

***Atlantic Maritime Group, 16 OCB2d 15 (BCB 2023)***  
(IP) (Docket No. BCB-4352-19)

***Summary of Decision:*** The Union claimed that DOT violated NYCCBL § 12-306(a)(1) and (3) when it terminated a Shop Steward during his probationary period in retaliation for union activity. The City argued that the Shop Steward was not terminated for his union activity, but rather for his lateness and poor work performance. The Board found that the Union established a *prima facie* case of retaliation and that DOT did not rebut the *prima facie* case or establish a legitimate business reason for terminating the Shop Steward. Accordingly, the petition was granted. (***Official decision follows.***)

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

**In the Matter of the Improper Practice Proceeding**

***-between-***

**ATLANTIC MARITIME GROUP, INTERNATIONAL  
ORGANIZATION OF MASTERS, MATES, & PILOTS, ILA,  
AFL-CIO,**

***Petitioner,***

***-and-***

**NEW YORK CITY DEPARTMENT OF  
TRANSPORTATION, FERRY DIVISION,**

***Respondent.***

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**DECISION AND ORDER**

On September 19, 2019, the Atlantic Maritime Group, International Organization of Masters, Mates, & Pilots, ILA, AFL-CIO (“Union”), filed an improper practice petition alleging that the New York City Department of Transportation, Ferry Division (“City” or “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 terminating Nicholas Tosto, a Shop

Steward serving as a probationary Marine Oiler, in retaliation for his union activity. The City argues that the Union has failed to show any causal link between the alleged protected activity and Tosto's termination. It further argues that it had a legitimate business reason to terminate Tosto due to his unsatisfactory work performance and lateness and that it exercised its managerial right when it did so. The Board found that the Union established a *prima facie* case of retaliation and that DOT did not rebut the *prima facie* case or establish a legitimate business reason for terminating Tosto. Accordingly, the petition is granted.

### **BACKGROUND**

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

The Union represents Deckhands, Ferry Agents, and Marine Oilers employed by DOT. Prior to his May 2019 discharge, Tosto had been employed as a provisional Marine Oiler at DOT since 2014. Tosto's primary work responsibilities as a Marine Oiler involved working below deck in the engine room of the Staten Island Ferry ("Ferry"), where Marine Oilers are responsible for maintaining oil and coolant levels, ensuring that the room remains clean, monitoring the status of the engine, fueling the vessel, prepping it to operate each morning, and retiring it at the end of the day. While working as a provisional Marine Oiler, Tosto's performance was evaluated as satisfactory. Tosto testified that he had never been counseled for his work performance or for lateness. Roland Rexha, a Marine Engineer, supervised Tosto for approximately a year and drafted

Tosto's 2016 evaluation.<sup>1</sup> In Tosto's 2016 evaluation, he noted that Tosto "needs to improve tardiness." (Union Ex. 4) However, while Tosto would sometimes arrive to work late, Rexha testified that "[f]or the most part [Tosto] would always let us know ahead of time he was running late" and that he was a "hard worker." (Tr. 77-78)

On July 24, 2017, Tosto began serving as a Union Shop Steward. On February 25, 2019, Tosto passed the civil service exam to secure a permanent position as a Marine Oiler on the Ferry. Several other provisional Marine Oilers also passed the exam and were appointed to permanent positions. Tosto began to serve a three-month probationary period as a permanent Marine Oiler, which ran through May 24, 2019.

#### Union Activity

As a Shop Steward, Tosto acted as a liaison between employees and management and represented employees in disciplinary proceedings in DOT's Advocate office. Tosto handled approximately 10 disciplinary matters during his tenure as Shop Steward. In April 2019, Tosto represented two fellow Union members in disciplinary hearings where the City sought to terminate them for absenteeism. Tosto claims that his advocacy resulted in the City choosing not to terminate the employees.

