

**DC 37, L. 2507, 11 OCB2d 18 (BCB 2018)**  
(IP) (Docket No. BCB-4225-17)

**Summary of Decision:** The Union claimed that the FDNY violated NYCCBL § 12-306(a)(1) and (3) when it removed a Union official from its Ceremonial Unit in retaliation for his testimony at a meeting of the State Emergency Medical Services Council. The City argued that the official’s testimony at the meeting did not constitute protected union activity. It further argued that he was not removed from the Ceremonial Unit for the ideas he expressed at the meeting, but because of the language he used in expressing these ideas, which violated the Ceremonial Unit’s code of conduct. Therefore, the City contends that it had a legitimate business reason for its action. The Board found that the Union official’s testimony constituted protected union activity and that the FDNY’s proffered legitimate business reason for removing him from the Ceremonial Unit based on his testimony was pretext for retaliation. 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-*

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated  
LOCAL 2507,**

*Petitioner,*

*-and-*

**THE CITY OF NEW YORK and THE NEW YORK CITY FIRE  
DEPARTMENT**

*Respondents.*

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**DECISION AND ORDER**

On July 11, 2017, District Council 37, AFSCME, AFL-CIO, and its affiliated Local 2507 (collectively, “Union”) filed a verified improper practice petition against the City of New York (“City”) and the New York City Fire Department (“FDNY”). The Union asserts that the FDNY

removed Donald Faeth from its Ceremonial Unit in retaliation for his testimony at a meeting of the State Emergency Medical Services Council (“SEMSCO”), in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). The City argues that Faeth’s testimony at the SEMSCO meeting did not constitute protected union activity. It further argues that Faeth was not removed from the Ceremonial Unit for the ideas he expressed at the meeting, but because of the language he used in expressing these ideas, which violated the Ceremonial Unit’s code of conduct. Therefore, the City claims that it had a legitimate business reason for its action. The Board finds that Faeth was engaged in protected union activity when he testified at the SEMSCO meeting and that his removal from the Ceremonial Unit based on his testimony was unlawful retaliation in violation of the NYCCBL. The Board further finds that the FDNY’s proffered legitimate business reason for removing Faeth from its Ceremonial Unit was pretext for retaliation. Accordingly, the petition is granted.

### **BACKGROUND**

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

Local 2507 represents employees of the FDNY employed in its Bureau of Emergency Medical Service (“EMS”) in the titles Emergency Medical Technician (“EMT”), Paramedic, and Fire Prevention Inspector. EMS covers all five boroughs of the City and is responsible for the operation and staffing of all ambulances deployed via the City’s 911 system.

Faeth has been employed by EMS since September 1987, when he was hired as an EMT. EMTs are primarily responsible for acting as first responders in cases of medical emergencies and

for performing Basic Life Support (“BLS”) on those requiring it. In 1988, Faeth was promoted to Paramedic. In addition to performing the duties of an EMT, Paramedics also provide Advanced Life Support (“ALS”) to those requiring it. Sometime in 2009 or 2010, Faeth became a Rescue Paramedic, which is an in-house designation and his current title. As a Rescue Paramedic, Faeth is responsible for performing “crush medicine” and high-angle, confined space, and trench rescues.<sup>1</sup> (Tr. at 12)

Since 1990, Faeth has also served as a member of the FDNY’s Dignitary Protection Unit, which provides ambulance and fire units to elected officials and foreign dignitaries who visit the City from around the world. As a member of this Unit, Faeth is on a 24-hour detail and personally provides emergency medical care to the dignitary if needed. He had to pass a background check by both the FDNY and the U.S. Secret Service in order to be qualified to work for the Unit. At the time of his testimony, Faeth stated that he had recently been asked to work the detail for President Trump, but that he was not available to do so. Additionally, from approximately 2007 to 2017, Faeth was a member of the FDNY’s Ceremonial Unit, which will be discussed in further detail below.<sup>2</sup>

Beginning in 1999, Faeth also served in various Union officer positions. Most recently, from approximately 2011 to March 2017, he served as the Union’s Secretary-Treasurer. As a Union officer, Faeth regularly attended meetings, including bargaining sessions, with FDNY administrators such as the Chief and Assistant Chiefs of EMS. He also participated in disciplinary

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<sup>1</sup> Additionally, Faeth is certified as a Haz-Tac Paramedic and is a member of the FDNY special operations command task force and the Federal Emergency Management Agency (“FEMA”) search and rescue team.

<sup>2</sup> Faeth has also received numerous awards and other forms of recognition throughout his career with EMS. In 2012, he was featured on the FDNY’s poster for EMS Week, which was displayed in various formats throughout the City.

hearings and arbitrations. Furthermore, he frequently attended public events in his capacity as a Union officer. Such events included parades, member funerals, plaque dedications, and station openings.

SEMSCO and the January 11, 2017 meeting

SEMSCO is an advisory body that meets between three and six times a year in the Albany area and assists the New York State Department of Health in “providing leadership, [and] developing rules and regulations and general guidelines for the operation of the EMS system.” (City Ex. 5) Pursuant to § 3002(2) of the Public Health Law, SEMSCO has the power to make recommendations to establish minimum standards for New York State EMS Services. Its membership consists of 18 Regional Councils and 15 representatives of “various organizations and interest[s] in the EMS community.” (*Id.*) The Union holds one of the representative positions on SEMSCO. Faeth has represented the Union as either a member or alternate member of SEMSCO for approximately 18 years.

