

SSEU, 15 OCB2d 32 (BCB 2022)

(IP) (Docket No. BCB-4447-21)

Summary of Decision: The Union claimed that the grievant was wrongly demoted in retaliation for her performance as a Union delegate in violation of NYCCBL § 12-306(a)(1) and (3). The City argued that the Union failed to establish a *prima facie* case and that, to the extent the Board found a *prima facie* case, the actions alleged were taken for legitimate business reasons. The Board found that the Union had proffered a *prima facie* case of retaliation but that the City established it had a legitimate business reason for the grievant’s demotion. Accordingly, the petition was denied. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

**SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
on behalf of its member, JOANNE DESMANGLES,**

Petitioner,

-and-

**THE CITY OF NEW YORK and
THE NEW YORK CITY ADMINISTRATION FOR CHILDREN’S SERVICES,**

Respondents.

DECISION AND ORDER

On September 13, 2021, Social Service Employees Union, Local 371 (“Union”) filed an improper practice petition alleging that the grievant, Joanne Desmangles, was demoted in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (“NYCCBL”). The Union claims that Desmangles’ May 2021 demotion was in retaliation for her activities as a Union delegate, including relaying complaints about a supervisor to upper management, which resulted in the supervisor being transferred. The City argues that the Union failed to establish a *prima facie*

case and that, to the extent the Board finds a *prima facie* case, the actions alleged were taken for legitimate business reasons. The Board finds that the Union proffered a *prima facie* case but further finds that the City has established a legitimate business reason for Desmangles' demotion. Accordingly, the petition is denied.

BACKGROUND

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

Desmangles has been employed by the New York City Administration for Children's Services ("ACS") since October 2014. She was initially hired as a Child Protective Specialist ("CPS") assigned to an ACS facility at 185 Marcy Avenue ("Marcy Ave").

It is undisputed that Desmangles engaged in union activity while employed at ACS. She was elected as a Union delegate in 2016. In that capacity, she initiated and led several group meetings both with her fellow bargaining unit members and between those unit members and ACS upper management between September 2017 and January 2018. These meetings concerned complaints from staff members about the managerial performance of Child Protective Manager ("CPM") Neysa Vargas. The complaints involved Vargas' failure to approve subordinates' time sheets in a timely manner, failure to approve overtime worked, her unrealistic expectations regarding work plans, issuance of "illegal directives," failure to timely close cases, and communication with staff in an unprofessional manner. (Tr. 53-54) It is undisputed that as a result of Desmangles' communication of these complaints to management, in January 2018 both Vargas and her supervisor, Deputy Director Airat Bakare-Adejobi, were directed to either accept demotions or be reassigned to another office. Both opted to be reassigned away from Marcy Ave. Thereafter, Desmangles continued as a Union delegate.

In February 2018, Desmangles was promoted to acting Child Protective Specialist Supervisor Level I (“CPSS I”), making her responsible for supervising a team of CPSs. In April 2018 she was again promoted, to acting Child Protective Specialist Supervisor Level II (“CPSS II”). Later that same month, she was demoted back to a CPSS I. Desmangles testified that this demotion was the result of her having been assigned to carry out both her previous duties as a CPSS I and new duties as a CPSS II and difficulty performing both duties at once. In contrast, Deputy Director Shirene Pratt-Baker testified that she made the decision to demote Desmangles in April 2018 because she was being combative and not following directives from her supervisor. In December 2018, Desmangles was once again promoted to acting CPSS II. As a CPSS II, Desmangles supervised four CPSs and was supervised by a CPM. Each CPM is assigned three CPSSs to supervise. In or around December 2019, Desmangles received the first of two performance evaluations in her position as a CPSS II at Marcy Ave, for which she was given an overall performance rating of “very good.” (Union Ex. 1)