#### Seniority List Dispute

Following the February 2019 civil service exam, the Union and DOT discussed revising the seniority list for Marine Oilers so that the list would account for the employee's civil service exam results. During this discussion, DOT was represented by George Mahoney, Director of Administration for the Ferry Division, and the Union was represented by Union Vice President

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<sup>1</sup> The City failed to introduce evidence that DOT evaluated Tosto's work as unsatisfactory prior to the beginning of his probationary period.

Steve Doherty and Representative Rich Russo. On April 10, 2019, the Union and DOT agreed that the order of the seniority list would be revised to take each employee's civil service exam results into account and created a revised seniority list. Tosto was not involved in the discussions to revise the seniority list. On April 11, 2019, Tosto and other Union representatives were sent a copy of the newly revised seniority list.

Tosto disagreed with the order of the revised seniority list for two reasons. First, he argued that Thomas Stewart, who was third on the revised list, should not be on the list at all because he had a "major conflict of interest." (Tr. 30-31) As the interim Deputy Director of Assignments, Licensing, and Training, Stewart had been involved in revising the list. Second, Tosto noted that he and several other Marine Oilers were disputing their exam results and believed that if these challenges succeeded, their rankings on the list would improve.<sup>2</sup> Tosto and the other affected Marine Oilers wanted the revised list to reflect their scores after their appeals had been considered.

After Tosto spoke with other Union representatives about his concerns, the Union met with Mahoney on April 15, 2019. Tosto attended the meeting and felt that Mahoney appeared "annoyed" based on his body language, which Tosto believed was because the Union had created more work for Mahoney over the list. (Tr. 34) Mahoney agreed to the Union's proposal to restore the original list. The original list was restored and circulated to Union members on April 16, 2019. Thereafter, Tosto successfully appealed the results of his DCAS exam. As a result, Tosto's ranking increased seven places from the bottom of the list to the middle. In addition, Stewart was removed from the list.

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<sup>2</sup> At the time the list was first revised on April 11, 2019, Tosto had received a score of 70 on the test. He believed that once his score had been appealed, his score would increase, and his ranking on the list would improve accordingly.

Tosto's May 1, 2019 Lateness

Senior Port Engineer Brad Hopper testified that the appropriate protocol when a Marine Oiler becomes aware that they will be late for their shift is for the employee to contact the Assignment Officer on duty as soon as possible. (Tr. 147) Hopper testified that absences can be excused for several reasons including "...a doctor's appointment, official City business, official union business...taking a DCAS exam." (*Id.* at 177-178) By contrast, "[i]f you're late for another reason it's unexcused." (*Id.* at 178) According to Hopper, an employee's lateness due to official union business is considered an excused absence.

On April 30, 2019, Tosto went to the Ferry Division's personnel office and spoke with Keith Kmiotek, the DOT Assignment Officer that was on duty, to tell him that he would be attending a Union meeting the following day in Newark, New Jersey. Tosto told Kmiotek that he might be late for his scheduled 3:30 p.m. shift because of the Union meeting and that he would call Kmiotek as soon as the meeting finished. Tosto predicted that he would call sometime between 3:15 p.m. and 3:30 p.m. and asked Kmiotek if he could provide coverage for his shift in the event that he were late for work. On May 1, Tosto left the Union meeting at 3:15 p.m. He called Kmiotek to tell him that he would be late for his 3:30 p.m. shift. After speaking with Tosto, Kmiotek contacted the Port Engineer on duty and arranged for him to cover Tosto's shift. Following his conversation with Kmiotek, the Port Engineer called Hopper, his supervisor, and told him that he was covering Tosto's shift on the Ferry. The Port Engineer did not tell Hopper at that time that Tosto was late to work because he had to attend a Union meeting or that Tosto had contacted Kmiotek to tell him that he would be late. Tosto arrived to work at approximately 4:20 p.m., fifty minutes late for his shift, and was unable to work on the first Ferry trip, as scheduled.

