examples are summarized here.

[28] Three of these Captains were seen using their phones while the boat was on the hooks. Additionally, one Captain was also seen using his phone while the boat was maneuvering between the Whitehall terminal and the Castle, and another was seen using his phone while docking the boat and while training an AC.

[29] Evidence submitted by the City shows that in addition to the Captains and ACs discussed above, one additional AC, three Mates, and two Deckhands were issued verbal warnings as a result of cell phone use viewed on the January and February 2020 videos.

Captain "J.T."

J.T was one of the Captains who received a letter of warning for cell phone use on February 4, 2020. On the video from that date, he can be seen looking at his Apple watch while the boat is on the hooks preparing for departure. He is also seen holding his cell phone in one hand and looking at it while steering the boat in the harbor with the other hand. At the time this conduct was discovered, J.T. was serving as a provisional Captain and his permanent Civil Service title was Mate. Prior to the discovery of that incident, J.T. received a verbal warning for putting the vessel in the path of an oncoming vessel, maneuvering to avoid it, and hitting the mainland in Brooklyn. In addition, the record reflects that prior to the discovery of his February 2020 Apple watch and cell phone use, J.T. had been involved in a near-miss with another vessel when he was training an AC,[30] another allision while he was training an AC on the Kennedy boat, and a collision with a cluster while training an AC that resulted in damage to the cluster.[31] J.T. was not disciplined for those incidents. In addition, J.T. took the 2020 Civil Service Exam for Captain and was promoted to a permanent Captain. According to Ferraro, J.T. is not active in the Union.

Port Captain "R.S."

Port Captain R.S. was filling in for an AC on February 4, 2020, and was observed on video looking at his phone while the boat was on the hooks and passengers were loading. As the Port Captain, R.S. is responsible for ensuring that Ferry deck officers adhere to the Ferry's safety rules and regulations. However, he was not given a verbal or written warning for this conduct. Prior to

[30] Ferraro testified that he believed J.T. was given a written warning for leaving his post early during this incident.

[31] The allision with the Kennedy boat caused damage to the boat and pier. Capelonga, Ferraro, and Garvey all testified as to different amounts of time that the Kennedy was out of service, ranging from a few weeks to a few months.

discovery of his cell phone use on February 4, 2020, R.S. was involved in a "double allision" in which he hit another boat and a pier while driving a Ferry boat, causing damage to both. He was not disciplined for that incident. On another occasion, R.S. failed to check the coolant system on the engine of a 38-foot utility boat, which required the boat to be taken out of service to replace the engine. Garvey testified that this incident was documented, and R.S. was cautioned about proper procedure.[32]

Captain "S.A."

Another provisional Captain, S.A., who was involved in incidents involving safety, was only demoted one level to AC. In one incident, S.A. failed to successfully navigate a vessel into the assigned slip, and he hit a cluster, destroying it. In another incident, S.A. ran over and dragged a navigational buoy, resulting in the buoy being moved to the wrong location and rendered non-functional for approximately a month before the Coast Guard replaced it. This also caused damage to the boat. According to Retired Captain Capelonga, the only person who received any discipline for this incident was a Mate who was also a Union delegate. In addition, video evidence admitted into the record shows two separate incidents occurring in the same week in which Captain S.A. pulled a vessel away from the dock while its cables were still attached to the hooks. This caused the cables to snap, and the passenger transfer bridge to fall, both times causing damage. S.A. was demoted to AC after the second incident. His permanent title is Mate.

Other Demotions

Garvey testified briefly about other demotions that have occurred at the Ferry. AC "L.S." was involved in three different incidents "that all managed to make the papers, [and] become public issues," sometime in or around 2010. (Tr. 825) L.S. was stepped down from AC to his permanent

[32] According to Torrey, repair of the damage would have cost more than $25,000.

title of Mate as a result. Also, Captain "A.C." was involved in a hard landing that resulted in injury claims as well as a lawsuit, which was eventually settled. A.C. was also demoted one level to his permanent title of Mate in or around 2015. Finally, Mate "K.T.," who was training to be an AC, was stepped down to his permanent title of Deckhand after he was involved in a physical altercation with a Ferry Terminal Supervisor that included shoving.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the DOT violated NYCCBL § 12-306(a)(1) and (3) by demoting Ferraro in retaliation for filling grievances and advocating for the Union and by cancelling its policy of paying employees to attend trainings on their day off. It asserts that not only was Ferry management aware that Ferraro filed the grievances, they were "apoplectic about it," and began taking retaliatory actions against Ferraro and the Union shortly after a request for arbitration of the grievances was filed. (Union Br. at 23) Further, the evidence demonstrates that retaliation for Ferraro's Union activity was the sole motivating factor behind his demotion.

The Union asserts that there is strong evidence of anti-union animus. Approximately one month after the Union filed for arbitration of the grievances, Ferry management cancelled a scheduled radar training course, and Garvey informed Ferraro that the cancellation was a result of the Union pursuing the grievances to arbitration. Although management rescinded its decision to cancel the training course, it did not comply with its practice of paying union members who attend the class on their day off. The Union asserts that DeSimone also displayed his animus when he called a Union official and berated him about Ferraro and the grievances. Additionally, Garvey's

animus was demonstrated in his comments that, by filing for arbitration of the grievances, Ferraro was "putting a stick in his eye." (*Id*.)

The Union contends that the reasons given for the punitive actions are pretextual and that the City has failed to prove that it would have demoted Ferraro or cancelled its practice of treating attendance at training courses as paid work days in the absence of Ferraro's protected union activity. With respect to Ferraro's demotion, the Union argues that no other Captain had ever been demoted two levels for similarly innocuous conduct and, in fact, no Captain had ever been disciplined, suspended, or demoted for phone use before. According to the Union, until Ferraro was demoted, phone use had been a "common, conspicuous and *de facto* accepted practice at the Ferry for as long as anyone could remember." (Union Br. at 29) The Union asserts that the evidence demonstrates that even Garvey thought the decision to demote Ferraro was unjustified and he tried to talk DeSimone out of it, despite the fact that Garvey also "hates" Ferraro. (*Id*.) The Union argues that the only witness with direct knowledge of DeSimone's motives for suspending and demoting Ferraro is DeSimone, yet the City failed to call him to testify or show that he was unavailable. The Union therefore requests that the Board make an adverse inference against the City on the issue of DeSimone's motives.

