

DSBA, 18 OCB2d 1 (BCB 2025)
(IP) (Docket Nos. BCB-4498-23; BCB-4532-23)

Summary of Decision: Petitioners alleged that DOF violated NYCCBL § 12-306(a)(1) and (a)(3) by transferring the Union President and Second Vice President and disciplining, suspending, and placing on modified duty the Second Vice President and the Treasurer in retaliation for their union activity. The City argued that there is no causal link between the alleged retaliatory acts and the protected union activity and that it had legitimate business reasons for the transfers and disciplinary actions. The Board found that the Union established *prima facie* evidence of retaliation regarding the transfer of the Union President and that the City’s purported business reasons for the transfer were pretextual. The Board found that the claim regarding the transfer of the Second Vice President was untimely and not properly before the Board. The Board further found that the Union did not establish a *prima facie* case regarding the discipline, suspension, and placement on modified duty of the Second Vice President and the Treasurer. Accordingly, the improper practice petition docketed as BCB-4498-23 was granted, and the improper practice petition docketed as BCB-4532-23 was denied. ***(Official decision follows.)***

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

In the Matter of the Improper Practice Proceeding

-between-

**NEW YORK CITY DEPUTY SHERIFFS’ BENEVOLENT ASSOCIATION and
INGRID SIMONOVIC,**

Petitioners,

-and-

**CITY OF NEW YORK and THE NEW YORK CITY
DEPARTMENT OF FINANCE,**

Respondents.

DECISION AND ORDER

On January 12, 2023, the New York City Deputy Sheriffs’ Benevolent Association (“Union”) and Union President Ingrid Simonovic filed a verified improper practice petition,

docketed as BCB-4498-23, against the City of New York (“City”) and the New York City Department of Finance (“DOF”) alleging that they violated § 12-306(a)(1) and (a)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by involuntarily transferring President Simonovic from a task force in retaliation for her actions as Union President. On August 7, 2023, the Union filed a second improper practice petition, docketed as BCB-4532-23, alleging that the City and DOF violated NYCCBL § 12-306(a)(1) and (a)(3) by disciplining, suspending, and placing on modified duty the Union’s Second Vice-President (“VP”), Furney Canteen, and its Treasurer, Timothy Lo, in retaliation for their union activity, and independently violated NYCCBL § 12-306(a)(1). The Union’s petitions were subsequently consolidated. The City argues that there is no causal link between the alleged retaliatory acts and the Executive Board members’ protected union activity. Further, the City argues that it had legitimate business reasons for the actions taken regarding the Executive Board members. The Board finds that the Union established a *prima facie* case of retaliation regarding the transfer of President Simonovic to the New York County Law Enforcement Bureau and that the City’s purported business reasons for transferring her were pretextual. The Board finds that a claim regarding the transfer of Second VP Canteen was untimely and not properly before the Board. The Board further finds that the Union did not establish a *prima facie* case regarding the discipline, suspension, and placement on modified duty of Second VP Canteen and Treasurer Lo. Accordingly, the improper practice petition docketed as BCB-4498-23 is granted, and the improper practice petition docketed as BCB-4532-23 is denied.

BACKGROUND

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

DOF is the agency responsible for administering the City's tax and revenue laws. It includes the Office of the New York City Sheriff ("Sheriff's Office"), which is responsible for serving and enforcing mandates and orders issued from local or state courts and the federal government, among other entities. The Sheriff executes processes involving the seizure of money or property pursuant to writs, warrants, and court orders; serves civil and criminal processes; and engages in a variety of other law enforcement activities. The Union is the exclusive collective bargaining representative for DOF employees in the titles of Deputy City Sheriff and Supervising Deputy Sheriff.¹

The Sheriff's Office consists of five county-based facilities with its headquarters located in Queens at 30-10 Starr Avenue ("Starr Avenue"). Within each of these facilities, a majority of bargaining unit members are assigned to the Law Enforcement Bureau ("LEB"), while others are assigned to the Bureau of Criminal Investigations ("BCI"), which conducts cigarette tax investigations and now also cannabis investigations. Additionally, bargaining unit members are deployed to interagency task forces ("task forces") that work in conjunction with various federal, state, or local agencies, such as the Drug Enforcement Administration, the High Intensity Drug Trafficking Area program, the Department of Homeland Security ("Homeland Security"), the United States Marshals Service ("US Marshals"), and the City's Office of Emergency Management.

Anthony Miranda was appointed Sheriff on May 3, 2022. When he was appointed, the Sheriff was informed that the New York City Department of Investigation ("DOI") had an active investigation involving the theft of property seized by the Sheriff's Office that had been ongoing

¹ Employees in the Deputy City Sheriff and Supervising Deputy Sheriff titles have in-house positions of Deputy Sheriff, Sergeant, Lieutenant, and Undersheriff. The Sheriff's Office also has civilian Sergeants, who are not represented by the Union.

for over a year. Sheriff Miranda was aware that two bargaining unit members who were “implicated” were already on modified duty.²

The Sheriff and President Simonovic met in May 2022 to discuss the Sheriff’s plan to transfer employees who had been assigned for multiple years to task forces outside of DOF. The goal of the plan was to allow others in the agency “to take on these special assignments” while those who had completed a two to five-year tour on a task force could “com[e] back...[and] have had both connections and experience to be able to train other[s].” (Tr. 227-28) As of May 20, 2022, there were ten employees from the Sheriff’s Office serving on task forces. Of these ten employees, three were Deputy Sheriffs, including President Simonovic; four were Sergeants; and three were in titles not represented by the Union, including a Detective, a Detective Sergeant, and a Community Associate.

President Simonovic claims, and the Sheriff denies, that the Sheriff told her that the transfers would apply solely to the supervisory employees serving on task forces. President Simonovic identified herself, the two other Deputy Sheriffs, and the Detective as the non-supervisory employees. According to President Simonovic, the Sheriff said he would bring back the supervisors because they had kept their task force positions after being promoted, and supervisors needed to be supervising. According to the Sheriff, when he told President Simonovic that he was considering “moving everybody,” she responded by saying “you wouldn’t do that to me,” and he told her that “it is just a matter of when it is going to happen because we have to plan it out.” (Tr. 229)

In the summer of 2022, the Sheriff called a meeting with all of the employees assigned to the various task forces to discuss the transfer plan. The Sheriff and Chief Julio Lopez asked those

² The two Deputy Sheriffs placed on modified duty prior to the Sheriff’s appointment had their guns confiscated but kept their uniforms.

present to explain what cases they were working on with their respective task forces. According to President Simonovic, the Sheriff told them that they would hear from Chief Lopez, who would be letting them know when they were coming back from their task forces and that they needed to start preparing to do so.³

The Sheriff testified that after the meeting he asked “each of the participants in the task forces” who wished to remain to provide their resumes to Chief Lopez and any justification for remaining in their current assignments. (Tr. 230) His office then reached out to the task forces to find out their guidelines and timelines for transfers.

In September 2022, President Simonovic requested a labor-management meeting with the City’s Office of Labor Relations (“OLR”) to discuss the denial of bargaining unit members’ vacation requests. Prior to contacting OLR, President Simonovic had made the same request to DOF’s Labor Relations Department but had not received a response.

On October 17, 2022, the Sheriff requested and received a spreadsheet of “everyone” assigned to a task force that included their rank, dates of promotion, and the number of years employed at the Sheriff’s Office. (City Ex. 8) As two Sergeants had retired, there remained eight employees assigned to a task force in October 2022: three Deputy Sheriffs, two Sergeants, a Detective, a Detective Sergeant, and a Community Associate. Most had been assigned to task forces for three to five years. However, the Detective and the Detective Sergeant had been assigned to task forces for 11 and seven years, respectively.