In March 2020, employees assigned to Marcy Ave began working remotely in response to the COVID-19 pandemic. CPSs were assigned to work fully remotely, while supervisors, both Levels I and II, were assigned to work remotely four days a week and in the office one day a week. Desmangles was initially assigned to work in the office on Tuesdays, but later requested and was reassigned to Wednesdays. Desmangles’ supervisor, Lakesha Campbell, went on maternity leave in or around June 2020 and Vargas was reassigned to Marcy Ave to replace her. Desmangles testified that Campbell and other managers held weekly meetings with each of their subordinates to discuss supervision of cases. Desmangles claimed that after Campbell left, she asked Vargas about scheduling such meetings, but Vargas declined to do so, and no supervisory meetings were held.

On September 2, 2020, Desmangles had a technical issue with her laptop. She testified

that the tech support she needed to resolve the issue was not available at Marcy Ave that day but was available at the office on Linden Boulevard. Desmangles testified that she called Vargas to discuss going to Linden Boulevard that day to meet with tech support, but that Vargas “scream[ed]” at her and ordered her to either report to Marcy Ave or be considered insubordinate. (Tr. 23) After speaking to Vargas, Desmangles contacted Vargas’ supervisor, Deputy Director Pratt-Baker. Desmangles and Pratt-Baker worked out a plan to switch Desmangles’ in-office day for that week to the next day, at which point tech support personnel would be present to assist her at Marcy Ave. Desmangles claimed that after informing Vargas of this arrangement, Vargas continued to demand that Desmangles come into the office that day. Desmangles remained at home and reported to work at Marcy Ave the following day.

On September 16, 2020, Desmangles received a memo from Vargas. The memo stated that it was the result of a 60-day investigation into Desmangles’ work, finding “several areas of concern that reflect a lack of Supervisory oversight” by Desmangles over her subordinates. (City Ex. B) Vargas noted that cases for which Desmangles’ team was responsible were missing reviews and other documentation and that clients had not been asked certain questions. Once CPSs are assigned cases, they are expected to complete a series of scheduled reviews, starting with an initial review at the time they receive the case, followed by additional reviews after 48 hours, five days, 25 days, and 50 days. The maximum legally allowable time a case can remain open is 60 days, at which point it must be submitted to CPMs for review. In particular, the memo referenced a case file for a client with the initials PV. As of September 16, 2020, the PV file included an initial review that was months late, was missing the 48-hour and 5-day reviews, had a 25-day review that was weeks late, was missing a 50-day review, and had not been closed despite September 16 being

the deadline to do so.¹ Additionally, the September 16 memo directed Desmangles to begin a Corrective Action Plan (“CAP”). The CAP required her to be in the office three days a week (Monday, Wednesday, and Friday) from September 21, 2020, to October 16, 2020, so that Vargas could monitor her progress, and directed Desmangles to attend a meeting on October 16 to discuss her progress.

Soon after ordering Desmangles to begin the CAP, Vargas went on vacation, returning on October 2, 2020. While Vargas was away, Desmangles worked with another CPM, who allowed her to continue reporting to the office only one day a week along with the other supervisors. Upon Vargas’ return to work, she received Desmangles’ daily remote clock-in email and informed her that, as it was a Friday, Desmangles was required to report to the office. Desmangles replied that she was unable to be in the office on Mondays and Fridays due to pandemic-related childcare issues. Although noted in the September 2020 memo, Vargas did not have a progress meeting with Desmangles on October 16, 2020.

On October 19, 2020, Vargas sent Desmangles another memo.² This memo once again criticized Desmangles for late or missing case reviews and added a complaint that she did not comply with the terms of the CAP. This memo referenced a series of case files with late or missing reviews for which Desmangles’ team was responsible, including but not limited to the PV file

¹ The PV case was due to be submitted for its final 60-day review on September 12, 2020. Usually such a case would be submitted to Vargas, but she was out of the office at the submission time, so it was submitted to another CPM, Sheyna Douglas, on September 11, 2020. On September 12, Douglas reviewed the file and declined to approve it. On September 16, Vargas sent an email to Desmangles including additional directives for the handling of that case. Desmangles closed the case and resubmitted it for review on September 17.