The Union argues that the City reached back to earlier incidents that it now claims motivated DeSimone to severely punish Ferraro because was it knew that Ferraro's phone use alone could not support a suspension and demotion. However, it argues that even those incidents do not support the demotion. With respect to the joystick incident, it was not treated as punishable conduct when it happened. Moreover, the fact that Ferraro continued working as a Captain on that date and for another two and a half years shows that Ferry management did not view him as a danger. Additionally, the fact that Garvey offered Ferraro a promotion to a Port Captain position

in March 2018 further demonstrates that the joystick incident could not be considered one of the City's supposed "three strikes." (Union Br. at 33)

Further, the Union maintains that the three strikes and you're out policy as articulated by Garvey "is a work of fiction" and does not make sense. (Union Br. at 36) First, other Captains have been involved in three or more incidents without being demoted to their permanent civil service title or suspended. Second, this supposed policy is completely incompatible with the concept of progressive discipline, which the City claims it follows. According to Garvey, discipline would routinely progress directly from a warning to a lengthy suspension and maximum possible demotion regardless of the severity of the offenses or the amount of time that separates them. Consequently, the Union contends that the City has failed to prove that any of the City's retaliatory actions would have been taken in the absence of Ferraro's protected union activity.

As a remedy, the Union asks that Ferraro be reinstated with full backpay and benefits and that he be granted the same level of seniority as Captain he would have had if he had not been suspended. The Union also asks the Board to order the City to schedule and administer the Civil Service Exam and to appoint Ferraro as permanent Captain.[33] Additionally, the Union requests that the City be ordered to make each Licensed Officer whole who took the radar class on a day off but did not get paid. Finally, it asks that the City be ordered to cease and desist from discriminating and/or retaliating against Ferraro and MEBA members because of protected union activity, to post appropriate notices, and any further relief as the Board deems necessary and proper.

[33] The Union notes that if it becomes legally impossible to employ Ferraro as Captain based on a court order determining that the Board's Order violates the Civil Service Law, the City should be ordered to continue to pay Ferraro the wages and benefits he would be earning as Captain, even while working in a lower title.

City's Position

The City argues it did not violate NYCCBL § 12-306(1) and (3) because the record demonstrates that Ferraro was stepped down from the provisional title of Captain to his permanent civil service title of Mate based on legitimate business reasons, documented over several years, and unrelated to his activities as a Shop Steward.[34] It alleges that DOT's actions were taken because Ferraro's August 2019 misconduct, which was discovered in the course of investigating unrelated allegations, coupled with incidents in February and March 2017, raised concerns about his fitness to pilot Staten Island Ferry vessels that carry millions of passengers a year. The City contends that its actions were an exercise of its managerial right to direct its operations and would have occurred in the absence of any protected activity.

The City maintains that the Union has failed to establish a *prima facie* case because there is no causal connection between the decision to return Ferraro to his permanent civil service title and his union activities. Torrey, Garvey, and Mahoney testified that the video showing Ferraro using his cell phone was discovered during the investigation of other employees' misconduct and that DOT took action because of concerns about Ferraro's ability to safely oversee Ferry operations, which had been noted by DOT in the past. The City asserts that the length of time that lapsed between Ferraro's Union activity, which occurred primarily in March 2018, and the alleged retaliation is too attenuated to sustain a cause of action. Further, Ferraro had a history of Union

[34] In its answer to the petition, the City denied that its failure to compensate Licensed Officers for radar training on their days off was a violation of the NYCCBL. However, it did not address this claim in testimony or in its brief other than to mistakenly assert that the Union had abandoned the claim by failing to produce testimony or documentary evidence in support.

activity without any alleged retribution, even when there were concerns about his ability to pilot a Staten Island Ferry vessel in February and March 2017.

The City argues that the Union's claims of improper motivation are conclusory. Regarding videos showing other Licensed Officers using cell phones or glancing at a smart watch, the City asserts that there are notable distinctions between Ferraro and those individuals. First, Ferraro's conduct was more severe since he can be seen watching videos for extended periods of time. Second, Ferraro's work history differed from other employees. Third, the employees noted by the Union as being treated differently for cell phone use were only discovered after DOT took action against Ferraro, when video was reviewed at the request of the Union. The City asserts that it issued verbal and written warnings to the employees involved. In addition, Russell testified that cell phone use by Licensed Officers halted after Ferraro was disciplined.

Regarding Chief Operations Officer DeSimone's statement in January 2019 that DOT would "go to the mat" over pending grievances, the City contends that the Board should not credit Sermoneta's interpretation of the statement as a threat of retaliation. (Union Ex. 1) Instead, Mahoney, who reported to DeSimone for many years and was "deeply familiar" with the grievances, correctly understood that DeSimone merely meant that management would use all means to prevail at arbitration. (City Br. at 28) Further, the City contends that "threatening" to read the contract as it is written is "no threat at all." (*Id*. at 29)

In addition, the City claims that the actions taken against Ferraro passed through "checks and balances" involving multiple people in a variety of DOT units, not just the Ferry division. (*Id*.) According to the City, the lifting of the 30-day suspension and withdrawal of the disciplinary charges demonstrate that DOT was objectively evaluating the purpose of its actions, which was to safeguard the ridership of the Staten Island Ferry.

In support of its legitimate business reason, the City notes that it is obligated by maritime law to ensure that its vessels are manned with officers fit to carry out their duties and that there is financial and criminal exposure for failing to do so. Following a 2003 accident that resulted in 11 deaths, over 70 injuries, and substantial financial liability, the Staten Island Ferry adopted its Safety Management System, which specifically prohibits the use of cell phones during safety critical operations, such as arrivals and departures.

The City contends that Ferraro continued to violate DOT's cell phone policy despite several warnings, counseling, and retraining, which demonstrated a propensity to engage in dangerous conduct that put Staten Island Ferry operations at risk and could only be mitigated by a step down in title and commensurate decrease in responsibility. Torrey testified that DOT has implemented step-downs from Captain, even down to Mate, when sufficient concerns arose. Similarly, Garvey testified that a step down to Mate can be necessary when there is a loss of confidence in the officer's ability to properly perform his duties.