On October 24, 2022, the Sheriff sent an email announcing that applications to serve on

³ President Simonovic testified that the Sheriff called two meetings to discuss the transfer plan: at the first, every employee assigned to a task force was present except for one Deputy Sheriff; at the second, every employee assigned to a task force was present except for a Sergeant who had announced that he would be retiring. President Simonovic testified that the conversation about what work was being performed and the Sheriff’s statement that Chief Lopez would let them know when they were coming back took place at the second meeting.

task forces were open and would be accepted through November 1, 2022. The Sheriff stated that “[t]his is a prestigious assignment” and that “[t]hose selected would be sharing their skills and expertise.” (City Ex. 4) He stated that “[t]his is not a permanent transfer, however successful candidates can anticipate a 2-5 year assignment.” (*Id.*) The application requirements included, among other things, a non-supervisory position, five years of active service, and a recommendation from a supervisor or Undersheriff. The Sheriff noted that “[i]f you are eligible for promotion to a supervisory position and accept the promotion you will be transferred back to the Sheriff’s Office.” (*Id.*)

On October 31, 2022, the Union responded to a request from OLR for a list of subjects for the upcoming labor-management meeting. The subjects included cancellation of vacation during summer and prime weeks, Deputy Sheriffs working out of title due to a lack of supervisors, promotions being placed on hold, civil service exams, blackout weeks for vacation during electronic monitoring weeks, denials of vacations without being offered alternative dates, and bargaining unit members returning from line of duty injuries being placed on five-day schedules.⁴

The labor-management meeting was held on November 10, 2022. President Simonovic and Sergeant Canteen, who was then a Queens Delegate, were among the Union representatives present. First Deputy Sheriff Maureen Kokeas and OLR Assistant Commissioner Matt Campese were among the City representatives. The Sheriff was not present. The parties discussed a new task force comprised of employees of the Sheriff’s Office, the New York City Police Department, the City’s Department of Consumer and Worker Protection, and the New York State Office of Cannabis Management, which had recently begun conducting regulatory inspections at unlicensed

⁴ Electronic monitoring is a task rotated among each county office and involves monitoring the ankle devices placed on individuals released from jail.

cannabis retail locations throughout the City. In addition, while many of the subjects that the Union previously identified were discussed at the meeting, others were not discussed.

At the labor-management meeting, the Union representatives explained their members' concerns that the cannabis inspections "were borderline violating Fourth Amendment rights" because their authority to conduct cannabis enforcement was not clear. (Tr. 153-154) President Simonovic asked for an email to be circulated notifying bargaining unit members of the names of attorneys to contact at DOF's Law Department regarding the legality of their actions. First Deputy Sheriff Kokeas responded by saying, "That's a lie. Everyone knows who they can contact if they have legal questions." (Tr. 37)

Less than two weeks later, a meeting was held at Starr Avenue for employees in the BCI unit. President Simonovic, then-Queens Delegate Canteen, and First Deputy Sheriff Kokeas were among the attendees. The Union repeated its request for the names of attorneys to contact at the Law Department. Management representatives responded that employees should not contact the Law Department directly. Instead, if employees had a question, they should contact their supervisor, who would pass it up the chain of command, and management would obtain an answer from the Law Department and relay it. The Union also raised concerns regarding what items should be seized during the cannabis inspections because the bargaining unit members were concerned about being sued for violating Fourth Amendment rights.

Around this time, the Union and its members also raised concerns to management that there were no set cannabis storage procedures and no consistent vouchering for seized cannabis and related paraphernalia brought to Starr Avenue. A Sergeant notified management that two employees had become sick due to cannabis exposure, and the Union raised concerns about proper ventilation at Starr Avenue.

In mid-December 2022, then-Queens Delegate Canteen was notified that he would be

transferred from BCI to the US Marshals Office task force even though he had not applied for a task force position. According to the Sheriff, initially his office processed the transfer applications and recommended a Deputy Sheriff for the US Marshals Office task force. However, the US Marshals Office indicated that it preferred a Sergeant. The Sheriff testified that he asked his executive team whom they recommended, and Chief Lopez and DOF Assistant Commissioner Glover recommended Sergeant Canteen. Chief Lopez and Assistant Commissioner Warren Glover met with Canteen to discuss the transfer. The Sheriff testified that he had to make sure that Sergeant Canteen wanted the assignment and that, when he explained the taskforce assignment to him, Canteen accepted it and “was enthusiastic about the transfer.” (Tr. 242)

However, Canteen represented that he did not initially accept or decline the assignment, but asked to think about whether to accept, and Chief Lopez told him, “it was already a done deal.” (Tr. 106-107) Canteen speculated that he was transferred because he was “pretty vocal in asking management” about cannabis inspections and that bargaining unit members looked to him for answers. (Tr. 89) He was concerned that the move from Starr Avenue, where he regularly interacted with 60 bargaining unit members, to the US Marshals Office, where he interacted with only one bargaining unit member, would interfere with his ability to represent the members. While Canteen testified that he told someone in DOF’s Equal Employment Opportunity Office at the end of December 2022 that he did not want to move to the task force, there is no evidence that Canteen notified management or that management was otherwise aware that he did not want the transfer.

According to President Simonovic, on December 28, 2022, Chief Lopez informed her that she would be transferred from her task force position at Homeland Security to Starr Avenue. Around that same time, three other employees were also notified that they would be transferred out of their task force assignments: the two Sergeants, one of whom was then the Union’s Second VP, and the Detective Sergeant.

On December 30, 2022, an inspector from the New York State Public Employee Safety and Health Bureau (“PESH”) arrived unannounced at Starr Avenue to conduct a site inspection regarding the storage of hazardous materials at the location. Assistant Commissioner Glover asked him to reschedule the inspection. PESH subsequently conducted its first inspection on January 6, 2023. Neither Union representatives nor the Sheriff were present. During this visit, PESH notified DOF officials, including First Deputy Sheriff Kokeas and Assistant Commissioner Glover, that it had received a complaint that alleged improper storage and transportation of seized evidence and property, including cannabis, lack of personal protective equipment, employees having headaches, decontamination of transporting vehicles, and lack of HAZMAT training. PESH did not reveal the source of the complaint.

On January 11 and 13, 2023, the Union filed three improper practice petitions: BCB-4496-23, regarding changes to the vacation selection process; BCB-4497-23, regarding changes to the compressed work schedule for bargaining unit members returning from leave for a line of duty injury; and BCB-4498-23, regarding President Simonovic’s then-upcoming involuntary transfer.⁵

On January 23, 2023, PESH conducted its second inspection. The Sheriff was not present. Union representatives, including Second VP Canteen, sat in on PESH’s interviews of bargaining unit members.⁶ Assistant Commissioner Glover and an attorney from the City’s Law Department also wished to be present during these interviews and were “very hostile” when President Simonovic said they could not attend. (Tr. 175) In addition, President Simonovic told PESH and

⁵ The Board takes administrative notice that the improper practice petition docketed as BCB-4496-23 was granted, finding that the procedure for requesting and use of annual leave is a mandatory subject of bargaining and that DOF violated the duty to bargain in good faith by unilaterally changing it. *See DSA*, 17 OCB2d 8, at 14-15 (BCB 2024).

⁶ Canteen became the Union’s Second VP in early January 2023.

First Deputy Sheriff Kokeas that there was fentanyl in a storage container. Kokeas denied that there was fentanyl present. President Simonovic told Kokeas to consult her emails since Simonovic had previously sent an email on the subject. First Deputy Sheriff Kokeas asked for the names of employees making the allegations, and President Simonovic said she would not provide names because DOF would retaliate against them. Kokeas said, “no, we don’t retaliate against people.” (Tr. 176) President Simonovic told her to tell that to all the members that DOF had retaliated against “because that’s not true.” (*Id.*) According to President Simonovic, “[t]hen it just got heated.” (*Id.*) According to Second VP Canteen, during this visit, PESH told DOF that it would issue violations.

A second labor-management meeting was held in early February 2023, regarding the same subjects discussed at the first labor-management meeting. President Simonovic, Second VP Canteen, the Sheriff, First Deputy Sheriff Kokeas, Assistant Commissioner Glover, and DOF Labor Relations Officer Cisa Mack were among the attendees. According to Second VP Canteen, the Sheriff told them that most of the topics were “not open for discussion,” and the subjects were tabled. (Tr. 77) Second VP Canteen described the meeting as “cold” and “one-sided,” with no back-and-forth discussion. (*Id.*) President Simonovic described the atmosphere as “hostile” and stated that “everything was a mandate,” with the Sheriff telling them, “You have to do as you’re told and that’s that.”⁷ (Tr. 179)

In mid-February 2023, Chief Lopez called President Simonovic to tell her to report to a meeting for all employees assigned to a task force. At the meeting, Chief Lopez told her that she would be moved to New York County LEB in a few days. President Simonovic told him that she

⁷ President Simonovic and Second VP Canteen were the only witnesses who testified about this labor-management meeting. Neither elaborated specifically on what management said at the meeting.

had cases to close at Homeland Security, and he informed her that she had a week to finish her work there.

On February 23, 2023, three of the eight employees assigned to a task force were transferred back to the Sheriff's Office. President Simonovic, who is a Deputy Sheriff, was assigned to New York County LEB.⁸ The Sergeant who was formerly the Union's Second VP was assigned to Queens BCI because a supervisor was needed to replace Second VP Canteen. The civilian Detective Sergeant returned to BCI because it is the only unit that employs civilian detectives.