² Deputy Director Pratt-Baker consulted with Vargas about this memo before it was sent and later discussed it with Desmangles.

noted above and files regarding clients with the initials GW and MJ.³ The City submitted case files for three of those clients into evidence, including the PV file discussed above, and two more regarding clients with the initials GW and MJ. As of October 19, 2020, when the memo was sent, the GW file indicated that the initial review was two days late, and the 48-hour and 5-day reviews were missing. The MJ file showed the initial review was missing and the 48-hour and five-day reviews were submitted weeks late. Desmangles testified that her performance regarding timely submission of reviews and notes was no different from that of any other supervisor at Marcy Ave and that no supervisor completed all reviews for all cases. She claimed that the final submission of the case to the CPM on the 60th day was the only hard deadline.

In the October memo, Vargas ordered Desmangles to complete her reviews in a timely fashion and extended her instruction to come into the office three days a week through November 11, 2020. In addition, Desmangles was instructed to meet weekly with Vargas to review cases. However, Desmangles testified that these meetings never took place. Desmangles disputed the claims in the memo and refused to sign it. On October 21, 2020, Vargas submitted an employment law consultation form that accused Desmangles of misconduct and incompetence based on the same issues discussed in the two memos.⁴

On or around October 23, 2020, Desmangles tested positive for COVID-19 and went on leave starting that date. On or around November 16, she returned to work for two days. On November 18, 2020, Pratt-Baker informed Desmangles via email that she was being placed on

³ While the October memo discusses errors in the PV file with greater specificity than the September memo it does not appear to include additional errors that occurred after September 16, 2020.

⁴ An employment law consultation form is a document filled out by supervisors who are having an issue with an employee. It provides information about that employee's situation to the Employment Law Unit, which provides guidance to supervisors regarding possible employee actions and has the power to bring or recommend disciplinary charges.

administrative duty. However, on November 19, Desmangles went back on sick leave without commencing her administrative duty assignment. The email assigning Desmangles to administrative duty also instructed her to report to the office on Mondays and Fridays and asked her to attend an in-person meeting on Friday, November 20, 2020. Desmangles responded that she was unavailable to come to the office on Mondays and Fridays and requested that she be allowed to work remotely on those days. She further requested that the in-person meeting either be scheduled for a day when she was able to come into the office or that she be allowed to participate remotely. Those requests were denied in subsequent emails from Deputy Director Pratt-Baker and CPM Douglas. However, the November 20th meeting never occurred. Pratt-Baker testified that she spoke to Union organizer Ron Cook several times regarding Desmangles' poor performance in or around November 2020.

Desmangles returned to work on December 11, 2020, working in-office two days a week on Mondays and Fridays as directed, and began her administrative duty assignment. While on administrative duty, Desmangles was switched to an office on a different floor and assigned to report to CPM Douglas rather than Vargas. She was removed from her usual duties, including her role supervising CPSs. Instead, she was assigned to tasks such as covering an office front desk, checking in with staff about overdue documents, and binding together relevant documents to create references for cases.⁵

While Desmangles was on leave, ACS began to require employees to complete a new type of health screening before entering the office. Upon Desmangles' return to the office, she had difficulty using the screening system. On December 11, Desmangles, who was not yet aware of

⁵ Desmangles repeatedly complained to Deputy Director Pratt-Baker and other managers that she was not able to complete her assignment of binding together documents because, once placed on administrative duty, she no longer had access to the database containing some of the necessary documents.