Furthermore, the City argues that the requested remedy is improper or moot. The suspension has been reversed, and the disciplinary case withdrawn. The City claims that the Board lacks authority to order DCAS, a separate agency, to reopen a long-passed civil service exam and that doing so would set a "dangerous" precedent, especially since there is no evidence that the timing of the civil service exam was related to the events at issue here. (City Brief at 34) According to the City, the extraordinary remedy of granting Ferraro the opportunity to become a permanent Captain would disregard the unacceptability of his misconduct and endanger passengers and staff.

Accordingly, the City argues that the petition must be dismissed in its entirety.

DISCUSSION

The Union claims that DOT demoted Ferraro and rescinded its policy of paying Licensed Officers for attendance at training courses in retaliation for Ferraro's Union activity.[35] 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."[36] 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 employee has engaged in union activity and "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);

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[35] As noted later in this discussion, we do not agree with the City that the Union "abandoned" its claim regarding failure to pay employees for attendance at the February 15, 2019 radar training class. (City Br. at 5) The Union presented testimony and documentary evidence concerning this issue, which was alleged as a violation of the NYCCBL in its amended petition, and argued this point in its brief.

[36] A violation of NYCCBL § 12-306(a)(3) is also a derivative violation of NYCCBL § 12-306(a)(1) because discrimination based on union activity inherently interferes with public employees' rights under the NYCCBL. *See Kalman*, 11 OCB2d 32, at 11 (BCB 2018); *Local 621, SEIU*, 5 OCB2d 38, at 2 (BCB 2012).

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). 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).

With respect to the first prong of the *Bowman* test, we find that Ferraro was engaged in protected union activity. He became a Shop Steward for the Union in 2016 and remained active in that position by filing grievances and attending labor management meetings through the time he was demoted. Further, the evidence shows that the employer had knowledge of his union activity throughout this time. Ferraro initiated and submitted grievances directly to DOT and discussed the issues with then-Director of Ferry Operations Garvey and Deputy Commissioner DeSimone. Indeed, knowledge was clearly established by DeSimone's February 2019 call to the Union when he essentially told Union representative Sermoneta that Ferraro's filing of grievances was going to "blow up" certain workplace practices. (Union Ex. 1)

Similarly, there is evidence to support the conclusion that Ferraro's union activity was a motivating factor in DOT's alleged retaliatory actions. Both Chief Marine Engineer DeFonce and Ferraro testified that Ferraro's relationship with management had been more adversarial than prior Shop Stewards because he frequently questioned management's actions. Ferraro filed his request for arbitration concerning the grievances in January 2019. He testified that the following month, Garvey informed him that if he continued to advance the grievances, DOT would stop paying for required radar training. This testimony is corroborated by Ferraro's February 14, 2019 email to DeSimone, in which he contemporaneously relayed the conversation with Garvey and requested that the training be reinstated. There is no evidence that DeSimone responded to this email or disputed the assertions therein, and Garvey did not deny making these statements.

Additionally, hostility toward Ferraro's grievance activity was demonstrated by more than one Ferry official. Sermoneta testified that DeSimone was angry about Ferraro's grievance filing when he spoke to him in February 2019 and that, in essence, DeSimone was threatening to take action against employees who engaged in union activity. As noted earlier, DeSimone told Sermoneta that Ferraro's grievances were going to "blow up" certain workplace practices. *Id.* In addition, it is undisputed that DeSimone told him that he would "go to the mat" in defense of management's practices. *Id.* A few days later, Senior Port Engineer Hopper similarly expressed his displeasure with Ferraro to Chief Marine Engineer DeFonce by stating that he thought Ferraro was "overstepping" and "fighting for his own agenda," rather than for the Union members. (Union Ex. 7) In addition, Hopper advised DeFonce that as a result of Ferraro's grievance activity, "management has taken a closer look to ensure what is and is not in the contract," and that certain training not covered by the contract is now the employee's responsibility. *Id*. Therefore, the record shows that members of DOT management were angered by Ferraro's grievance filing.

Although after Ferraro intervened, DOT continued to offer the radar and other training courses, Licensed Officers were not paid for their attendance at the radar training held on February 15, 2019, if it was their regular day off, as had been the practice in the past. The testimony that the training course was initially cancelled because of Ferraro's continued pursuit of the grievances was unrebutted. In addition, Hopper's emails clearly indicate that the failure to compensate Licensed Officers who attended training on their days off was also due to Ferraro's grievances. This action was taken one month after Ferraro requested arbitration of the grievances. Accordingly, we find that the Union has met its burden to establish that Ferraro's union activity was the motivating factor for the cancellation of the practice of paying for training.

Similarly, the Union has shown sufficient evidence that Ferraro's protected activity was a motivating factor for his demotion. Ferraro was notified of his suspension and demotion on October 3, 2019, about seven months after the animus statements were made. Additionally, formal charges were filed against him on January 15, 2020, just a few days before the first scheduled day of arbitration hearings, January 24, 2020. Further, although DOT discovered four Licensed Officers besides Ferraro engaging in cell phone use during its investigation, it is undisputed that only Ferraro was disciplined for this conduct. No other Licensed Officers even received a warning for cell phone use. We find that this disparate treatment, combined with the multiple statements demonstrating animus on the part of DOT management discussed above, along with proximity in time between the demotion and Ferraro's union activities, constitute sufficient evidence to establish that Ferraro's demotion was improperly motivated.

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). Here, we do not find that the City has sufficiently rebutted the evidence of animus and improper motivation. First, the City did not offer evidence to rebut the evidence that Ferraro's union activity was the motivating factor for the cancellation of the practice of paying for training.[37]

Second, with respect to Ferraro's demotion, we find it inconsequential that the investigation that led to the demotion was related to an issue that did not concern Ferraro's union activity, particularly as the Union does not claim that the investigation itself was motivated by anti-union animus. Moreover, regardless of what prompted the investigation, the fact that multiple Licensed Officers were seen during this investigation using their cell phone but were not disciplined while Ferraro was, supports the conclusion that Ferraro's union activity was the distinguishing factor for this disparate treatment.[38]

We are also not persuaded by the City's argument that the disciplinary action taken against Ferraro was not motivated by union animus because it passed through "checks and balances" involving multiple people, and the removal of the suspension and disciplinary charges demonstrates that DOT was objectively evaluating its decisions. The evidence demonstrates that DeSimone was the primary decision-maker in Ferraro's demotion and that he had hostility toward Ferraro based on his grievance. However, DeSimone was not called to rebut the evidence of hostility or testify as to the motivation for his recommendation. Further, while others, including

[37] As noted earlier, the City mistakenly asserted this claim was in effect withdrawn.