Five employees remained on their task forces: two Deputy Sheriffs, a Sergeant, the Detective, and the Community Associate. One Deputy Sheriff stayed at the request of the Office of Emergency Management because "[h]e was playing a critical role for them." (Tr. 286-287) According to the Sheriff, Chief Lopez recommended that another Deputy Sheriff remain on their task force because he had only recently been assigned there.⁹ The Sergeant was notified in December 2022 that he would be transferred but the transfer was rescinded after he told Chief Lopez that he would be retiring at the end of the year and wanted to end his career in that unit. According to the Sheriff, the Detective was not transferred for several reasons, including his task force role and "how much time he had left" before his retirement, and the Community Associate has a "permanent assignment" to her task force.¹⁰ (Tr. 245, 289)

The Sheriff testified that he agreed with Chief Lopez's recommendation to transfer

⁸ President Simonovic's position on the Homeland Security task force was filled by a civilian employee not represented by the Union.

⁹ As of October 2022, this Deputy Sheriff had been assigned to that task force for three years.

¹⁰ As of March 15, 2024, neither the Sergeant nor the Detective had retired.

President Simonovic off the task force because she “had a significant amount of time already assigned to the unit,” “there was a need to bring more people in,” and “she had very little or no time in county work.”¹¹ (Tr. 237) According to the Sheriff, President Simonovic had never worked in a county office. However, President Simonovic testified that, while she had never been permanently assigned to a county office, she worked in the Queens and Bronx county offices for a combined total of approximately one year. In addition, the Sheriff testified that New York County LEB’s Chief, Orpheus Cuttino, was “a good teacher and leader,” which afforded President Simonovic the opportunity to be trained by someone with a lot of knowledge, and that her Spanish language skills were needed at that office. (Tr. 337)

When President Simonovic called her new supervisor, Chief Cuttino, to tell him that she would be assigned to his office, he told her, “good now nobody can say that the [U]nion [P]resident has a cush[y] gig.”¹² (Tr. 187) She found the comment to be “hostile” and “unnecessary.” (*Id.*) He also said that he would not give her “any special treatment.” (*Id.*) She responded that she had not asked for any and requested that he treat her like everyone else.

Upon her arrival at New York County LEB, President Simonovic was placed on the evening shift, working 2 p.m. to midnight. All the other bargaining unit members on the evening shift worked 12:00 p.m. to 10 p.m. When she asked her co-workers why she was there working alone after 10 p.m., they told her that her schedule was “supposed to be 12:00 to 10:00.” (Tr. 189) According to President Simonovic, when she raised the issue with Chief Cuttino, he responded that he put her on the work schedule for five days a week. Simonovic told him that she should be

¹¹ President Simonovic was transferred from BCI to the Homeland Security task force in 2018 and, by December 2022, had served there for at least four years.

¹² Chief Cuttino is a member of the Union’s bargaining unit.

working four days, not five days a week, and Cuttino responded that if he put her back on a four-day schedule, management would “say something.” (Tr. 189) Chief Cuttino also said, “[m]anagement sent you here so I could watch you” and they want you to work five days.¹³ (Tr. 190)

Sometime after her transfer, President Simonovic submitted a request to DOF for access to the designated lactation facility at New York County LEB. When President Simonovic asked Chief Cuttino for information on the lactation room, he told her that “they didn’t want [her] wandering around the building” and “wanted to keep everybody together.” (Tr. 418) She was instructed to use a vacant office next to Chief Cuttino’s office as a lactation room.¹⁴

In addition, President Simonovic testified that, in March 2023, she received a phone call from DOF’s Labor Relations Officer and OLR Assistant Commissioner Campese informing her that she was not allowed to use release time to meet with bargaining unit members unless she sent the two of them an email two weeks in advance.¹⁵ This was the first time President Simonovic had heard of this procedure since the Union obtained *ad hoc* release time in 2021. According to President Simonovic, the Labor Relations Officer told her that the Sheriff, as department head, needed to authorize her release time. She further testified that, on this phone call, the Labor

¹³ While the testimony reflects that President Simonovic was assigned to work five days per week and different hours/days from her colleagues, it is unclear why she was regularly assigned ten additional hours per week and whether her complaint to Chief Cuttino included that discrepancy. Nevertheless, there is no dispute that President Simonovic was assigned a schedule different from the other bargaining unit members.

¹⁴ President Simonovic testified that an unnamed DOF employee advised Chief Cuttino of the lactation room’s location and how to access it. However, there is no specific evidence in the record concerning the location of the designated lactation room or whether one existed.

¹⁵ Release time refers to paid leave time available to union officials performing union duties during work hours.

Relations Officer told her that, going forward she “couldn’t be speaking with any of the members” because “[i]t would be seen that [she was] speaking with them about union activities.” (Tr. 427) President Simonovic stated generally that DOF gave the Union a “hard time” getting approval for release time because “[t]hey want to know what we were doing” and “who we were with.”¹⁶ (Tr. 428-429) As a result, she and other Union officials used their personal leave time instead of union release time when they did not want to reveal the details of their activities.

DOF’s Labor Relations Officer did not recall having had a call with both President Simonovic and the OLR Assistant Commissioner. In addition, she testified that it is the employee’s supervisor who is responsible for approving *ad hoc* release time at the Sheriff’s Office. On one occasion, DOF’s Time and Leave Department did not know whether President Simonovic’s release time had been approved since Chief Cuttino was out on leave, and DOF’s Labor Relations Department asked Chief Cuttino’s supervisor, Chief Lopez, to approve it. The Labor Relations Officer then emailed President Simonovic and asked her to copy the Labor Relations and Time and Leave Departments on her emails requesting release time so that the process would go smoother. She testified that the process for the Union to obtain release time is the same for all unions representing DOF employees.¹⁷ The email requesting release time must contain the date, timeframe, and the employee’s name. The supervisor’s role is to check if the timeframe will impede the operations of the unit. To her knowledge, President Simonovic’s requests for release time have never been denied.

On April 7, 2023, DOI sent the Sheriff a letter with its investigation findings (“DOI

¹⁶ According to President Simonovic, the Sheriff instructed “some of the undersheriff[s] that... if the union needed to see anybody or go to any county, they have to let him know.” (Tr. 187-188)

¹⁷ The only difference is that, typically, the Labor Relations Officer receives the release time request from an administrative assistant, not the requesting employee.

Report”) regarding allegations that Sheriff’s Office employees had taken “items that were seized from enforcements out of evidence storage for personal use.”¹⁸ (City Ex. 5) The DOI Report “referr[ed] its investigative findings to [the Sheriff’s] office for whatever administrative action [it] deem[ed] appropriate.” (*Id.*) Based on video footage covering November 2020 to May 2021, the DOI Report “found multiple incidents where deputy sheriffs removed items, including bottles of alcohol, from the evidence containers; placed items from the evidence containers into their personal or take-home vehicles; and stayed in the garage not performing any job functions for multiple hours while on the clock and on overtime.” (*Id.*) The DOI Report listed 14 employees who were allegedly involved in the misconduct, though it did not identify their union status.¹⁹ Second VP Canteen and Treasurer Lo were on the list of “deputy sheriffs who were involved in this misconduct and acted as a group.” (*Id.*) To illustrate the incidents observed on the video footage, the DOI Report summarized each employee’s involvement on four specific dates. While some employees are described as “hanging around,” others are seen removing concealed items from the evidence container. (*Id.*) On one occasion, Second VP Canteen was observed with a bottle of alcohol. On several occasions, Canteen and Treasurer Lo were seen opening the evidence container. The Sheriff testified that the DOI Report contained serious allegations because they involved a violation of the employees’ oath of office and “it is a crime.” (Tr. 249) He further stated that employees involved in misconduct “should not be involved in active investigations or be carrying a weapon at that point.” (Tr. 250)

¹⁸ As background, the DOI Report indicated that DOI had received an anonymous complaint against Second VP Canteen and others on January 26, 2021, and a second allegation regarding Second VP Canteen and two Deputy Sheriffs on June 3, 2021.

¹⁹ We note that three of the 14 employees named in the DOI Report are members of the Union’s Executive Board, ten are bargaining unit members with no Union position, and one is a civilian Investigator not represented by the Union.

Based on the DOI Report, DOF's Advocate's Office conducted a follow-up investigation and recommended disciplinary charges against 12 of the 14 employees identified, including Second VP Canteen and Treasurer Lo. On May 2, 2023, DOF served those 12 employees with disciplinary charges and specifications, and all 12 were suspended for 30 days. Second VP Canteen and Treasurer Lo were charged with stealing or facilitating the theft of seized contraband on six and nine occasions, respectively. Immediately after service of the disciplinary charges, the Sheriff called a meeting at Starr Avenue at which he announced that the 12 employees were suspended "because they stole" and that no one is "to help them, [or] get in contact with them." (Tr. 93) Of the remaining two employees who were not charged, one was placed on modified duty without suspension, and the other faced no disciplinary action and has since been promoted.