the requirement, did not complete the screening. On her next day in the office, December 14, she completed the health screening. The results of the screening indicated that she should not go into the office, but she did so anyway. Pratt-Baker testified that Desmangles repeatedly stated that “HR said I can be here.” (Tr. 215) After hearing that claim from Desmangles, Pratt-Baker emailed an Administrative Manager in the Office of Human Resources to check on what Desmangles had been told. The Administrative Manager sent Pratt-Baker text copied out of an email that was sent to Desmangles that instructed Desmangles to “use the Health Screening Tool daily before reporting to a work-site” and to “contact [her] supervisor ... for further instructions” but not directing her to report to the office. (City Ex. Y) Pratt-Baker issued a memo on December 14, 2020, regarding what she described as Desmangles’ “insubordination” and “unprofessional” conduct in failing to properly complete the health screenings and failing to comply with instructions to not report to work based on the results of the screening. (City Ex. J)

Desmangles testified that in January 2021, she and another Union delegate requested a labor-management meeting to discuss a recurrence of the issues with Vargas that had resulted in her reassignment in 2018. The meeting was held on or around January 11, 2021, between the two Union delegates, Deputy Director Pratt-Baker, Borough Commissioner Joan Cleary, and First Deputy Mitchell Walker. There is no dispute that Desmangles raised issues at the meeting regarding Vargas’s behavior, including employee complaints of being disrespected, subjected to “illegal directives,” being asked to work outside of scheduled work hours, and not having their cases closed in a timely manner after submission. (Tr. 56-57) Desmangles claimed that Vargas’ behavior had resulted in low morale and heightened staff turnover, leaving the remaining staff overworked. Desmangles testified that at this meeting the Borough Commissioner requested documentation of the reported issues with Vargas and generally denied the allegations regarding Vargas’s behavior. Desmangles further testified that the Borough Commissioner told her that “she

knows that I want to advocate for other people, but in me advocating for other people it's not helping my particular case" regarding the work issues that had resulted in her placement on administrative duty. (*Id.* at 59) In contrast, the Borough Commissioner denied saying anything about Desmangles' role as a Union delegate. In her testimony, the Borough Commissioner acknowledged that issues with Vargas were discussed but testified that the primary purpose of the meeting was to discuss issues with Desmangles' timesheets.⁶

On February 9, 2021, Desmangles received a memo from CPM Douglas regarding three instances when Desmangles allegedly clocked in to work from home before leaving for the office: on January 25, February 5, and February 8, 2021. The memo instructed Desmangles that her workday begins when she arrives at the office and that clocking in before then could be classified as stealing time. Desmangles responded on February 12, 2021, denying that the January 25 incident occurred as Douglas described, but admitting to the February 5 and 8 instances. Desmangles argued that she was required to complete the health screenings at home and refused to complete work tasks without clocking in first. Thereafter, Desmangles continued to clock in at home each morning before conducting her health screening and then leave for the office.

During February, Douglas, Cleary, and ACS Assistant Commissioner of Human Resources Siheem Roseborough each instructed Desmangles that she could not clock in before arriving at the office. It is undisputed that Desmangles continued to clock in from home prior to her commute on each day she went to the office through February 25, 2021. On February 25, 2021, Roseborough suggested that Desmangles complete her health screening closer to when she arrived at the office. Desmangles rejected this suggestion on the basis that she had received instructions to complete the

⁶ The Borough Commissioner testified that, after the meeting, she discussed the issues that Desmangles raised about Vargas with other CPSS IIs that Vargas supervised and that they told her they did not share Desmangles' complaints.

health screening at home. Roseborough acknowledged that such instructions had been given but told her that the screening could be completed any time prior to entering the building. The record does not indicate whether Desmangles' timesheets were approved or whether she continued to clock in from home after February 25, 2021.