He did report to his assigned location on the Ferry and worked the next scheduled trip, which departed at 4:50 p.m.

Based on his phone conversation with the Port Engineer who covered Tosto's shift, Hopper testified that he was concerned that Tosto did not follow protocol when he called out on April 30, 2019. Accordingly, Hopper asked Stewart, the Deputy Director of Assignments, Licensing, and Training, to investigate whether Tosto had followed protocol when he called out. On May 9, Assignment Officer Kmiotek emailed Mahoney to explain Tosto's lateness on May 1. Kmiotek's email confirmed that on April 30, Tosto had informed him that he might be late due to his attendance at a Union meeting and that he had called at 3:15 p.m. on May 1 to confirm that he would be late for his scheduled shift. Kmiotek stated that he then arranged for the Port Engineer on duty to cover Tosto's position. Hopper learned of this email sometime after May 9, but testified that he "can't say for sure" if he read the email before recommending that Tosto be terminated and then drafting Tosto's evaluation on May 23. (Tr. 167) Nevertheless, it is undisputed that Mahoney received Kmiotek's email when it was sent on May 9. Notwithstanding his testimony that union business is considered an excused absence, when Hopper drafted Tosto's evaluation on May 23, Tosto's lateness on May 1 was deemed to be unexcused.

#### Tosto's Probationary Evaluation and Termination

On May 21, three days prior to the end of Tosto's probationary period, Mahoney asked Hopper if all the employees whose probationary periods were ending should become permanent. Hopper testified that he ran a search in CityTime for all probationary employees who had unexcused absences or lateness. Mahoney drafted an email outlining the justification for terminating Tosto, which stated that it is Ferry Division policy for an employee to provide two hours' notice if they will not be on time for their shift. (Union Ex. 7) There is no evidence in the

record that corroborates Mahoney's statement that the Ferry Division maintains this policy requiring two hours' notice.

Hopper's search identified two probationary employees with unexcused absences: Tosto and "DG," another probationary Marine Oiler. Hopper told Mahoney that he wished to terminate Tosto and DG. On May 21, Mahoney emailed DOT Director of Personnel Helene Holloway to ask if it would be possible to extend the probationary periods of only select probationary Marine Oilers for six months. Holloway replied that this was not possible. On May 22, Mahoney told Holloway that since the probationary period could not be extended, he wished to terminate Tosto and DG. Mahoney wrote that the reason to terminate DG was because he had been a no call/no show on two occasions. In the first instance, on January 23, 2019, DG was AWOL the entire day.<sup>3</sup> In the second instance, DG was thirty minutes late for an overtime shift, which resulted in the Ferry departing ten minutes later than scheduled. Mahoney described the reason he wanted to terminate Tosto as follows:

50 minutes late to work. When [Tosto] called in the day prior advising that he *might* be late the next day, he called in late 15 minutes before start of shift, which is a violation of Division practice requiring two hour notification before shift begins.

(Union Ex. 7)

Mahoney then instructed Hopper to complete a probationary employee evaluation report ("evaluation") for both employees. Hopper did not complete evaluations for any other probationary employees.

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<sup>3</sup> We note that January 23, 2019, was prior to the three-month probationary period, which began on February 24, 2019.

Hopper drafted evaluations recommending the termination of Tosto and DG, both dated May 23, 2019. In DG's evaluation, Hopper recommended termination because DG had been a "no call/no show" for a shift he had been scheduled to work. (Tr. 176) In Tosto's evaluation, Hopper recommended termination because Tosto's work performance during the probationary period was unsatisfactory in four respects:

- (a) the promptness and speed of his work;
- (b) his effectiveness in oral and written communication;
- (c) his dependability in meeting commitments and carrying out assignments; and
- (d) his attendance and punctuality.