The same day as the charges were issued, the Sheriff sent an email to DOF's Commissioner and other DOF management stating that the "[s]uspension [o]peration was completed without incident," 11 employees were suspended for 30 days, and one employee was placed on modified leave.²⁰ (City Ex. 6) It identified the Undersheriff, four Sergeants (including the civilian Investigator), and six Deputy Sheriffs who were suspended and the Deputy Sheriff who was placed on modified duty. The email listed the employees by title and indicated their Union position, where applicable. In addition, the email noted that "all agency property and firearms were secured." (*Id.*) The Sheriff testified that firearms were confiscated because the Sheriff's Office "wanted to take precautions to make sure that [the employees] did not do any harm to themselves or anyone else." (Tr. 256) He further stated that the badges, uniforms, and ID cards were confiscated because DOF and the Sheriff's Office wanted to ensure the confidentiality of "active

²⁰ We note that this email listed the names of only 11 of the 12 employees charged and suspended and that the employee placed on modified duty was not charged.

investigations” by preventing the suspended employees from using those proofs of authority to access areas where confidential information regarding those active investigations was kept. (Tr. 257)

DOF offered all 12 employees the option to resign in exchange for expungement of the disciplinary action from their record and treatment of the 30-day suspension as leave without pay. Seven of the suspended employees, including one Union Executive Board member and the civilian Investigator, accepted the offer and resigned from their positions. Five employees, including Second VP Canteen and Treasurer Lo, declined the offer and instead elected to proceed to administrative trials at the Office of Administrative Trials and Hearings (“OATH”).

On June 2, 2023, a few days before the suspended employees returned to duty, the Sheriff sent out an email indicating that, while they were on restricted duty, those individuals were “prohibited from entering any of the Sheriff’s Offices for any reason,” and “[a]ccess to computers, locker rooms, office desks, [and] any area inside the Sheriff’s Office is prohibited. . . .” (Union Ex. H) The email further states that “[a]ny individual aiding or facilitating access to or the removal of any property not expressly authorized . . . will be subject to disciplinary action.” (*Id.*) The Sheriff testified that the restrictions were necessary because of the seriousness of the allegations of “stealing property from the Sheriff’s Office.” (Tr. 261) In addition, he asserted that the employees could not have access to confidential information regarding active investigations and that their involvement could compromise ongoing investigations.

The five suspended employees who had not resigned returned to work on June 5, 2023, and were placed on modified duty. All five suspended employees who had not resigned were assigned to other DOF facilities; were not given their badges, firearms, or uniforms; were issued new ID cards; and were prohibited from working overtime. The Sheriff testified that, upon their return,

Second VP Canteen and Lo “had the same restrictions that we put in place for everybody.”²¹ (Tr. 258) Second VP Canteen was transferred to DOF’s Facilities Management Office. In addition, he lost access to two lockers and an assigned take-home car and was prohibited from retrieving personal items stored in the lockers and car. In contrast, the one employee placed on modified duty without facing disciplinary charges or suspension was not subject to the same restrictions. While this employee’s firearm was confiscated, he was permitted to keep his uniform, stay in the “operational room,” and work overtime while on modified duty. (Tr. 408)

Second VP Canteen and President Simonovic testified that the restrictions imposed on the five employees after they returned from serving their disciplinary suspensions were unusual. According to Second VP Canteen, generally employees on modified duty “are still able to access computers, their locker, their uniform, [and] a badge.” (Tr. 98) President Simonovic had never seen a member on modified duty be deprived of their uniform and gun or assigned to a new facility. In addition, Second VP Canteen testified that, since the disciplinary actions, other bargaining unit members have “ostracized” him and the other suspended employees. (Tr. 101) He stated that employees were told to “stay away” from him and that they avoided contact with the suspended Executive Board members “for fear of retaliation from management.” (Tr. 101)

On September 18, 2023, PESH issued a Notice of Violation and Order to Comply to the Sheriff’s Office detailing seven health and safety violations related to the storage of seized evidence pursuant to its January 2023 inspections at Starr Avenue.

On March 19 and March 25, 2024, OATH issued decisions finding that the charges against

²¹ Both Deputy Sheriffs who had been placed on modified duty prior to the Sheriff’s appointment were named in the DOI Report, charged, and suspended. One resigned, and the other’s placement on modified duty was further restricted in light of the additional allegations in the DOI Report. The Sheriff testified that “in their second modification [DOF] did the same thing to all members across the board.” (Tr. 336)

Second VP Canteen and Treasurer Lo, respectively, were not established by a preponderance of the evidence and recommending the dismissal of those charges. The ALJs who issued each decision rejected the argument that the charges were untimely under the Civil Service Law but found that the evidence was circumstantial and did not support an inference that Second VP Canteen and Treasurer Lo either stole or knowingly facilitated the theft of seized evidence. A third OATH decision was also issued on March 19, 2024, finding that the charges against one of three remaining bargaining unit members who had been suspended had been proven and recommending that he be terminated. DOF adopted the OATH recommendations in each case.²²

POSITIONS OF THE PARTIES

Union's Position

The Union contends that DOF violated NYCCBL § 12-306(a)(1) and (a)(3) when it engaged in a series of retaliatory acts against the Union's Executive Board. Noting that the City did not dispute that Executive Board members engaged in union activity, the Union focuses its arguments on establishing that the adverse actions taken were improperly motivated by union activity. In its post-hearing brief, the Union specifies the following retaliatory actions by DOF: (1) the involuntary transfer of President Simonovic, (2) the involuntary transfer of Second VP Canteen, and (3) the suspensions, subsequent disciplinary proceedings, and the related placement on modified duty of Second VP Canteen and Treasurer Lo. The Union argues that each of those adverse actions, taking place from December 2022 through June 2023, were in close temporal proximity to the advocacy of the Executive Board members at the November 10, 2022 and February 2, 2023 labor-management meetings and during the PESH investigation of the Sheriff's

²² OATH decisions regarding the other two suspended employees who did not resign were not entered into evidence.

Office's seizure storage issues.²³

The Union asserts that the facts surrounding President Simonovic's transfer show that it was motivated by her union activity and undermine the City's defense that the transfer was made for a legitimate business reason. The Union claims that President Simonovic did not meet the criteria set forth by the Sheriff for transfer of employees with a task force assignment because she was not a supervisor and was the only non-supervisory bargaining unit member to be transferred. Additionally, the Union questions the validity of the other purported criteria because they were not consistently applied, as at least two other task force employees had been assigned for over five years and were not transferred. Further, the reasons provided by the Sheriff for keeping them in their task force assignments were not borne out by the facts. The Union notes that the Sheriff's additional reasons for transferring President Simonovic, specifically, that she had no experience working in a county assignment and that she would benefit from the guidance of her new supervisor, Chief Cuttino, were without merit. In actuality, President Simonovic had a combined year of experience in two counties, and the Union argues that statements by her new supervisor upon her arrival undermine the reasons provided by the Sheriff. The Union claims that those same statements by her new supervisor explicitly demonstrate that President Simonovic's transfer was improperly motivated. Specifically, her new supervisor told her that now no one could say the Union President had a "cush[y] gig," she would not receive special treatment, and she was assigned to his office so he could watch her. (Tr. 187) Moreover, the Union alleges that, upon her transfer,

²³ In further support of its temporal proximity argument, the Union notes that the Board has issued only four improper practice decisions regarding this bargaining unit in the past 50 years, the last of which was in 2005. Since the arrival of Sheriff Miranda in 2022, the Union has filed five improper practice charges and already received a favorable decision by the Board. It maintains that this pattern suggests animus by DOF's new leadership and evinces that the contentious relationship between the parties was based on the Union's challenges to purportedly dubious management decisions and management's refusal to deal with the Union in good faith.

DOF imposed changes regarding the process for requesting union release time, suggested that President Simonovic not speak with other bargaining unit members at work, denied her access to the designated lactation room to prevent her from “wandering” throughout the facility, and instead provided an office in close proximity to her supervisor. (Tr. 418) Finally, President Simonovic was placed on a different, less convenient work schedule from her co-workers, which left her alone in the office from 10 p.m. to midnight at the end of each shift.

The Union argues that the facts surrounding the involuntary transfer of Second VP Canteen similarly show retaliation for union activity. Initially, the Sheriff solicited applications for transfers into taskforce assignments, but Second VP Canteen had no interest in a taskforce assignment and did not submit an application. Although others actively sought the assignment, DOF transferred Second VP Canteen against his wishes. In addition, the transfer entailed moving Second VP Canteen from a work location where he regularly interacted with 60 bargaining unit members to one where he was separated from the rest of the unit. The Union contends that these facts establish improper motivation for his transfer and undermine the City’s claim that the transfer was for a legitimate business reason.