[38] Furthermore, even if we take as true the City's contention that Ferraro's cell phone use was more egregious than others', in light of the City's claim that cell phone use is strictly prohibited, such a fact would only support a difference in the level of discipline, not the fact that discipline was levied at all.

HR employees, accepted his recommendation for discipline, there is insufficient evidence in the record to make a finding that the process that DOT followed in this regard resulted in a decision made without regard to Ferraro's union activity. As such, we find that the City has not rebutted the Union's *prima facie* case.

Since it is clear that Ferraro's protected union activity formed a basis for DOT's decision to demote him, we must now assess whether DOT nevertheless had a legitimate business reason to do so. In the case of a decision based on a dual or mixed motive, "even if it is established that a desire to frustrate union activity is a motivating factor, the employer is nevertheless held to have complied with the NYCCBL where it is proven that the action complained of 'would have occurred in any event and for valid reasons.'" *Local 768*, 63 OCB 15, at 18 (BCB 1999) (quoting *CWA, L. 1180*, 43 OCB 17, at 19 (BCB 1989)).

In support of the City's assertion that the DOT had a legitimate business reason to demote Ferraro, it maintains that the demotion was necessary based on the unsafe nature of his misconduct, progressive discipline, and its loss of trust in Ferraro's ability to safely operate a vessel. It further claims that the demotion was consistent with its actions involving other Captains and their misconduct. The Union, however, argues that the reasons the City has given for Ferraro's demotion are pretextual and that the punishment was not progressive discipline and was disparate from that of similarly-situated employees.

Initially, it is without question that DOT has the obligation to ensure and maintain the safe operation of its ferries for the public and staff. In so doing, DOT is within its rights to set rules and guidelines to accomplish this goal and to enforce those rules. Similarly, this Board acknowledges that DOT has the right not only to expect its Ferryboat Captains to be alert and responsible for the safe operation of the vessel, but also to expect that the Captains will require the

same effort by the remainder of the ship-board staff. In this regard, DOT has promulgated rules broadly prohibiting cell phone use by staff when onboard an operational vessel, and it periodically reminds staff of this prohibition.

However, this Board has recognized that an otherwise legitimate exercise of an employer's discretion can constitute a violation of the NYCCBL. *See DC 37, L. 983*, 6 OCB2d 10, at 32 (BCB 2013) (citing *CSTG, L. 375*, 4 OCB2d 61, at 23 (employer's managerial rights do not shield it from discrimination and/or retaliation claims); *Feder*, 4 OCB2d 46, at 41 (BCB 2011)). Additionally, "if a petitioner presents evidence of disparate treatment to show retaliation, the respondent has the burden to rebut such evidence." *L. 376, DC 37*, 73 OCB 15, at 15 (BCB 2004) (citations omitted) (finding retaliation where evidence demonstrated that employee was disciplined for conduct for which other employees were not). *See also Fabbricante*, 71 OCB 30, at 15, 31, 36, (BCB 2003) (finding retaliation when City offered no evidence to refute that other employees in a unit were not disciplined); *Convention Center Operating Corp.*, 28 PERB ¶ 4675 (1995), *affd.*, 29 PERB ¶ 3022 (1996) (termination of employees retaliatory in the absence of a legitimate explanation for disparity of treatment or severity of penalty); *Deer Park Union Free School District*, 22 PERB ¶ 3014 (1989), *affd.*, 167 A.D.2d 398 (2nd Dept. 1990) (same).

Notwithstanding DOT's rules regarding cell phone use, testimony and video evidence establish that Captains and other Licensed Officers frequently used their cell phones at various times throughout their shifts without fear of being disciplined prior to the DOT's Fall 2019 investigation. Captain Russell and Retired Captain Capelonga testified that phone use was common, particularly when the boat was on the hooks and that this was not treated as punishable conduct. Moreover, Russell's unrebutted testimony demonstrated that even Torrey and Garvey thought the punishment of Ferraro for cell phone use was somewhat "over the top." (Tr. 132)

Further, while it is also true that DOT issued memos and newsletters periodically to remind staff to comply with SPM Rule 7.16 regarding cell phone use, the City did not present any evidence of a Licensed Officer, other than Ferraro, who was formally disciplined for a violation of this rule prior to September 2019.

Nevertheless, the City argues that Ferraro's demotion was warranted because he had previously been warned about cell phone use and other distractions in the pilothouse and because he had been involved in other incidents which made DOT management "lose confidence" in his ability to safely pilot a vessel. In this regard, Garvey testified that discipline would generally lead to a demotion after an employee had received three "strikes." (Tr. 833; 844) We find, however, that the evidence does not demonstrate a "three strike" policy or that Ferraro's record showed three prior disciplinary incidents.

With respect to the incidents of alleged misconduct prior to January 2020, the Union correctly points out that the first incident, when Ferraro accidentally bumped against a joystick and caused damage to the boat and slip, was not treated as misconduct at the time it happened. The record reflects that Ferraro was not issued any discipline for this incident and that Garvey's response was simply that "shit happens." (Tr. 342) Although we note that damage occurred and necessary repairs cost a significant amount of money, the record reveals multiple instances in which other Captains had incidents that caused monetary damages but did not receive discipline for doing so.[39] It appears that in contrast to Ferraro, those incidents resulting in damage to the vessel were not considered "strikes."

[39] It was only after the March 4th incident, that any record was made of the joystick incident in Torrey's March 17, 2017 memorandum.

Next, the City relies upon the incident which led to the "ugly" landing in March 2017. DOT issued Ferraro a Letter of Warning concerning his use of a cell phone on that date in violation of the SMS Rules. Torrey testified that the earlier joystick incident combined with this incident led him to believe that there was an overarching issue with Ferraro being distracted that needed to be addressed. We credit this testimony and do not question the legitimacy of the Letter of Warning for Ferraro's use of the cell phone. However, the fact remains that this was the first disciplinary action Ferraro received.