On February 17, 2021, Desmangles received a performance evaluation from Vargas for the period from April 1, 2020, through December 31, 2020. The evaluation rated Desmangles from 1 (worst) to 4 (best) in a series of categories. Her scores alternated between "2-Needs Improvement" and "3-Good." She was given an overall rating of "2-Needs Improvement" and was recommended for demotion. In the space provided to justify that overall rating, Vargas wrote the following:

CPSSII Desmangles received an overall rating of Needs Improvement. Although Ms Desmangles has the desire to be a good supervisor, there are factors that create a barrier to her professional development. Despite unforeseen changes or differences in approach to casework practice Ms Desmangles is expected to maintain a professional demeanor. When agitated, Ms Desmangles becomes combative and exhibits conduct unbecoming of a Supervisor. Her temperament negatively influences her direct staff. **She uses her platform as a Union Delegate to create intimidate [sic] which does not make for a healthy work environment nor does it support comradery between leadership and front line staff.** I would like to see Ms Desmangles to have better oversight of her 25/50 Day Supervisory Reviews, which promotes best casework practice and manageable caseload. Leadership Trainings offered by the agency is recommended to prepare Ms Desmangles in her career endeavors. Ms Desmangles will be referred to all trainings offered by the agency.

(Union Ex. 15) (emphasis added) Desmangles refused to sign the evaluation, saying that she was denied the opportunity to respond before it was finalized, and objected to the reference to her activities as a Union delegate. On February 23, 2021, CPM Douglas submitted an employment law consultation form regarding Desmangles' improper clock-in practices. The Employment Law Unit recommended that Desmangles' managers speak to her about adjusting her time but did not recommend disciplinary charges.

On March 23, 2021, Vargas and Pratt-Baker jointly submitted a memo to the Borough Commissioner and First Deputy requesting that Desmangles be demoted to CPSS I. The memo recommended a demotion based on incompetence, misconduct, and issues with time and leave. Regarding incompetence, the memo stated that Desmangles was unable to ensure the completion of her team's work and her own work in a timely manner, despite her team having a lower caseload than other teams. Regarding misconduct, the memo stated that Desmangles failed to provide proper supervision to her subordinates, resulting in the September 2020 PV case being submitted late. The memo asserted that case reviews being submitted late could endanger the children under ACS's care. Regarding time and leave, the memo described how Desmangles clocked in shortly after 9 a.m. but did not arrive at the office until approximately 11 a.m. on four occasions in February 2021. The April 1, 2020, through December 31, 2020, performance evaluation recommending demotion that Desmangles received on February 17, 2021, was included with the memo as supporting documentation.

On March 29, 2021, Cleary sent a memo to two Associate Commissioners requesting a "level reassignment" for Desmangles from CPSS II to CPSS I. (City Ex. DD) Regarding the caseload of Desmangles' team, Pratt-Baker testified that the team of four staffers had 14 cases assigned to them at the time the case files were retrieved on October 5, 2020.⁷ Pratt-Baker claimed that this was a low caseload, with the average for other comparable teams being 20-25 cases. Desmangles denied the characterization of her team's caseload as indicative of a lower workload. In fact, she claimed her team received more cases than comparable teams. She further claimed that caseload is measured based on the number of cases outstanding at any one time and that her team's low caseload reflected their ability to complete and close out cases particularly efficiently.

⁷ Desmangles ended her supervisory involvement with that team and those cases when she went on sick leave on or about October 23, 2020.

On May 3, 2021, Pratt-Baker called Desmangles and then visited her office. Desmangles claimed that Pratt-Baker “came in [her] face,” spoke to her in a “very aggressive manner,” and yelled at her about binding documents as part of her administrative duties, ignoring the practical issues Desmangles raised regarding not having access to the database on which some documents were kept. Desmangles responded to that incident by immediately sending a message to the EEO office and then a week later putting together a memo describing the incident that she sent to Pratt-Baker, the Borough Commissioner, and the First Deputy.

Desmangles testified that on May 24, 2021, she received a phone call from an HR representative, who told her that the management team had opted to “level change” her position from CPSS II to CPSS I, effective May 26, 2021. (Tr. 83-86) Desmangles testified that when she asked him for clarification about why this was happening, he did not have an answer for her and instead promised to call back to discuss the matter further. Desmangles claimed that, while the HR representative did call back the next day, she never received an additional explanation either for being placed on administrative duty or being demoted. The demotion resulted in an approximately \$25,000 annual salary decrease and reassignment to the Linden Boulevard office. Desmangles also left her role as Union delegate at that time.