The Union also argues that the suspensions of Second VP Canteen and Treasurer Lo and the disciplinary actions against them were motivated by their union activity. It argues that the facts demonstrate that DOF’s disciplinary charges were untimely, given the 18-month statute of limitations set forth in Civil Service Law § 75, and utterly devoid of merit. The Union notes that DOI did not refer the allegations of theft to the District Attorney for prosecution and that Second VP Canteen and Treasurer Lo were both completely exonerated after a disciplinary trial since DOF “could not meet the relatively low burden of proof associated with the preponderance of the evidence standard.” (Union Br. at 27) Additionally, the Union observed that when the Sheriff emailed the DOF Commissioner a list of the employees who were suspended or placed on modified

duty, he needlessly identified which employees held Union positions – a fact that has no legitimate bearing on the decision to discipline. The Union contends that statements by the Sheriff indicate that he prejudged the allegations that the suspended employees “stole” and threatened retaliation against any employees who were “aiding or facilitating” them. (Union Ex. H) According to the Union, these combined facts show that DOF purposefully pursued baseless charges against Second VP Canteen and Treasurer Lo in retaliation for their union activity. Accordingly, this demonstrates that the discipline imposed on Second VP Canteen and Treasurer Lo was improperly motivated and not justified by legitimate business reasons.

The Union further argues that the restrictions placed on Second VP Canteen and Treasurer Lo while on modified duty exceeded the restrictions traditionally imposed and were greater than the restrictions placed on other similar DOF employees who were suspended and placed on modified duty upon their return to work. Specifically, the Union asserts that Second VP Canteen and Treasurer Lo were prohibited from entering the Sheriff’s Office; denied access to their work computers, locker room, and desks; and prohibited from working overtime. In addition, Second VP Canteen’s belongings were confiscated from his lockers, and he lost his take-home vehicle. The Union notes that the two employees who were placed on modified duty prior to the issuance of the DOI Report and one employee identified in the DOI Report but not charged received lesser forms of modified duty.²⁴ In addition, another employee identified in the DOI Report was neither charged nor placed on modified duty. According to the Union, these facts demonstrate animus towards the Union and rebut the City’s defense that the modified duty restrictions imposed on

²⁴ Specifically, the Union notes that the two employees who were placed on modified duty prior to the Sheriff’s appointment “were allowed to wear their uniforms” during that initial modified duty assignment and that the employee who was not charged but placed on modified duty “[kept] his uniform [and] stayed in the operational room.” (Union Br. at 20 n. 20) (internal citations omitted)

Second VP Canteen and Treasurer Lo were for legitimate business reasons.

Lastly, the Union argues that the retaliatory actions against President Simonovic, Second VP Canteen and Treasurer Lo have had a chilling effect on members engaging in union activity. The Union highlights the testimony of Second VP Canteen, asserting that bargaining unit members believe the actions taken against Executive Board were in retaliation for union activity and have expressed that they avoid engaging with the Union for fear of retaliation.

City's Position

The “City acknowledges that petitioners have successfully established the first prong of the Bowman standard.” (City Br. at 18) However, it maintains that “petitioners have failed to demonstrate that the employee[s’] protected union activity was a motivating factor” in the purported adverse employment actions. (City Br. at 18)

The City argues that there is no causal link between President Simonovic’s transfer and her union activity. It asserts that her transfer was one of several assignments announced and discussed with the Union shortly after the Sheriff was appointed. It contends that any claimed evidence of causation based on union activity should not be credited as it relies on conjecture and surmise rather than probative facts. The City avers that the only evidence of anti-union motivation was alleged statements by Chief Cuttino. It argues that this evidence should be disregarded because it is uncorroborated, self-serving, and attributed to a bargaining unit member who does not speak for DOF. Moreover, the City claims its action was a proper exercise of a management prerogative and was taken for the legitimate business reason of rotating employees in and out of task force roles to provide more employees with diverse opportunities and to share knowledge. Lastly, the City states that even if the Board were to find that the transfer was in some way motivated by union activity, it has been rebutted because the transfer plan was announced prior to the union activity

and would have occurred even in the absence of union activity.²⁵

The City maintains that as the Union did not allege the transfer of Second VP Canteen in its pleadings, it should not be considered by the Board. To the extent the Board does consider the allegation regarding Canteen's transfer, the City argues that this allegation should be rejected for lack of a retaliatory motive. According to the City, the request by the US Marshals Office for a Sergeant and the executive team's recommendation of Canteen constitutes a legitimate business justification for the transfer. In addition, the City alleges that Canteen was enthusiastic about the transfer, which undermines any claim that it was an act of retaliation. Further, the City adds that it is logically inconsistent for the Union to maintain that President Simonovic's transfer out of a task force assignment and Second VP Canteen's transfer into a task force assignment are both acts of retaliation.

Regarding the suspensions and disciplinary charges issued to members of the Union's Executive Board and their subsequent placement on modified duty, the City argues that it acted on credible evidence of alleged misconduct and that there is no causal link between these actions and union activity. Further, it contends that the City has established that it acted for legitimate business reasons. First, the disciplinary and related actions were based upon an independent investigation by DOI and a referral to DOF to take appropriate action. Second, the DOI Report was supported by video footage of the alleged wrongdoing. Third, the City maintains that DOF acted within the bounds of Civil Service Law § 75 for a legitimate purpose and to ensure the integrity of the agency. Fourth, it argues that there was no difference in treatment between Executive Board members and similarly situated bargaining unit and non-bargaining unit members. Specifically, the City notes

²⁵ Regarding the Union's claim that Simonovic "was treated differently than other lactating mothers when she was provided with an empty office in which to lactate . . . this argument is also without merit as she was provided with a suitable space to perform this function." (City Br. at 29)

that 12 of the 14 employees listed in the DOI Report received the same 30-day suspension followed by placement on modified duty. Seven of those 12 resigned and had their record expunged, while five, including Second VP Canteen and Treasurer Lo, were suspended, returned, and placed on modified duty. Fifth, the City claims that, in lieu of specific or probative facts or evidence of hostility to union activity, the Union's allegations are based on speculation, conclusory allegations, and unsubstantiated claims of "cold" and "one-sided" labor-management meetings. (Tr. 77) For all these reasons, the City argues that the claims regarding Second VP Canteen and Treasurer Lo's discipline/suspensions and placement on modified duty should be dismissed for a lack of retaliatory motive.

Finally, the City argues that the record does not support a finding of an independent or derivative violation of NYCCBL § 12-306(a)(1). It asserts that the Union has not established an independent violation because the record does not show that DOF's conduct was inherently destructive of NYCCBL rights, nor has it demonstrated far-reaching effects that would hinder future bargaining. Further, the City argues that the Union has not shown that Respondents have committed an improper practice in violation of NYCCBL § 12-306(a)(3), and thus it also fails to establish a derivative violation of NYCCBL § 12-306(a)(1).

DISCUSSION

In deciding this matter, we must determine whether the Union has presented sufficient probative evidence to establish that DOF transferred and/or disciplined members of its Executive Board in retaliation for their union activity. NYCCBL § 12-306(a)(3) provides that it is an improper practice for a public employer "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any public employee organization." In determining whether an alleged action constitutes retaliation based on

anti-union animus, thus violating NYCCBL § 12-306(a)(3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012, at 3027 (1985), adopted by the Board in *Bowman*, 39 OCB 51 (BCB 1987). To establish a *prima facie* case under the Salamanca-Bowman test, we have held, and the courts have affirmed, that a petitioner must establish:

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.

See Bowman, 39 OCB 51, at 18-19; *see also Atl. Mar. Grp.*, 16 OCB2d 15, at 14 (BCB 2023). If a petitioner is able to establish a *prima facie* case, "the 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." *Kaplin*, 3 OCB2d 28, at 13-14 (BCB 2010) (citation omitted).

The City does not dispute that all members of the Executive Board were engaged in protected union activity or that DOF knew that the Executive Board members were engaged in such activity. In addition, the record shows that President Simonovic raised complaints on behalf of bargaining unit members about vacation schedules, cannabis enforcement, and other issues after the Sheriff took over in May 2022. Second VP Canteen was also present at staff and labor-management meetings when these issues were discussed as well as at the PESH inspection. Thus, the first prong of a *prima facie* case under the *Salamanca-Bowman* legal standard has been established. Therefore, our analysis focuses on the second prong of the *prima facie* case, whether the Union has established that DOF's transfer and discipline of its Executive Board members was improperly motivated.