The record also reflects that DOT advised Ferraro after the March 4, 2017 incident that he would be enrolled in an NSAP class including a Legal Primer. However, the training Ferraro attended was also attended by all Captains and ACs. The only training or assignment unique to Ferraro was requiring him to speak personally with a maritime lawyer about legal consequences for casualties involving distractions such as a cell phone. While DOT has the right to send an employee for training, we note that the training itself is not a disciplinary action. This is particularly so where, as here, evidence demonstrates that Ferraro would have received the same training regardless of the March 2017 incident and Letter of Warning. Additionally, although Ferraro was the only employee for whom MITAGS recommended additional training, DOT acknowledged that some components of the NSAP training were not relevant to the Ferry's operations, and therefore it adjusted the Captains' scores based on this. After adjustments, Ferraro's scores were the same or higher than all but one of the other Captains.

Moreover, the record reveals that Ferraro continued as a Captain and drove Ferry boats without further incident for over two years. Indeed, only one year after the March 2017 incident, DOT offered Ferraro a promotion to a Port Captain position. As this is a supervisory position that

involves ensuring DOT rules and regulations are followed, we find that by March 2018, DOT's concerns regarding Ferraro's performance or safety had dissipated.

Even assuming, however, that DOT was relying upon all incidents that implicate safety concerns regardless of whether discipline was imposed, we find that the City has not sufficiently rebutted evidence that demonstrates that other Captains were involved in more numerous and/or serious safety incidents than Ferraro without similarly facing a two-level demotion. One provisional Captain, for example, had multiple near-misses with other boats, as well as multiple incidents in which his boat collided with and caused damage to piers and clusters, and caused a boat to be put out of service for weeks to repair. The only discipline this same Captain received was written warning after January/February 2020 videos were reviewed by DOT for production in this proceeding showed him using a cell phone during a prohibited time. Instead, he was allowed to remain in his provisional appointment, took the Qualified Incumbent Examination, and was promoted to permanent Captain. Another Captain ran over a navigational buoy, necessitating replacement by the Coast Guard, collided with and damaged multiple clusters, and pulled a vessel away from the dock while its cables were still attached to the hooks twice in one week. While this provisional Captain was demoted one level to an AC, we note that he still drives Ferry boats. Additionally, the only example provided by the City of a Licensed Officer that appears to have been demoted two levels— from AC to Deckhand— concerned a physical altercation, which is an entirely different type of misconduct than what Ferraro was accused of and not the type of unsafe behavior that the City asserts warrants removal from the pilothouse.

In light of the above, we find that the City failed to rebut evidence demonstrating that Ferraro was disciplined more harshly than other similarly-situated employees. *See L. 376, DC 37*, 73 OCB 15. Consequently, we find that DOT's proffered reasons for demoting Ferraro are not

legitimate and are instead pretextual. We conclude based on the evidence that Ferraro would not have been demoted to a Mate were it not for his filing and pursing of grievances on behalf of the Union. Additionally, we find that DOT failed to proffer a legitimate business reason for its failure to pay for Licensed Officers' attendance at a radar training course held on February 15, 2019. Consequently, we find that DOT's actions were taken in retaliation for protected union activity and violated NYCCBL § 12-306(a)(1) and (3).

Turning to the issue of remedy, this Board has broad authority to issue "appropriate remedial orders." NYCCBL § 12-309(a)(4). In instances where an improper practice has been found, the Board will often order the respondent to "make whole" the individual. *NYSNA*, 53 OCB 10, at 6 (BCB 1994) (ordering reinstatement); *CWA*, 41 OCB 13, at 6 (BCB 1988) (ordering the employer to make an employee whole for loss of pay and benefits). The New York State Public Employment Relations Board ("PERB") has similarly held that "remedial orders are guided by the primary and simple philosophy that an employee is to be placed as nearly as possible in the position he or she would have been had it not been for whatever improper conduct is found." *Village of Greenport*, 26 PERB ¶ 3067 (1993) (ordering backpay from the date of termination and reinstatement once the employee obtained the license necessary for appointment to the position from which he was wrongfully terminated). Reinstatement to the affected individual's former position is often an appropriate remedy when the employee was reassigned or terminated for union activity. *See, e.g., County of Wyoming*, 34 PERB ¶ 3042 (2001); *Town of Henrietta*, 28 PERB ¶ 3079 (1995); *Mahopac Central School Dist*., 28 PERB ¶ 3045 (1995); *County of Orleans*, 25 PERB ¶ 3010 (1992).

To properly remedy the violations found, the DOT shall make whole any Licensed Officers' who attended the radar training course held on February 15, 2019 and were not paid for

their attendance. With respect to Ferraro's demotion, the facts here are unique. DOT determined Ferraro's eligibility and selected him for a provisional appointment to Captain in 2014, and he served in that position for almost five years until he was demoted in violation of the NYCCBL on September 30, 2019. But for his discriminatory demotion, he would have been a provisional Captain in July 2020, when he would have been qualified to take the Qualified Incumbent Examination and had the opportunity to be considered for a permanent appointment. While we cannot speculate whether he would have ultimately been appointed as a permanent Captain, it is clear that he would have remained a provisional Captain until DOT started making permanent appointments off the civil service list in 2021. Generally, provisional appointments are not authorized until a civil service list has been exhausted or expires. *See* CSL § 65. Therefore, we are constrained from reinstating Ferraro as a provisional Captain until such time as another provisional position is lawfully available. *See City of Rome v. State Pub. Empl. Relations Bd.*, 283 A.D.2d 817 (3d Dept. 2001); *County of Suffolk*, 11 PERB ¶ 3105 (1978). When the City can lawfully make provisional appointments to Captain, we order the City to appoint Ferraro to the next available provisional appointment.[40] *See Local 1549, DC 37*, 51 OCB 2, at 23 (BCB 1993) (ordering reinstatement to a provisional position "with back pay, interest thereupon, and all rights and privileges, as if [the employee] had not been terminated" for her union activity).