(City Ex. 15)

Hopper testified that he never observed Tosto perform any of his job duties and that the evaluation was based on information provided to him by the reports of Port Engineers. The Port Engineers who drafted these reports also did not observe Tosto's work at any time and based their reports on accounts provided to them by crews that worked the shift on the Ferry following Tosto's. Hopper testified that Tosto's unsatisfactory ratings were based on reports he received that Tosto frequently needed to be reminded to perform his routine duties and that, at times, his work needed to be rectified by other crew members. For example, Hopper testified that one of the Port Engineers had told him that Tosto had consistently failed to properly clean cooling strainers on the Ferry, which were part of a Marine Oiler's job responsibilities.<sup>4</sup> With respect to what Hopper cited as unsatisfactory communications, dependability, and attendance, Hopper described only Tosto's failure to follow the proper chain of command when calling out on May 1, 2019. There is no

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<sup>4</sup> The allegation that Tosto failed to properly clean strainers is not mentioned in any of the exhibits, Tosto's evaluation, or the City's answer, and was raised for the first time during Hopper's testimony.



evidence that Hopper ever confirmed that Tosto had failed to follow protocol when he contacted Kmiotek on May 1. According to Hopper, it is “critical” that the Marine titles in Ferry operations are at their assigned work locations on time because it is impossible to maintain Ferry operations otherwise. (Tr. 175-176) Hopper noted that it is impossible for the Ferry to get underway if even one Marine Oiler is not on station as scheduled. (*Id.* at 145) Due to this, if a Marine Oiler arrives late, it might be impossible for the Ferry to operate as scheduled.

On May 23, 2019, the City sent Tosto a letter that stated that his employment would be terminated, effective May 24, 2019.

### **POSITIONS OF THE PARTIES**

#### **Union’s Position**

The Union argues that DOT violated NYCCBL § 12-306(a)(1) and (3) by terminating Tosto in retaliation for his union activity. According to the Union, Tosto’s activity as a Shop Steward was the motivating factor in the City’s decision to terminate him. It asserts that both Mahoney and Hopper were aware that Tosto was a Shop Steward who had represented Union members facing disciplinary charges and by negotiating with DOT over the implementation of the seniority list in April 2019. The Union avers that both Mahoney and Hopper were also aware that Tosto reported late to work on May 1, 2019, because he had attended a Union meeting.

According to the Union, Tosto’s repeated engagement with management as a Shop Steward provided a basis for the City’s anti-union animus. As evidence of this improper motivation, the Union points to the temporal proximity between Tosto’s protected activity in April and May of 2019 and his termination on May 23, 2019. The Union notes that Tosto’s challenge to the seniority list and his representation of three Union members all occurred within seven weeks of his

termination. The Union asserts that Tosto had been more aggressive than others in his advocacy as a Shop Steward, which shows that anti-union animus was the motivating factor in terminating him.

The Union maintains that the City's improper motivation is further demonstrated by the weak basis for Tosto's evaluation and termination. The only stated reason in the documentation concerning Tosto's termination is his lateness on May 1, 2019. The Union argues that Tosto's lateness was the only detail that Hopper had direct knowledge of when he decided to terminate him. The Union argues that the City's reliance on Tosto's lateness on May 1, 2019, is pretextual. It stresses that according to Hopper's testimony, Tosto followed DOT protocol when he called out on May 1, 2019, and notes that it is undisputed that on April 30, 2019, Tosto contacted Kmiolek, the Assignment Officer, to inform him that he might be late the next day and that Kmiolek told Tosto that he would find coverage if needed. Further, the City concedes that Tosto was late due to Union business and that he contacted Kmiolek as soon as he could. Critically, it is undisputed that both Mahoney and Hopper knew that Tosto was late because he attended a Union meeting prior to deciding to terminate him. The Union maintains that Tosto's absence should have been defined as excused because he was attending a Union meeting and that he followed all applicable protocol when he called in late. According to the Union, Hopper's contradictory testimony that Tosto's absence was unexcused calls Hopper's credibility into question and is evidence that anti-union animus was the motivating factor. (Union Br. at 20)

The Union notes that the remainder of Tosto's evaluation is based on "third-hand accounts" from employees who never worked the same shift as Tosto and did not observe his work. (Union Br. at 7) Hopper conceded that he never personally observed any of Tosto's work and that neither did the Port Engineers whose reports he relied on in concluding that Tosto's work performance

was unsatisfactory. Further, the Union notes that Hopper did not identify any of the employees who told him that Tosto's work was unsatisfactory.