The second prong of the *Bowman* test requires that Petitioner "demonstrate a causal connection between the protected activity and the motivation behind management's actions [that]

are the subject of the complaint.” *OSA*, 7 OCB2d 20, at 19 (BCB 2014) (quoting *DC 37*, *L. 376*, 79 OCB 38, at 16 (BCB 2007)) (internal quotation marks omitted). Regarding the motivation behind the employment actions in question, “typically, this element is proven through the use of circumstantial evidence, absent an outright admission.” *Burton*, 77 OCB 15, at 25 (BCB 2006); *see also CEU*, *L. 237*, 67 OCB 13, at 9 (BCB 2001); *CWA*, *L. 1180*, 43 OCB 17, at 13 (BCB 1989). However, to establish motive, “a petitioner must offer more than speculative or conclusory allegations.” *SBA*, 75 OCB 22, at 22 (BCB 2005). Rather, “allegations of improper motivation must be based on statements of probative facts. . . .” *Ottey*, 67 OCB 19, at 8 (BCB 2001); *Kaplin*, 3 OCB2d 28, at 14 (BCB 2010). A petitioner may establish a *prima facie* case by “deploying evidence of proximity in time, together with other relevant evidence.” *Colella*, 79 OCB 27, at 54 (BCB 2007); *CWA*, *L. 1182*, 57 OCB 26, at 22 (BCB 1996). However, the Board has ruled that “temporal proximity alone is not sufficient” to establish a *prima facie* case. *COBA*, 2 OCB2d 7, at 42 (BCB 2009); *see also Colella*, 79 OCB 27, at 55.

Involuntary Transfer of President Simonovic

Regarding the involuntary transfer of President Simonovic to the New York County LEB, we find that the Union has established sufficient evidence to show that this action was taken based on her union activity. It is undisputed that President Simonovic complained to management about vacation schedules, cannabis enforcement, and other issues between September and December 2022, shortly prior to the implementation of the transfers. Moreover, certain statements made to President Simonovic demonstrate animus. The record reflects that Chief Cuttino of the New York County LEB told President Simonovic that “[m]anagement sent you here so I could watch you.” (Tr. 190) Further, he stated that, now that she was serving under him, “nobody can say that the [U]nion [P]resident has a cush[y] gig” and that he would not give her “any special treatment.” (Tr. 187). In addition, President Simonovic was assigned a different schedule than other LEB

employees on the evening shift. She was assigned to work 2 p.m. to midnight, while all the other bargaining unit members on the evening shift were assigned a shift that ended at 10 p.m. When President Simonovic asked Chief Cuttino why she was working a five-day instead of a four-day schedule, he told her that management would “say something” if he returned her to a four-day schedule. (Tr. 189) In addition, Chief Cuttino told her she was not permitted to use the designated lactation room because DOF did not want her wandering around the building. These statements indicate that management was subjecting President Simonovic to closer scrutiny than other employees and treating her differently than the other LEB evening shift staff based on her union activity.²⁶ This evidence, in conjunction with the temporal proximity between President Simonovic’s union activity and her transfer, is sufficient to establish a *prima facie* case that the transfer was improperly motivated by her union activity. *See CSTG, L. 375, 7 OCB2d 16, at 21-22 (BCB 2014) (prima facie case established by temporal proximity coupled with employer’s failure to follow its own policies regarding promotions); CSTG, L. 375, 7 OCB2d 18, at 15 (BCB*

²⁶ Contrary to the City’s assertion, we find that President Simonovic’s testimony concerning Cuttino’s statements was reliable. Statements of admission by a party opponent are not hearsay. *See Federal Rules of Evidence*, Rule 801(d)(2). Moreover, these animus statements are attributable to the City inasmuch as Chief Cuttino was President Simonovic’s supervisor at the time they were made, the statements were made in the context of a workplace discussion between a subordinate and supervisor, and they were not rebutted. *See Fabbicante, 71 OCB 30, at 32 (BCB 2003) (supervisors’ acts were chargeable to the employer when those acts were part of a broader pattern of retaliatory and discriminatory conduct by petitioner’s managers); see also Town of Huntington, 26 PERB ¶ 3073, at 3140 (1993) (animus statements by supervisor while acting as employer representative in grievance process are attributable to the employer); City of Schenectady, 26 PERB ¶ 3038, at 3064 (1993) (dismissing direct dealing claim based on evidence that a supervisor’s change to employee’s schedule was inconsistent with management instructions and therefore not authorized or attributable to the employer); cf. Echevarria, 43 OCB 28, at 12 (BCB 1989) (supervisor’s acts not attributable to employer when those acts arose out of personal animosity and resulted in disciplinary charges against the supervisor). Further, we find that the fact that Chief Cuttino is a member of the same bargaining unit does not impugn the reliability of President Simonovic’s testimony or require the Board to find that the statement is not attributable to the DOF. *See UFA, 8 OCB2d 3 (BCB 2015) (finding anti-union animus in statements by a supervisor who was a union member).**

2014) (*prima facie* case established by temporal proximity coupled with an unexplained change in performance evaluation procedures): *see also* SSEU, 15 OCB2d 32, at 17 (BCB 2022) (finding direct evidence of anti-union animus sufficient to establish a *prima facie* case even in the absence of temporal proximity between union activity and the adverse action).

Our analysis therefore turns to whether the employer has refuted the *prima facie* evidence and/or established a legitimate business reason for its action. The record reflects that the Sheriff announced a task force transfer plan early in his term. In May 2022, during his first month on the job, the Sheriff informed President Simonovic of his plan to transfer those who had completed two to five years in a task force assignment back to the agency. While it is unclear whether the Sheriff initially represented that the plan would apply only to supervisors or that was simply President Simonovic's understanding, what is clear from the record is that the initial steps to implement the plan included all employees assigned to interagency task forces. In July 2022, all the employees assigned to a task force were notified of the plan, not just the supervisors, and all were asked to attend two meetings at which they were told that they were all going to be returning to the agency. In mid-October 2022, the Sheriff received a list of all employees assigned to task forces. The list included eight names, only three of whom were supervisors. The list also included how many years the employees had been employed at the Sheriff's Office, how many years they had been assigned to a task force, their ranks, and dates of promotion. (City Ex. 8) At that time, President Simonovic, who was included on the list, had been assigned to Homeland Security for over three years. On October 24, 2022, volunteers were solicited to move into task force positions, and employees were told to expect that the assignments were temporary and would continue for approximately two to five years and that no one in a supervisory position would be eligible to serve on a task force. (*Id.*)

The organizational plan to transfer all those assigned to interagency task forces was

announced prior to the Union representatives' complaints about vacation schedules, cannabis enforcement, and other issues. However, the plan was not implemented until after the Union representatives complained about vacation schedules, cannabis enforcement, and other issues. Once implemented, the transfers executed were substantially different from the plan that was announced.

First, while there were eight employees assigned to interagency task forces in October 2022, only three were transferred out of those assignments, namely, President Simonovic, a Sergeant and former Union officer, and a supervisory Detective. Four other employees assigned to interagency task forces remained for reasons that contradict the stated intent and purpose of the plan, and the City's explanations for these departures from the plan are not supported by the record. According to the City, two of the four who remained in their task force assignments, a Sergeant and a Detective, were not transferred because they would soon be retiring. The Sheriff testified that the Sergeant told Chief Lopez that he would retire by the end of 2022 and that the Detective was allowed to stay in consideration of both "how much time he had left" prior to retirement and his role at the task force.²⁷ (Tr. 289). Neither retired, and both were still in their task force assignments at the time of the hearing in March 2024, more than a year after the transfers were implemented. Further, the failure to transfer that Sergeant lies at odds with the stated plan to return supervisors to agency positions to increase supervision within the agency. In addition, a Community Associate was purportedly not transferred because she had a "permanent assignment" to a task force. The Sheriff's October 2022 email, however, stated that task force assignments were "not [] permanent." (*Compare* Tr. 245 with City Ex. 4) Next, the Sheriff testified that a Deputy Sheriff was allowed to stay in his assignment because Chief Lopez believed he had been

²⁷ The City did not call Chief Lopez as a witness.

recently assigned. However, the records provided to the Sheriff in October 2022 indicate that this Deputy had been assigned to a task force for three years, roughly the same tenure that President Simonovic had reportedly served. Therefore, there is little basis upon which to conclude that the decision to transfer President Simonovic comports with the legitimate business reasons asserted by the City.

There is similarly scant evidence to support the criteria cited in support of President Simonovic's selection for reassignment to New York County LEB. The City proffered that President Simonovic was moved to New York County LEB as part of the overall transfer plan and because Chief Cuttino would be a good teacher for her first permanent role in a county office and she spoke Spanish. However, much of this justification is belied by other unrebutted evidence in the record. Additionally, there is ample evidence that shows that President Simonovic was treated differently than other Deputy Sheriffs and task force members after her transfer.