POSITIONS OF THE PARTIES

Union’s Position

The Union argues that ACS demoted Desmangles from her position of CPSS II to the position of CPSS I “in retaliation for her aggressive and diligent performance of her duties” as a Union delegate, in violation of NYCCBL § 12-306(a)(1) and (3). (Pet. ¶ 19) The Union asserts that there is clear evidence that Desmangles was demoted due to her union activity. First, it points to the January 2021 meeting at which Desmangles alleges that Cleary told her that her activities as

a Union delegate were hurting her career as a supervisor. Second, it notes the criticism of Desmangles' performance of her Union delegate duties in her final performance evaluation, which was used as justification for an unfavorable evaluation. Thus, the Union argues that there is affirmative proof of discriminatory intent.

The Union claims that the reasons advanced by the City for Desmangles' demotion are pretextual. It argues that the CAP on which Desmangles was placed in September 2020 was not a good faith effort to improve her performance. Under the CAP, Desmangles was supposed to have one-on-one supervision with her manager to correct her alleged work deficiencies. That supervision never occurred, meaning that the only effect of the CAP was to require Desmangles to work a more difficult schedule than other supervisors.

The Union denies the City's claims that Desmangles was incompetent. It argues that the low caseload in her unit that the City presents as evidence of her poor performance is in fact the result of her unit being particularly efficient in processing cases. The Union claims Desmangles' unit actually received more cases than other units but had a lower number of active cases at any one time because those cases were closed out quickly. It argues that the particular examples of supposed incompetence the City offered, such as the late completion of the PV case, were cherry-picked instances from among all cases closed by Desmangles during her time as a CPSS II. Finally, the Union argues that the time and leave issues complained of were the result of a lack of clear instructions on when and how to sign in.

City's Position

The City argues that the Union failed to make out a *prima facie* case of retaliation under NYCCBL § 12-306(a)(3). It concedes that Desmangles engaged in union activity in 2017 and 2018 and served as a delegate through May of 2021 but argues that Desmangles was not engaged in union activity in 2020 or 2021. The City notes that the Union has not presented evidence of

union activity during that later period, such as filing grievances on behalf of members or being vocal about workplace issues. It argues that Desmangles' complaints during that period about time and leave issues and her CAP were personal in nature and did not constitute union activity. In particular, the City alleges that the January 2021 meeting that Desmangles attended with ACS management was solely about her personal issues and not a wider complaint involving other Union members. To the extent that Desmangles is found to have engaged in any union activity during the 2020-2021 period, the City claims that any relationship between her union activity and the demotion is "pure conjecture." (Ans. ¶ 105) Additionally, the City claims that Pratt-Baker had several conversations with Union organizer Cook about Desmangles regarding how they could collaborate to help her fulfill her role as a supervisor, demonstrating that she was attempting to avoid a demotion, not scheming to carry one out.

The City further argues there is no causal connection between any alleged union activity and Desmangles' demotion. It notes that the demotion came three years after the 2017-2018 union activity that resulted in Vargas being reassigned, during which time Desmangles was promoted more than once. The City argues the allegation that Vargas maintained a grudge through the period when she was not supervising Desmangles and then acted on that grudge when she was again made her supervisor is "patently absurd." (Ans. ¶ 96) The City denies that Borough Commissioner Cleary said anything to Desmangles about her work as a Union delegate in the January 2021 meeting.

To the extent the Board finds the Union has established a *prima facie* case of retaliation, the City argues that it had legitimate business reasons for Desmangles' demotion. It argues that Desmangles had a history of ignoring her responsibilities, not reviewing her cases, and stealing time. The City notes that the alleged time theft alone would be sufficient to sustain a disciplinary penalty as severe as termination.