In addition, we find that compensatory damages are necessary to restore Ferraro as nearly as possible to where he was prior to his unlawful demotion. *See City of Dunkirk*, 23 PERB ¶ 3025 (1990) ("[F]ailure to award compensatory damages would result in a finding of unlawful

[40] The Civil Service Law sets forth the duration of the current eligibility list for Captain, and we do not find that ordering DCAS to conduct another civil service exam following the expiration of the current list is "reasonably related to the injury to be rectified." *State Division of Human Rights v. County of Onondaga Sheriff's Dept*., 71 N.Y.2d 623, 633-634 (1988); *see CWA*, 41 OCB 13, at 6.

discrimination but no relief at all for the person discriminated against. [PERB's] broad grant of remedial process cannot be construed to produce such an anomalous result."). Ferraro remains employed by DOT as a Mate. Therefore, in order to make Ferraro whole for lost wages, benefits, and seniority resulting from his discriminatory demotion, we order that he receive the difference between the pay and benefits he has received as a Mate and what he would have received as a provisional Captain from the date of his demotion to the date of his reinstatement as a provisional Captain. *See Local 1549, DC 37*, 51 OCB 2, at 23.[41]

[41] We acknowledge and share our dissenting colleagues' concerns for public safety and the safe operation of the ferry service. However, their arguments accept that the City was genuinely motivated by a concern over Ferraro's ability to safely pilot a ferryboat when it made the decision to demote him. As described above in detail, the evidence presented simply does not support this conclusion. Moreover, we expect that consistent with the promotion of any Mate, DOT can and will take all necessary steps to ensure that Ferraro is trained (or re-trained) and qualified to resume as a provisional Captain when a position becomes available. We assume that, as is the case with every employee, DOT will monitor and evaluate his work performance thereafter.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by the Marine Engineers' Beneficial Association, AFL-CIO, docketed as BCB-4355-19, be, and the same hereby is, granted; and it is further

ORDERED, that the Department of Transportation and its agents cease and desist from retaliation against Christian Ferraro and other Union members in the exercise of rights protected by the NYCCBL; and it is further

ORDERED, that the Department of Transportation pay Licensed Officers who attended the radar training course on February 15, 2019, on their regular day off in the manner in which it had previously done prior to that date; and it is further

ORDERED, the Department of Transportation appoint Christian Ferraro to the next available provisional appointment to Captain when it can lawfully make provisional appointments under the Civil Service Law; and it is further

ORDERED, that the Department of Transportation make Christian Ferraro whole for lost wages, benefits, and seniority resulting from its retaliatory demotion from the date of his demotion to Mate until such time as he is appointed to provisional Captain; and it is further

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

Dated: August 3, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I dissent, in part (see attached opinion) M. DAVID ZURNDORFER
MEMBER

I dissent, in part (see attached opinion) CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

***MEBA,* 15 OCB2d 25 (BCB 2022)**

(IP) (Docket No. BCB-4355-19)

Partial Dissent of M. David Zurndorfer and Carole O'Blenes

We dissent from a) the Majority's decision that DOT's demotion of Christian Ferraro violated NYCCBL Sec. 12-306(a)(1) and (3); and b) the Majority's order reinstating Ferraro to the position of provisional Captain. The demotion did not violate the statute because DOT had a legitimate business reason for taking that action. And even if the demotion were found to constitute a violation, the relief should not include reinstatement which would clearly be contrary to the public interest.

The Union's improper practice petition alleged that Ferraro was demoted in retaliation for his protected activity. Applying the Bowman test, the Majority first decided that the Union had established a prima facie case of retaliation which DOT had failed to rebut. The opinion then turned to the issue of whether DOT had "a legitimate business reason" for the demotion which would also constitute a defense. Because

> "even if it is established that a desire to frustrate union activity is a motivating factor, the employer is nevertheless held to have complied with the NYCCBL where is it proven that the action complained of 'would have occurred in any event and for valid reasons.' " Local 768, 63 OCB 15, at 18 (BCB 1999) (Majority at 35)

The Majority concluded incorrectly that DOT did not have a legitimate business reason for demoting Ferraro.

Ferraro was demoted from the position of provisional Captain for his irresponsible and intentional misconduct in staring at and engaging with his cell phone for more than eleven minutes while piloting the John Noble on August 7, 2019. He did so in clear violation of DOT rules and despite a previous Letter of Warning for cell phone abuse that made plain that such violations were unacceptable and despite his awareness of other serious performance issues. We believe a fair reading of the record evidence establishes beyond doubt that Ferraro's demotion on this basis – removing him from piloting a DOT vessel where lives are at stake – constituted a legitimate business reason.

The Majority's opinion describes Ferraro's conduct – as captured by the video – as follows:

> "Video clips of the date in question show Ferraro sometimes scrolling through his phone, looking at music videos at times, reading a text message or an email, putting on his reading glasses so that he could see the phone better, and in general failing to observe the passenger transfer procedures. In one clip, Ferraro is seen looking intermittently at his phone for approximately a seven minute period." (Majority at 11)

As noted above, a review of the video reveals that Ferraro spent more than eleven minutes in all looking at his phone while ignoring his responsibility for piloting the vessel.

As DOT's Director of Administration George Mahoney testified at the hearing, the decision that Ferraro be stepped down to his Civil Service title of Mate was "based on a culmination of previous incidents with Mr. Ferraro" that led to "lost confidence in his ability to safely operate a [F]erry boat that carries thousands of people every half hour." (Tr. 879)

The first of those incidents occurred on February 9, 2017 when Ferraro was piloting the ferryboat Andrew J. Barberi. The video shows that while passengers were disembarking from the vessel, "Captain Ferraro bumped the joystick while he was distracted attempting to adjust a windshield wiper rather than focusing his attention [on] ongoing passenger operations." (City Exh. 7) This caused the vessel to surge, causing $296,000 in damage to the vessel and the slip, and required the slip to be taken out of service for an extended period. (City Exhs. 2, 3) Moreover, as Senior Port Captain Barry Torrey testified,

> "the abrupt shifting of the boat occurred shortly after the last passenger had disembarked from the vessel and … had the incident occurred a few seconds earlier, or a few hours later when there were more passengers on board, there could have been serious injuries." (Majority at 13)