The Union argues that the evaluation is pretextual because it was drafted after Hopper had already made the decision to terminate Tosto. The Union counters the City's argument that Tosto was treated the same as other similarly situated employees by noting that the other probationary employee who was terminated at the same time was terminated for being a "no-call/no-show" and having multiple unexcused absences, which the Union claims is not comparable to Tosto's single excused instance of arriving fifty minutes late for his shift. The Union argues that both Tosto and DG were treated differently than other probationary employees, citing Hopper's testimony that no other probationary employees were evaluated. The Union argues that the lack of support for Tosto's poor performance evaluation undermines the City's proffered legitimate business reason for terminating him.

Finally, the Union points to the Board's decision in *MEBA*, 15 OCB2d 25 (BCB 2022), in which it ruled that Mahoney and Hopper demonstrated anti-union animus. Here, the Union argues that the Board should draw an inference of anti-union animus against Mahoney and Hopper because the Union's claims here are substantially similar and contemporaneous to those in *MEBA*.

As a remedy, the Union asks that Tosto be reinstated as a Marine Oiler retroactively to May 24, 2019, with full back pay and benefits, plus interest, through the date of his reinstatement and with his seniority restored. Additionally, it asks that the City be ordered to cease and desist from discriminating and/or retaliating against Tosto and other Union members because of protected union activity, to post appropriate notices, and any further relief that the Board deems necessary and proper.

**City's Position**

The City argues that it did not violate NYCCBL § 12-306(a)(1) and (3) because the record demonstrates that the Union has failed to establish a *prima facie* claim of retaliation. The City maintains that the Union has not shown any evidence of anti-union animus and that Tosto's termination was unrelated to his activities as a Shop Steward. According to the City, the evidence shows that Tosto, a probationary employee, was terminated due to his failure to meet the performance standards required for permanent appointment. The City claims that Tosto's lateness is particularly problematic given the specific needs of the Ferry service and terminating him was an exercise of the City's managerial right to direct operations under NYCCBL § 12-307(b). Finally, the City argues that poor performance was a legitimate reason for terminating Tosto and that this would have occurred in the absence of any protected activity.

The City maintains that the Union has failed to establish a causal connection between the decision to terminate Tosto and his union activity. According to the City, the alleged temporal proximity between Tosto's union activity and his termination is insufficient. The City argues that the lack of evidence of temporal proximity is exemplified by the fact that Tosto had been a Shop Steward for two years before he was terminated but had not alleged any retaliation prior to the events in this petition.

The City avers that the Union's claim of improper motivation is wholly conclusory, which is insufficient to state a violation of the NYCCBL. The City notes that many of the instances in which Tosto advocated for his fellow Union members were successful and that there is no evidence that management was hostile during these exchanges. According to the City, allegations that management harbored animus against Tosto because he was a successful Shop Steward are purely speculative. Concerning Tosto's involvement with the revised seniority list, the City notes that

this list was proposed by the Union, not by the City, and that the City did not interfere with Tosto's attempts to reinstate the prior list. The City points to Tosto's testimony regarding Mahoney's "body language" during the discussion of the seniority list as emblematic of the speculative nature of the Union's evidence of anti-union animus. (City Br. at 12) The City characterizes the revision of the seniority list as a positive and cooperative exchange between the Union and management that ultimately resolved the Union and Tosto's concerns.