Finally, the City claims that ACS's decision to demote Desmangles is a protected management right under NYCCBL § 12-307(b). It argues that determinations as to the propriety of work assignments are reserved as a management right of the City to "determine the ... personnel by which government operations are to be conducted." (Ans. ¶ 128) (quoting NYCCBL § 12-307(b)). Thus, the City argues that the petition must be dismissed.⁸

DISCUSSION

To establish a *prima facie* case of retaliation in violation of NYCCBL § 12-306(a)(1) and (3), the Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), requiring that the Union 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 CSTG, L. 375*, 7 OCB2d 16, at 19 (BCB 2014), *affd.*, *Matter of Donas v. City of New York & NYC Off. of Collective Bargaining*, Index No. 101265/14 (Sup. Ct. N.Y. Co. Oct. 23, 2015) (Wooten, J.). If a *prima facie* case of retaliation is established, "the employer may attempt to rebut petitioner's showing on one or both elements, or may attempt to rebut this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *CSTG, L. 375*, 7 OCB2d 16, at 20 (citations and quotation marks omitted); *see also SSEU, Local 371*, 77 OCB 35, at 18 (BCB 2006).

⁸ Although Respondents address an independent NYCCBL § 12-306(a)(1) claim in their answer, the Board does not find that the Union pled this claim and therefore does not consider it here.

Among the employee actions this Board has found to be protected under NYCCBL § 12-305 are “holding a union position, acting at the union’s request, filing a grievance, or advocacy on behalf of other union members.” *CWA, L. 1182*, 8 OCB2d 18, at 11-12 (BCB 2015) (citing *Local 375, DC 37*, 5 OCB2d 27, at 14 (BCB 2012)) (email to colleagues regarding employer’s alleged misapplication of the collective bargaining agreement protected); *Local 376, DC 37*, 5 OCB2d 31, at 18 (BCB 2012) (seeking union’s assistance in appealing disciplinary charges protected); *SSEU, L. 371*, 79 OCB 34 at 9-10 (BCB 2007) (testifying at co-worker’s disciplinary hearing at union’s request protected); *Washington*, 71 OCB 1, at 13 (BCB 2003) (individual’s filing of out-of-title grievance protected); *County of Tioga*, 44 PERB ¶ 3016, at 3061 (2011) (“statements and actions that are organized, prompted or encouraged by an employee organization will, in general, be found to be protected concerted activity for purposes of the [Taylor] Act. . . .”).

We find that the Union has satisfied the first prong of the *Bowman* test. It is undisputed that Desmangles engaged in union activity in 2017-2018 and was a Union delegate from 2016 through May 2021. *See COBA*, 65 OCB 19 (BCB 2000) (grievant’s status as union delegate sufficient to satisfy first prong of *Bowman* test). Regarding alleged union activity in 2020-2021, the performance evaluation Desmangles received in February 2021 references her union activity during the covered period from April 1, 2020, through December 31, 2020, demonstrating that Desmangles’ superiors were aware of her union activity during that period.

As for the second prong of the *Bowman* test, “absent an ‘outright admission of any wrongful motive, proof of the second element must necessarily be circumstantial.’” *CSTG, L. 375*, 7 OCB2d 16, at 20 (quoting *CWA, L. 1180*, 77 OCB 20, at 15 (BCB 2006)). However, a “petitioner must offer more than speculative or conclusory allegations.” *SBA*, 75 OCB 22, at 22 (BCB 2005). Such “allegations of improper motivation must be based on statements of probative facts.” *Feder*, 5 OCB2d 14, at 25 (BCB 2012) (quoting *Ottey*, 67 OCB 19, at 8 (BCB 2001)).