Contrary to the City's assertion, New York County LEB was not President Simonovic's first county office assignment. President Simonovic had worked in county offices previously, albeit not in a permanent assignment. No explanation was given as to why a temporary assignment was not considered prior experience. More significantly, in light of her prior experience, it is not clear why President Simonovic needed "a good teacher" such as Chief Cuttino to perform county office work.²⁸ Therefore, the evidence discussed earlier that suggests that the assignment was made in retaliation for President Simonovic's union activity is unrebutted. President Simonovic testified that Chief Cuttino told her that management had assigned her to New York County LEB so Cuttino "could watch" her. (Tr. 190) In addition, he told her that she would not be given "special

²⁸ Similarly, other than the facial assertion that Spanish language skills were needed in New York County LEB, there was no evidence to corroborate that assertion.

treatment,” which implied that her assignment to the task force had been a “cush[y] gig” or “special treatment.” (Tr. 187) Furthermore, when President Simonovic inquired about a designated lactation room, Chief Cuttino told her that management did not want her “wandering” around the building, and she was directed to use the office adjacent to Cuttino’s. These un rebutted statements sent a clear message that President Simonovic was reassigned to the New York County LEB to subject her to greater supervision, scrutiny, or surveillance, indicating that the assignment was made in retaliation for her union activity. Moreover, the fact that President Simonovic was assigned to work a schedule different from the other bargaining unit members in the New York County LEB, ensuring that she would be alone in the office for several hours each shift, reinforces the retaliatory nature of her re-assignment.

For all the reasons stated, we find that the City’s proffered reasons for transferring President Simonovic are pretextual. Accordingly, we do not find sufficient evidence that the transfer of President Simonovic was for a legitimate business reason. *See DC 37, L. 376, 79 OCB 38, at 22 (BCB 2007)* (internal quotation marks omitted) (quoting *Colella, 79 OCB 27, at 61 (BCB 2007)*) (holding that a legitimate business defense that is unsupported by the record is insufficient to rebut a *prima facie* case of discrimination); *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)*).

In sum, we conclude that President Simonovic would not have been transferred were it not for her union activity. Consequently, we find that DOF’s actions were taken in retaliation for protected union activity and violated NYCCBL § 12-306(a) (1) and (3). Accordingly, we order that President Simonovic be offered reinstatement to her role on the Homeland Security task force, subject to the consent of Homeland Security, or in the alternative to a similar interagency task force position. *See Fulgieri, 11 OCB2d 34, at 18 (BCB 2018)* (ordering that an employee transferred in retaliation for union activity be reinstated to his previous position); *City Employees*

Union, L. 237, 77 OCB 3, at 17-18 (BCB 2006) (City ordered to rescind retaliatory transfers of bargaining unit members and reinstate them to previous positions).

Involuntary Transfer of Second VP Canteen

Preliminarily, we must address the City's claim that the involuntary transfer of Second VP Canteen is not properly before the Board. This Board has previously addressed the issue of whether it may consider claims that were not specifically raised in the improper practice petition. In those instances, the Board has held that when a new claim is presented after the petition is filed and the opposing party does not have adequate opportunity to respond, the claim is not properly before the Board and may not be considered. *See Cromwell*, 51 OCB 29, at 8 (BCB 1993) (finding that claims raised for the first time in a petitioner's reply were not properly before the Board). Nevertheless, when a petition was later amended, and the respondent had notice and opportunity to address the claim, the Board has determined that the claim is properly before it. *See SBA*, 75 OCB 22, at 15 (2005) (motion to amend petition post-submission of briefs to include a violation of a new section of the statute granted because it was based on the same facts plead in the original petition, was merely a technical correction, and respondent had an opportunity to address the claims); *Cerra*, 27 OCB 27, at 14-15 (BCB 1981) (allegation of an additional instance of harassment that occurred after the petition was filed found to be properly before the Board where it was the same cause of action and arose from previously pled retaliatory acts, the petition was amended at the hearing, and the employer was given adequate opportunity to prepare a defense to the new allegation). Here, while there was no amendment to the petition, the City had the opportunity to address the claim concerning Canteen's transfer when it was raised at the hearing and addressed it later in its closing brief. Nevertheless, regardless of Respondent's actions, the Board's authority is limited to addressing claims that fall within the four-month statute of limitations. *See NYCCBL* § 12-306(e). While the statute of limitations is an affirmative defense,

we have previously held that it is “not discretionary.” *Miller*, 57 OCB 40, at 4 (BCB 1996); *Howard*, 51 OCB 38 at 5, (BCB 1993); *Kane*, 41 OCB 59, at 10-11 (BCB 1988). Therefore, we must review the timeliness of claims raised after the filing of a petition when determining whether it may be considered.

The Board has held that claims raised after the petition is filed relate back to the initial petition’s filing date only if the new claim arises “out of the cause of action set forth in the original pleadings” and is not a “new and independent” improper practice claim. *McAllan*, 31 OCB 2, at 16 (BCB 1983) (new allegations of interference with petitioner’s involvement in safety matters in amended petition are permitted because they relate back to claim initially pled that respondent interfered with petitioners’ attempts to represent members; however, claims in amended petition arising more than four months prior to the petition or amended petition not considered); *see also PBA*, 63 OCB 12, at 6-7 (BCB 1999) (finding that new safety impact claim added in the reply was permissible because it arose from the same management action, the City had the opportunity to address the claim at hearing, and the claim could have been filed in a separate petition), *affd.*, *Matter of Savage v. DeCosta*, Index No. 120860/1998 (Sup. Ct. N.Y. Co. Jan. 13, 1999) (Gangel-Jacob, J.).

Here, we find that the alleged retaliatory transfer of Second VP Canteen is a new claim that did not arise from the claims set forth in the original petitions. Neither petition mentioned Canteen’s transfer. Despite the fact that Second VP Canteen had been notified of his transfer to an interagency task force in December 2022, the first petition filed in January 2023 alleged only President Simonovic’s announced transfer was discriminatory. It did not allege that all Union representatives serving on interagency task forces or anyone other than President Simonovic was targeted. Further, the second petition was filed approximately six months after Second VP Canteen’s transfer and was limited solely to the alleged discriminatory disciplinary actions,

suspensions, and modified duty assignments taken against Second VP Canteen and Treasurer Lo in May and June 2023.

As a result, we conclude that the claim regarding the transfer of Second VP Canteen did not arise from the same cause of action pled in either petition. Further, at the latest, any claim concerning Second VP Canteen's transfer arose in or around February 2023, when Second VP Canteen was moved to a task force. It was not raised until the improper practice hearing began and witness testimony was received in February 2024, approximately twelve months after the transfer was implemented. As a result, we must conclude that the claim is untimely and is therefore not proper for the Board's consideration. *See Johnson*, 17 OCB2d 3, at 6 (BCB 2024) ("Any claims antedating the four[-]month period preceding the filing of the [p]etition are not properly before the Board and will not be considered").

Discipline and Suspension of Second VP Canteen and Treasurer Lo

While the record reflects that the Union and the Sheriff's Office had a contentious relationship, we find that the Union has not established a *prima facie* case that DOF suspended and brought disciplinary charges against Second VP Canteen and Treasurer Lo in retaliation for their union activity. The totality of the evidence established that DOF's decision to discipline and suspend Second VP Canteen and Treasurer Lo was not motivated by anti-union animus. The record is clear that the disciplinary charges and related suspensions were triggered by the April 7, 2023 DOI Report, which made no reference to the employees' union activity or participation on the Union's Executive Board. The DOI Report resulted from an investigation that was already underway when Sheriff Miranda took office, referenced two anonymous complaints from 2021 about Second VP Canteen, and was based upon video footage of multiple incidents over a period of seven months. There is no evidence that DOF's Advocate's Office decision to conduct a follow-

up investigation, to issue disciplinary charges to 12 employees, and to suspend 11 of them was motivated by anti-union animus.²⁹

To the extent that the Union asserts that the charges were untimely and that such untimeliness is evidence of anti-union animus, we note that OATH ALJs found that the charges were timely. (Union Ex. I at 2; Union Ex. J at 2) Further, while the OATH ALJs found that the video footage was insufficient to establish that Second VP Canteen and Treasurer Lo either stole or knowingly facilitated the theft of seized evidence, we find that the dismissal of the charges does not demonstrate that DOF's Advocate's Office decision to bring the charges and suspend Second VP Canteen and Treasurer Lo was motivated by anti-union animus. *See Colella*, 67 OCB 49, at 8 (BCB 2001) (finding no causal link between a suspension and petitioner's filing of a grievance when the employer "submitted detailed factual allegations of repeated incidents . . . which it viewed as acts of misconduct, and which we are satisfied constituted the basis on which the [p]etitioner was suspended"); *see also Kalman*, 11 OCB2d 32, at 13 (BCB 2018) (finding no animus and thus no violation where employee's termination was consistent with normal practice). As in *Colella*, 67 OCB 49, the disciplinary charges and suspensions here were based on "detailed factual allegations of repeated incidents" of misconduct. *Id.* at 8. The charges against Second VP Canteen were based on six incidents, and the charges against Treasurer Lo were based on nine incidents. Further, even if the Sheriff wrongly presumed that the employees had committed the offenses with which they were charged, it is un rebutted that the Sheriff considered these allegations to be serious.