The second incident occurred just three weeks later (on March 4, 2017) when a ferry being piloted by an Assistant Captain under Ferraro's supervision collided with the slip while attempting to dock. When the video was reviewed, it showed that Ferraro had been looking at his cell phone during the arrival procedure when cell phone use is specifically prohibited. (Majority at 12-13) Ferraro was given a Letter of Warning for "using a personal hand-held device during the implementation of arrival procedures [in] violation of SMS Standing Orders (OPM 4.2), Personal Hand-Held Devices (SPM 7.16), memos issued by COO DeSimone (enclosed), and the DOT Code of Conduct." The Letter stated *inter alia* that "this conduct is unacceptable and unbecoming of a Staten Island Ferry Captain." (City Exh. 1)

These two incidents – and Ferraro's impenitent response when questioned about the incidents by management – raised serious concerns about his suitability for the responsibility of piloting a ferry. As Senior Port Captain Torrey stated in a memo dated March 17, 2017:

> "Recently I have witnessed actions by Captain Christian Ferraro which have brought into question his judgment, advanced proficiency in vessel operations, advanced proficiency in vessel maneuvering and watch keeping, and adherence to the Safety Management System. It should be noted that these criteria are some of the key fundamentals used in appraising a potential Captain."

Torrey went on to note in the memo that when he met with Ferraro, his "biggest take away ... was Captain Ferraro's questionable big picture judgment and lack of situational awareness." (City Exh. 7)

It was decided as a result a) to send Ferraro for NSAP training[1]; and b) to schedule a private session for Ferraro with outside counsel "to drive home the reality of the repercussions to Captains involved in marine casualties involving distractions such as cell phones." (City Exh. 7)

Ferraro performed poorly on the NSAP training as is evident from both the scores and comments contained in his Individual Assessment Summary (see pages 9 -12 of City Exh. 30). Among the comments on his performance were the following:

--"Prior to start of exercise, the Participant [Ferraro] did not make good use of available time to ascertain vessel situation. … [D]id not check on weather, tide, or currents; did not ask about traffic in the area; or ask about any equipment problems."

--"After exiting berth and Turtle Bay, seemed to lose positional awareness. Poor interpretation of visual, radar, and ECS cues led to a very wide turn; as a result passed close to 'TA Buoy' and into known shoal waters of separation zone."

--"Generally due to poor use of tools, recognized most pertinent traffic vessels at Not Effective distances; this included: Progress, Madrid Express, and Hanjin Rio."

--"Completely missed required check-in call to VTS."

--"Overall observation was that Participant made very limited use of available tools, resulting in late recognition of threats and low situational awareness. The Participant positioned himself forward of the instrument console for much of the transit and relied heavily on night-time visuals, which detracted from early recognition and timely interpretation of situations."

The Assessment Summary concluded with a list of recommendations including that Ferraro attend a 35 hour, simulator based, Bridge Resource Management course. (City Exh. 30 at 12) Ferraro was the only Captain in his class for whom MITAGS recommended this additional training. (Majority at 17)

However, all these efforts to correct Ferraro's failings – the Letter of Warning, the meetings with management, the NSAP training, the Bridge Resource Management course, and the private meeting with outside counsel "to drive home the reality of the repercussions to Captains involved in marine casualties involving distractions such as cell phones" – proved unavailing. And when Ferraro was discovered intentionally disregarding his responsibility to pilot the John Noble for more than eleven minutes on August 7, 2019 while staring at his cell phone, he was demoted and thus removed from responsibility for piloting a vessel in the future.

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[1] The NSAP (Navigation Skills Assessment Program) training is "a risk assessment tool for mariners so that companies can assess the skill levels of their officers in disciplines such as bridge resources management, their use of tools such as radar, effective communications, and their knowledge of the rules of the road." It is conducted by the Marine Institute of Technology and Graduate Studies ("MITAGS"), an independent maritime school for the National Mates and Pilots Union.

The Majority does not take issue with the accuracy of any of the foregoing – nor could it, as it is virtually all undisputed. Nor does the Majority try to minimize the seriousness of Ferraro's misconduct on August 7, 2019. Instead, the Majority's conclusion that DOT did not have a legitimate business reason for demoting Ferraro rests solely on its view that Ferraro was disciplined more harshly than other similarly situated employees.

However, that view is not supported by the record. As an initial matter – and one that should be dispositive – the other employees referred to were not "similarly situated." The record contains not a single incident of any Captain engaging in prolonged cell phone use in violation of DOT rules after having been given a written warning (or even an oral warning) for the same violation. Indeed, the record contains no evidence of any employee having engaged in intentional misconduct of any kind after having received a written warning for precisely the same conduct.

Furthermore, the Majority's view that other Captains "were involved in more numerous and/or serious safety incidents than Ferraro" and received lesser discipline is equally unsupported by the record. Among other things, the Majority ignores the material differences between Ferraro's misconduct and the incidents that the Union relies on involving other Captains — some of which are so obvious as to need no explanation and others of which were plausibly and credibly explained by DOT managers. For example, Port Captain RS's oversight in forgetting to check the coolant system during a routine check of a small utility boat was obviously not intentional; nor was it a safety violation. Similarly, with respect to the Majority's reliance on an incident involving the running over of a navigational buoy while Captain SA was piloting the ferry, Union witnesses conceded that the incident was caused by the fact that "the mate [assigned to rudder commands] didn't give the correct order" (Tr. 899) and consequently, that the Mate was suspended because of the incident (Tr. 206).

The Majority also relies on an incident involving an allision in Brooklyn while Captain JT was piloting the ferry that did not result in discipline. However, as the Director of Ferry Operations explained, it is common for Captains to have difficulty piloting in the tight quarters of Buttermilk Channel and, on this particular day, wind and current conditions created special difficulties that resulted in the allision. (Tr. 819-20) In light of those circumstances, he said, discipline was not warranted. (Tr. 820) Surely, that is a judgment properly made by the Director of Ferry Operations, not by this Board. Again, moreover, no violation of safety rules; no intentional misconduct; and certainly no repeated misconduct after an unequivocal warning.

The Majority's cherry-picking of facts from dissimilar cases is misguided at best. It leads to a result that would substitute the Board's judgment for that of DOT in assessing the seriousness of safety violations and the trustworthiness of the Captains assigned the heavy responsibility of piloting its vessels. The record establishes that DOT had a legitimate business reason – based on public safety concerns – for demoting Ferraro after repeated intentional misconduct despite retraining and a clear cut and unequivocal warning.