Upon review of the record, we find that the Union has satisfied the second prong of the *Bowman* test, in that a causal connection has been established between Desmangles' union activity and her demotion. The Union offered direct evidence of anti-union animus in the form of the 2020 performance evaluation, which explicitly referred to Desmangles' union activity as a contributing factor in her low performance rating. Indeed, the March 23, 2021, memo requesting level reassignment references that evaluation to justify Desmangles' demotion. Additionally, since Desmangles' union activity in 2017-2018 led to Vargas being reassigned, we find that the fact that her disciplinary issues in 2020 began shortly after Vargas returned suggests animus on Vargas' part. Accordingly, we find that the Union has established a *prima facie* case showing that Desmangles' union activity was a motivating factor in management's decision to demote her.

Once the Union has established a *prima facie* case, the burden shifts to the respondent to establish that its actions were motivated by a legitimate business reason. "[T]he employer may attempt to refute [the] petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *Local 30, IOUE*, 8 OCB2d 5, at 23 (BCB 2015) (quoting *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006)). We find that the City has established that Desmangles would have been demoted irrespective of her union activity. The City offered legitimate business reasons for Desmangles' demotion. It is undisputed that Desmangles failed to add certain reviews or entered them late in the PV case and failed to complete the file prior to the final 60-day deadline. In addition, one month later, Vargas noted that the failure to add certain reviews or addition of late reviews continued in the GW and MJ cases. While Desmangles did not dispute the existence of the case processing deadlines, or her failure to meet these deadlines, she claimed that untimely submission of case reviews was commonplace for supervisors. However, the City's witnesses

denied that late or missing reviews were common.⁹ No data or documentary evidence was offered to support either of these conflicting assertions. Accordingly, we cannot conclude that ACS' reliance on Desmangles' case processing errors demonstrated that Desmangles was treated differently than similarly situated employees.¹⁰ *See OSA*, 13 OCB2d 2, at 29-30 (BCB 2020) (union submitted data refuting claims about a terminated employee's low productivity); *cf. L. 376, DC 37*, 73 OCB 15, at 15-16 (BCB 2004) (citations omitted) (finding retaliation where evidence demonstrated that employee was disciplined for conduct for which other employees were not).

Therefore, based on the memos issued to Desmangles, Pratt-Baker's removal of Desmangles' supervisory responsibilities in November was not entirely unforeseen. Further, it is unrebutted that contemporaneous with the administrative re-assignment, Pratt-Baker spoke to Union organizer Cook several times regarding Desmangles' work performance. Moreover, after her reassignment to administrative duties, Desmangles' work issues continued. She repeatedly failed to follow simple instructions regarding the clock-in procedure. She also received a memo on February 9, 2021, ordering her to not clock-in before her commute but openly disobeyed that order and continued to clock-in from home before leaving for the office at least through February 25, 2021.

In sum, the City has established a legitimate basis for Desmangles' 2020 performance evaluation and for demoting her thereafter. We conclude that the decision to demote Desmangles was motivated by reasons relating to her poor work performance and failure to follow instructions

⁹ Additionally, Vargas and Pratt-Baker stated in the March 23, 2021, memo requesting level reassignment that delay in case processing could endanger the children under their care.

¹⁰ The same is true regarding Desmangles' and Pratt-Baker's assertions regarding the number of cases assigned to Desmangles' team. No data or documentary evidence was offered to support either of the conflicting assertions. Accordingly, we find insufficient evidence to conclude that ACS' assertion that Desmangles' performance was less than satisfactory was pretextual.

and would have been made even in the absence of protected union activity. Accordingly, we find that the City has overcome the Union's *prima facie* case by establishing that the decision to demote Desmangles was motivated by legitimate business reasons.

We find that the City did not violate §12-306(a)(1) and (3) of the NYCCBL when it demoted Desmangles from CPSS II to CPSS I. The Union's improper practice petition must, therefore, be dismissed.

ORDER

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

ORDERED, the improper practice petition filed by the Social Service Employees Union, Local 371, docketed as BCB-4447-21, is dismissed in its entirety.

Dated: September 28, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER

I dissent. PETER PEPPER
MEMBER