The City maintains that Tosto failed to follow DOT procedure when he informed Kmiotek that he would be late due to attending a Union meeting on May 1, 2019. According to the City, Tosto should have contacted the Assignments, Licensing and Training Office, according to the "usual hierarchy," more than two hours before his assigned shift. (City Br. at 11 n.4) The City claims that Tosto did not follow this protocol when he attempted to arrange coverage by contacting Kmiotek and the Port Engineer on duty less than an hour before his assigned shift was scheduled to begin. The City argues that the specific needs of the Ferry service make Tosto's lateness and failure to follow protocol particularly serious and that it would impact its managerial right to direct operations should employees be allowed to show up late to their scheduled shifts.

In support of its legitimate business reasons, the City maintains that Tosto's unsatisfactory evaluation did not depart from DOT procedure in any material way. Probationary employees are evaluated in a different manner because they are necessarily different from those of permanent employees who have due process rights. Accordingly, due to the unique needs of the Ferry service as well as Tosto's status as a probationary employee, the lapses in his performance gave the City a legitimate business reason for terminating Tosto. Further, Tosto would have been terminated even in the absence of the protected conduct. To support this rationale, the City argues that DG, a probationary non-Union member who was terminated for a "substantially similar probationary

evaluation” at the same time as Tosto, demonstrates that protected activity was not the motivating factor in his termination. (City Br. at 22) The City maintains that it has a managerial right to “determine the standards of services to be offered” and that doing so does not constitute interference with employees’ rights. (*Id.* at 24) Accordingly, any alleged interference does not rise to the level of being “inherently destructive,” and the petition must be dismissed in its entirety. (*Id.*)

### DISCUSSION

The Union claims that DOT terminated Tosto in retaliation for his protected union activity. 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.”<sup>5</sup>

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.

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<sup>5</sup> 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).

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); *Local 376, DC 37*, 73 OCB 15, at 13 (BCB 2004)), *affd.*, *Matter of Donas v. City of New York & New York City Office of Collective Bargaining*, Index No. 101265/2014 (Sup. Ct. N.Y. Co. Oct. 23, 2015) (Wooten, J.). To satisfy “[t]he 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) (internal quotation marks omitted) (quoting *Local 2627, DC 37*, 3 OCB2d 37, at 16 (BCB 2009)); *see also L. 1180, CWA*, 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) (citations omitted); *see also SSEU, L. 371*, 75 OCB 31, at 13 (BCB 2005), *affd.*, *Matter of Soc. Serv. Empls. Union, L. 371 v. New York City Bd. of Collective Bargaining*, Index No. 116054/2005 (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 Tosto was engaged in protected union activity. He became a Shop Steward for the Union in 2017 and remained active in that position by representing members in disciplinary hearings and attending Union meetings through the time he was terminated. Further, the evidence shows that the employer had knowledge of his union activity due to his regular interactions with Mahoney and Hopper in his capacity as

Shop Steward. Additionally, both Mahoney and Hopper were aware of the contents of Kmiotek's May 9 email, which stated that Tosto gave advance notice to his Assignment Officer that he might be late on May 1 because he would be attending a Union meeting. Therefore, the Union established that the employer's agents who were responsible for Tosto's termination, Mahoney and Hopper, had knowledge of his union activity.

As for the second prong of the *Bowman* test, temporal proximity is present in this case. Moreover, there is evidence in the record that supports the conclusion that Tosto's union activity, specifically his attendance at a Union meeting, was a motivating factor in his termination.<sup>6</sup> Indeed, the employer asserts that Tosto's tardiness as a result of his attendance at the May 1 Union meeting was a primary basis for his termination. However, there is no dispute that under DOT protocol, an employee's absence for attending official union business is considered excused. DOT's rules require that employees in the Ferry Division follow the "proper chain of command" in the event that they have to call out or report that they will be late for their shift. (Tr. 175) Hopper was aware that Tosto followed protocol when he called out on May 1 and that his lateness due to union activity was excused. Nevertheless, despite knowledge of these facts, Hopper and Mahoney maintained that Tosto's absence was unexcused, that Tosto failed to follow the proper protocol, and requested his termination. In conjunction with the pretextual basis for Tosto's termination, the timing of