²⁹ Although the Sheriff's email to the DOF Commissioner informing him that the "[s]uspension [o]peration was completed without incident" noted the employees' positions in the Union where applicable, there is no indication that having a Union position was a factor in the decision to bring charges or suspend employees. (City Ex. 6) Indeed, most of the employees charged and suspended did not hold Union positions.

The Union's primary argument that it established a *prima facie* case is that Second VP Canteen and Treasurer Lo were treated disparately. However, the record reflects that the Executive Board members were among 12 employees who received charges and the same 30-day suspension on May 2, 2023. While two of the 14 employees named in the DOI Report were not charged or suspended, the DOI Report suggests that the video footage provided varying degrees of evidence regarding each of the 14 named employees. Nothing in the record demonstrates that the two employees who were not charged were similarly situated to Second VP Canteen and Treasurer. Thus, we cannot conclude that DOF was motivated by anti-union animus, rather than the investigative findings in the DOI Report and DOI's referral for appropriate action, when it charged and suspended Second VP Canteen and Treasurer Lo.

We find that the decision to discipline and suspend Second VP Canteen and Treasurer Lo was motivated by the DOI Report, similar to the discipline and suspension of other bargaining unit members and the non-bargaining unit member identified in the report. Therefore, the Union has not established a *prima facie* case with regard to the discipline and suspension of Second VP Canteen and Treasurer Lo. *See DC 37, L. 983*, 6 OCB2d 10, at 36 (BCB 2013) (finding no violation where the Union could not demonstrate that alleged retaliatory disparate treatment occurred). Accordingly, we dismiss all related claims under NYCCBL § 12-306(a)(1) and (3).³⁰

³⁰ We decline to also analyze these allegations as independent violations of NYCCBL § 12-306(a)(1). While the Union pled independent interference claims in its petitions, these claims rely on the same underlying facts and arguments as its discrimination/retaliation claims. *See DC 37, L. 983*, 6 OCB2d 10, at 21 n. 13 (BCB 2013); *SSEU, L. 371*, 79 OCB 34, at 14 (BCB 2007). Further, inasmuch as we find the conduct was not discriminatory under NYCCBL § 12-306(a)(3), we find no derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 1549*, 13 OCB2d 20, at 21 (BCB 2020).

Placement of Second VP Canteen and Treasurer Lo on Modified Duty

Regarding the placement of Second VP Canteen and Treasurer Lo on modified duty after the completion of their suspensions, we similarly find that the Union did not establish a *prima facie* case of retaliation. The totality of the evidence reflects that DOF's decision to place Second VP Canteen and Treasurer Lo on modified duty was not motivated by anti-union animus. The record indicates that their placement on modified leave, like their charges and suspensions, resulted from the allegations in the DOI Report. In addition, the restrictions placed on Second VP Canteen and Treasurer Lo were consistent with the other three employees who did not resign and were placed on modified duty when they returned from their suspensions on June 5, 2023.³¹ The Sheriff's June 2, 2023, email indicated that they were all "prohibited from entering any of the Sheriff's Offices for any reason," and their "[a]ccess to computers, locker rooms, office desks, [and] any area inside the Sheriff's Office [was] prohibited. . . ." (Union Ex. H) They were reassigned to other positions within DOF. They were not given their badges, firearms, or uniforms; were issued new ID cards; and were prohibited from working overtime.

The Union claims that Second VP Canteen and Treasurer Lo's modified duty was more restrictive than what had been implemented in the past and what was imposed on other employees named in the DOI Report. However, we do not find that the employees identified by the Union were similarly situated. One employee named in the DOI Report was placed on modified duty on May 2, 2023, the same day that 12 other employees were issued disciplinary charges and 30-day suspensions. Like the 12 disciplined and suspended employees, his firearm was confiscated, but he was permitted to keep his uniform, stay in the "operational room," and work overtime. (Tr.

³¹ Seven of the 12 employees charged and suspended on May 2, 2023, accepted DOF's offer to resign in exchange for expungement of the disciplinary action against them and treatment of the 30-day suspension as leave without pay.

407-408) These conditions were different from the modified duty conditions for Second VP Canteen and Treasurer Lo. However, unlike Second VP Canteen and Treasurer Lo, when that employee was placed on modified duty he was not returning from a 30-day suspension and did not have pending disciplinary charges. Similarly, while two other employees were placed on modified duty, their firearms were confiscated, and they remained in uniform, these actions were taken before the Sheriff's appointment and the issuance of the DOI Report. After DOF received the DOI Report, both employees were charged and suspended. Ultimately, one resigned, and the other returned from his 30-day suspension to the same restrictions on modified duty as Second VP Canteen and Treasurer Lo. Therefore, we find that the circumstances relating to these other employees' modified duty assignments were substantially different from those of Second VP Canteen and Treasurer Lo and do not demonstrate disparate treatment.

Moreover, there is no evidence that individuals with pending disciplinary charges for similar types of misconduct have been treated differently. President Simonovic and Second VP Canteen testified only that typically an employee on modified duty following a suspension is not reassigned to other DOF facilities, is still able to access their computers and lockers, and is permitted to keep their uniform and badge. Nevertheless, Second VP Canteen testified that the suspensions following the DOI Report were unique since it was the first time that so many bargaining unit members had been suspended at one time. Even if the modified duty following these suspensions was more restrictive than usual, nothing in the record suggests that the severity of the restrictions was based on Second VP Canteen and Treasurer Lo's union activity or membership on the Union's Executive Board. Instead, the record reflects that the employees who did not hold Union positions were subject to the same restrictions pending the outcome of the OATH process. Thus, we conclude that Second VP Canteen and Treasurer Lo's placement on modified duty, like their disciplinary charges and suspensions, was based on the allegations in the

DOI Report, not union activity. Therefore, the Union has not established a *prima facie* case with regard to their placement on modified duty. *See DC 37, L. 983*, 6 OCB2d 10, at 36. Accordingly, we dismiss all related claims under NYCCBL § 12-306(a)(1) and (3).³²

In sum, we find that the involuntary transfer of President Simonovic was motivated by anti-union animus and thus constitutes a violation of NYCCBL § 12-306(a)(1) and (3). All other claims asserted by the Union are dismissed. Accordingly, the improper practice petition docketed as BCB-4498-23 is granted, and the improper practice petition docketed as BCB-4532-23 is denied. As a remedy, we order DOF to reinstate President Simonovic at her task force position, if approved by Homeland Security, or in the alternative to a similar interagency task force and publicly post the attached notice for a minimum of 30 days.

³² Like the previously discussed claims pertaining to Second VP Canteen and Treasurer Lo, we decline to analyze these allegations as independent violations of NYCCBL § 12-306(a)(1) because such claims rely on the same underlying facts and arguments as its discrimination/retaliation claims. *See DC 37, L. 983*, 6 OCB2d 10, at 21 n. 13; *SSEU, L. 371*, 79 OCB 34, at 14. Inasmuch as we find the conduct was not discriminatory under NYCCBL § 12-306(a)(3), we find no derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 1549*, 13 OCB2d 20, at 21.

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 Deputy Sheriff's Benevolent Association and Ingrid Simonovic, docketed as BCB-4498-24 is granted; and it is further

ORDERED, that the improper practice petition filed by the Deputy Sheriff's Benevolent Association, against the City of New York and the New York City Department of Finance, docketed as BCB-4532-24 is denied;

ORDERED, that the New York City Department of Finance offer President Simonovic reinstatement to her prior position on the Homeland Security taskforce, if approved by Homeland Security, or in the alternative, a similar interagency task force position; and it is further

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

Dated: March 6, 2025
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLNES
MEMBER

ALAN M. KLINGER
MEMBER

JEFFREY L. KREISBERG
MEMBER



OFFICE OF COLLECTIVE BARGAINING

**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**

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Alan M. Klinger
Jeffrey L. Kreisberg

CITY MEMBERS

M. David Zurndorfer
Pamela S. Silverblatt

DEPUTY CHAIRS

Monu Singh
Steven Star

We hereby notify:

That the Board of Collective Bargaining has issued 18 OCB2d 1 (BCB 2025), determining improper practice petitions between the New York City Deputy Sheriffs' Association and the City of New York and the New York City Department of Finance.

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 Deputy Sheriff's Benevolent Association and Ingrid Simonovic, docketed as BCB-4498-24 is granted; and it is further

ORDERED, that the improper practice petition filed by the Deputy Sheriff's Benevolent Association, docketed as BCB-4532-24 is denied; and it is further

ORDERED, that the New York City Department of Finance offer President Simonovic reinstatement to her position on the Homeland Security taskforce, if approved by Homeland Security, or in the alternative, a similar interagency task force position; and it is further

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

The New York City Department of Finance
(Department)

Dated:

(Title) (Posted By)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.