* * *

The Majority also errs in ordering that Ferraro be reinstated as a provisional Captain. While reinstatement is normally provided in prohibited employer practice cases, it is not always

warranted. In determining the appropriate remedial action in these cases, courts and agencies have generally applied a balancing test of the parties' rights and interests.[2] Especially where important public interests are at stake, as they are here, reinstatement can – and should – be denied.[3]

In applying the balancing test here, the paramount interest must be the protection of the riding public. Sadly the risk of having a person who is unfit serving as Captain of a Staten Island Ferry is not merely theoretical. On October 15, 2003 the Andrew J. Barberi crashed into a concrete maintenance pier at the St. George's terminal as a result of the failure of the Assistant Captain who was piloting the vessel to perform his job properly. Dozens of emergency vehicles and hundreds of emergency personnel responded to the scene. Eleven passengers died and more than seventy were injured, many of them seriously. Damages totaled more than $8 million. See "Allision of Staten Island Ferry Andrew J. Barberi, St. George, Staten Island, New York, October 15, 2003", NTSB Marine Accident Report.

The Assistant Captain, Richard J. Smith, subsequently pled guilty to seaman's manslaughter and was sentenced to eighteen months in prison. Ferry Director Patrick Ryan also pled guilty to seaman's manslaughter and was sentenced to a year and a day.

It should be self-evident that the decision whether an individual is fit to serve as Captain is properly made by the DOT and not by this Board. Indeed, in ordering Ferraro's reinstatement, the Majority does not argue that he is fit to pilot a ferry. Rather it argues only that he should be reinstated because he was disciplined more harshly than others who were (or were not) similarly situated.

In effect, the Majority says that the City must reinstate Ferraro because – in the Majority's judgment – there are other Captains who are also unfit and should be demoted. This approach – which would lead to the reinstatement of a Captain in whom the City has "lost confidence in his ability to safely operate a [F]erry boat" – is clearly not in the public interest. It would also result in this Board taking on a responsibility to the passengers of DOT ferries that it does not have the authority – and should not have the desire – to assume.

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[2] See Croton-Harmon Union Free School District, 31 PERB P 3086 at 4 (1998) ("In determining the appropriate remedial action, we must balance competing yet compelling rights and interests."), confirmed sub nom. CSEA v. PERB, 180 Misc.2d 869 (Sup. Ct. Albany Co. 1999); City of Olean, 2 PERB P 3069 (1969); McKennon v. Nashville Banner Publishing Company, 513 U.S. 352 (1995); NLRB v. Magnusen, 523 F.2d 643 ((9th Cir. 1975); NLRB v. Big Three Welding Equipment Co., 359 F.2d 77 ((5th Cir. 1966)

[3] See NLRB v. Western Clinical Laboratory, 571 F.2d 457, 461 (9th Cir. 1978) (reinstatement denied for "a hospital employee whose work, if incompetently done, would jeopardize the health and lives of patients"); NLRB v. Big Three Industrial Gas and Equipment Co, 405 F.2d 1140, 1143 (5th Cir. 1969) (reinstatement of truck driver with record of safety violations denied because "reinstatement would be incompatible with the safety on the public highways"). See also CSEA v. PERB, 180 Misc.2d 869, 872 (Sup. Ct. Albany Co. 1999) ("where the employees' personal conduct was intentional and egregious, personal relief is inappropriate and unnecessary to accomplish the Taylor Law's goals of protecting the collective rights of the union and insuring the orderly functions of government.")

The risk to public safety that the Majority would take by reinstating Ferraro is underscored by contemplating Ferraro's intransigence in the face of a written warning for cell phone abuse, as well as the consequences of the Majority's decision in this case. The formal Letter of Warning in March 2017, and admonishment by his supervisors, did not deter Ferraro from ignoring his responsibilities and spending more than eleven minutes staring at and engaged with his cell phone while piloting the John Noble two years later.

Now, as a result of the Majority's decision in this case, and despite his knowing and repeated misconduct, Ferraro will be rewarded with at least three years' back pay and the promise of the next available Captain position. Can there be any reasonable expectation that, if Ferraro is reinstated, such a reward will deter further misconduct? To the contrary, there seems little doubt that once reinstated, Ferraro will continue to display a callous disregard for his responsibilities as a Captain and for the safety of the riding public.

Thus the interest in public safety dictates that Ferraro not be reinstated. That is especially so here because reinstatement is not necessary to effectuate the policies of the Act. That would surely be accomplished by an order providing Ferraro with lost wages and benefits resulting from the demotion together with the prescribed posting.

August 3, 2022

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

OFFICE OF COLLECTIVE BARGAINING

OFFICE ADDRESS
100 Gold Street
Suite 4800
New York, New York 10038

MAILING ADDRESS
Peck Slip Station
PO Box 1018
New York, New York
10038-9991

212.306.7160
www.ocb-nyc.org

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

We hereby notify:

That the Board of Collective Bargaining has issued 15 OCB2d 25 (BCB 2022), determining an improper practice petition between Marine Engineers' Beneficial Association, AFL-CIO and the City of New York, the New York City Department of Transportation, and the New York City of Department of Citywide Administrative Services.

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby:

ORDERED, that the improper practice petition filed by the Marine Engineers' Beneficial Association, AFL-CIO, docketed as BCB-4355-19, be, and the same hereby is, granted; and it is further

ORDERED, that the New York City Department of Transportation and its agents cease and desist from retaliation against Christian Ferraro and other Union members in the exercise of rights protected by the NYCCBL; and it is further

ORDERED, that the Department of Transportation pay Licensed Officers who attended the radar training course on February 15, 2019, on

their regular day off in the manner in which it had previously done prior to that date; and it is further

ORDERED, the Department of Transportation appoint Christian Ferraro to the next available provisional appointment to Captain when it can lawfully make provisional appointments under the Civil Service Law; and it is further

ORDERED, that the Department of Transportation make Christian Ferraro whole for lost wages, benefits, and seniority resulting from its retaliatory demotion from the date of his demotion to Mate until such time as he is appointed to provisional Captain; and it is further

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

The New York City Department of Transportation
(Department)

Dated: _____ (Posted By)
(Title)