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<sup>6</sup> The Union argues that the Board should rely upon its factual findings in *MEBA*, 15 OCB2d 25 (BCB 2022), to infer that management, specifically Mahoney and Hopper, harbor anti-union animus against the Union and Tosto. We have previously ruled that prior findings of discrimination by an agency are not a basis to conclude that the agency "is or was hostile to all union activity." *Feder*, 9 OCB2d 33, at 29 (BCB 2016) (citation and internal quotation marks omitted). However, we note that the relevant events at issue in this case occurred contemporaneously with those in *MEBA* and that Hopper and Mahoney were involved in the adverse action taken in that case. Our findings here consider these facts in addition to the evidence of pretext described above.



this adverse action in close proximity to his union activity is sufficient to establish a *prima facie* case that his termination was retaliatory.

We find that the pretextual basis for Tosto's termination is further evinced by the City's proffered business reason that he was terminated for time and leave issues. *See Local 1757, DC 37*, 6 OCB2d 13, at 19 n.12 (BCB 2013) (citing *Local 376, DC 37*, 5 OCB2d 31, at 19-20 (BCB 2012)); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination") (internal quotation marks omitted and emphasis in original) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)); *Stockbridge Valley Central School Dist.*, 26 PERB ¶ 3007, at 3014 (1993) ("the pretextual nature of the employer's articulated reasons for its conduct not only rebuts a claim of legitimate business reasons, but may support the charging party's *prima facie* case") (emphasis in original).

The City further asserts that it had a legitimate business reason for firing Tosto due to the "serious deficiencies" in his performance as a probationary Marine Oiler. (City Br. at 21) However, there is no evidence that Tosto's work performance was evaluated as unsatisfactory. *See UFA*, 1 OCB2d 10, at 25 (BCB 2008) (finding the City's legitimate business reason pretextual where a contemporaneous email exchange did not mention the concern and the reason was asserted only in the answer, after the City's actions were challenged); *See also CSTG, L. 375*, 4 OCB2d 61, at 28-29 (BCB 2011). The only problem with Tosto's performance mentioned by Mahoney in his May 21 email was Tosto's lateness on May 1. Tosto's performance was not raised until after Mahoney had decided to terminate Tosto and instructed Hopper to write a probationary

performance evaluation. Further, Hopper's testimony regarding the performance issues that affected Tosto's probationary evaluation were based on non-specific reports provided to him by unidentified crew members. Neither Hopper nor the individuals who made these reports had any first-hand knowledge of Tosto's performance. This hearsay evidence lacked any indicia of reliability particularly in light of the fact that Tosto was never made aware of any deficiencies in his work. Therefore, we find that the City's assertion that Tosto's performance was unsatisfactory to be unsubstantiated by the record. *DC 37, Local 1113, 77 OCB 33, at 35 (BCB 2006)* (legitimate business reason defenses that are "unsupported by or inconsistent with the record . . . will not be credited by this Board"); *see also OSA, 13 OCB2d 2, at 28 (BCB 2020)*; *see also DC 37, 1 OCB2d 5, at 65-66 (BCB 2008)* (quotation and citations omitted) (declining to give weight to "unreliable hearsay accounts" that "lack[ed] indicia of reliability" or were uncorroborated by the person who made the alleged statements).

Where, as here, "a petitioner has established a credible *prima facie* case and there is sufficient evidence to find that the employer's asserted justification is false, we may conclude that the employer engaged in unlawful activity." *DC 37, L. 376, 79 OCB 38, at 22 (BCB 2007)* (internal quotation marks omitted) (quoting *Colella, 79 OCB 27, at 61 (BCB 2007)*). We find based on the evidence that Tosto would not have been terminated were it not for his attending the Union meeting on May 1, 2019. We reject the legitimate business reasons proffered by the City because under DOT policy Tosto's absence was excused and there was no reliable evidence that his work performance was unsatisfactory. Consequently, we find that DOT's actions were taken in retaliation for protected union activity and violated NYCCBL § 12-306(a)(1) and (3).

As a remedy for DOT's violations, the Union has requested that the Board order DOT to immediately reinstate Tosto and make him whole for lost wages and benefits, cease disciplining

employees for their union activity, and post a notice to all employees. The make whole remedies, however, must be consistent with the City's right to make appointments based on merit and their statutory powers of selection. *See L. 376, DC 37, 6 OCB2d 39, at 27 (BCB 2013) (citing Levy v. The City Commission on Human Rights, 196 A.D.2d 214, 217 (1st Dept. 1994))*. Accordingly, we order that Tosto be offered reinstatement to the title of probationary Marine Oiler and order Respondents to reevaluate him for maturation into the title of permanent Marine Oiler without any consideration of the Union or its members' protected activity within 30 days of this Order. Finally, the Board orders that DOT make Tosto whole for any and all back pay and lost benefits resulting from DOT's retaliatory actions.

**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 Atlantic Maritime Group, International Organization of Masters, Mates, & Pilots, ILA, AFL-CIO against the New York City Department of Transportation, Ferry Division, docketed as BCB-4532-19, 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 Nicholas Tosto and other employees in the exercise of rights protected by the NYCCBL; and it is further

ORDERED, that the Department of Transportation offer to reinstate Nicholas Tosto to the position of probationary Marine Oiler; and it is further

ORDERED, that the Department of Transportation reevaluate Nicholas Tosto for maturation into the title of Marine Oiler without any consideration of the Atlantic Maritime Group, International Organization of Masters, Mates, & Pilots, ILA, or its members' protected activity within 30 days of this Order; and it is further

ORDERED, that the Department of Transportation remit back pay and any lost benefits resulting from the Department of Transportation's retaliatory actions to Nicholas Tosto; and it is further

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

Dated: April 4, 2023  
New York, New York

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SUSAN J. PANEPENTO  
CHAIR

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ALAN R. VIANI  
MEMBER

---

M. DAVID ZURNDORFER  
MEMBER

---

CAROLE O'BLENES  
MEMBER

---

PETER PEPPER  
MEMBER



## OFFICE OF COLLECTIVE BARGAINING

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**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:

**IMPARTIAL MEMBERS**  
Susan J. Panepento, Chair  
Alan R. Viani

**LABOR MEMBERS**  
Charles G. Moerdler

**CITY MEMBERS**  
M. David Zurndorfer  
Pamela S. Silverblatt

**DEPUTY CHAIRS**  
Monu Singh  
Steven Star

That the Board of Collective Bargaining has issued 16 OCB2d 15 (BCB 2023), determining an improper practice petition between the Atlantic Maritime Group, International Organization of Masters, Mates, & Pilots, ILA, AFL-CIO, the New York City Department of Transportation, Ferry Division.

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 Atlantic Maritime Group, International Organization of Masters, Mates, & Pilots, ILA, AFL-CIO against the New York City Department of Transportation, Ferry Division, docketed as BCB-4532-19, 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 Nicholas Tosto and other employees in the exercise of rights protected by the NYCCBL; and it is further

**ORDERED**, that the Department of Transportation offer to reinstate Nicholas Tosto to the position of probationary Marine Oiler; and it is further

**ORDERED**, that the Department of Transportation reevaluate Nicholas Tosto for maturation into the title of Marine Oiler without any consideration of the Atlantic Maritime Group, International Organization of Masters, Mates, & Pilots, ILA, or its members' protected activity within 30 days of this Order; 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)