In January 2017, the FDNY submitted a proposal to SEMSCO that would change its regulations to allow Firefighters to administer the drug albuterol, which is used to treat people who are wheezing.<sup>3</sup> At the time, albuterol could only be administered by EMTs and Paramedics. Faeth became aware of this proposal through conversations with the Union’s then-President, Israel Miranda. Miranda told Faeth that he had a conversation with FDNY Commissioner Daniel Nigro about the issue. According to Faeth, Miranda objected to the proposal for two reasons: that patients would not be appropriately served by administration of albuterol without a medical evaluation and that the proposal would divert over 300 calls per day from EMTs and Paramedics to Firefighters.

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<sup>3</sup> Among other things, wheezing could be caused by asthma, chronic obstructive pulmonary disease or an anaphylactic reaction.

Miranda reported to Faeth that the Commissioner understood the Union's position and their objection to the proposed change, but that nevertheless the Department was going to continue forward with it.

Faeth testified that Miranda wanted to know whether he agreed with his assessment because he knew the issue would be brought to SEMSCO. Faeth agreed that the proposal was a bad idea for multiple reasons. He explained that besides the issues noted by Miranda, if the proposal passed it would mean that Paramedics would be supported by a Firefighter unit instead of an EMS unit that could provide BLS services and transport the patient to the hospital if necessary. As a result, Paramedics would have to transport the patient themselves and spend time at the hospital completing paperwork instead of being available to respond to another call. Faeth then planned to testify about the proposal on behalf of the Union at the next SEMSCO meeting.

The proposal was first discussed on January 10, 2017, at a meeting of the New York State Emergency Medical Advisory Committee ("SEMAC").<sup>4</sup> At the SEMAC meeting, the FDNY presented its proposal to allow Firefighters to administer albuterol and the physician representatives on SEMAC voted to approve the recommendation. Although Faeth attended this meeting, he did not speak at it. A SEMSCO meeting was held the following day, on January 11, 2017.<sup>5</sup> The meeting was open to the public to attend, but only members of SEMSCO could sit at the table and participate in the discussions. It was also broadcast live online. The FDNY's

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<sup>4</sup> SEMAC is composed of voting physician representatives from the Regional Councils "with demonstrated knowledge and experience in Emergency Medical Services." (City Ex. 5) It is responsible for developing and recommending to SEMSCO "statewide minimum standards for medical control, treatment, triage, transportation protocols and the use of regulated medical devices and drugs by certified EMS personnel." (*Id.*)

<sup>5</sup> The meeting occurred on a day that Faeth was not scheduled to work.

physician representatives on SEMSCO testified in favor of the proposal. Faeth then began his testimony. He wore a suit with a pin bearing the Union's emblem affixed to it, and he read from notes he had prepared in advance.<sup>6</sup>

In his testimony, Faeth urged SEMSCO to reject the proposal because he believed that its purpose was not to improve patient care but was instead about diverting work from the EMS workers to Firefighters. Thus, he stated, although he respected the physicians who voted on the proposal at the SEMAC meeting, “[u]nfortunately, the votes that were taken were predicated on a lie.” (Tr. at 47) He explained that he believed the proposal was really about “Mayor DeBlasio doing a press conference with the Fire Commissioner and securing firefighter jobs and funding” to the detriment of EMS workers. (*Id.*) Therefore, he stated that he believed that the SEMSCO physicians made their recommendation because they were given their marching orders from the Fire Commissioner and were likely afraid to speak up. He stated that he, on the other hand, had “no strings attached” because he could have retired four years earlier. (Tr. at 48)

Faeth then spoke about the history of the diversion of work that had occurred since EMS operations were functionally transferred from the Health and Hospitals Corporation to the FDNY in March 1996. He testified that, as a result of this transfer, EMS workers experienced a decline in both resources and status. In particular, Faeth testified that the FDNY had reduced the authority of EMS's Medical Director, replaced EMS emblems on uniforms and ambulances with the FDNY logo, eliminated free educational opportunities for EMS workers to become physician's assistants, and replaced BLS response units with fire trucks, which are not capable of transporting patients to

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<sup>6</sup> A digital video disc containing a video of the SEMSCO meeting is Union Exhibit D. The video was played during the hearing, and Faeth's SEMSCO testimony was recorded by the stenographer as part of the transcript in this matter. Faeth's prepared notes for his SEMSCO testimony were also admitted into the record as Union Exhibit A.

hospitals. Furthermore, he stated that EMS lacked funding for critical equipment, such as glucometers, continuous positive airway pressure machines, and “thumpers” that make performing CPR in a moving ambulance safer. (Tr. at 54) Meanwhile, fire marine boats were equipped with thumpers. Furthermore, EMS workers used “antiquated Rosetta systems” instead of WiFi, which delayed their response time. (*Id.*)

Faeth also testified that while EMS workers used to have a medical focus, now they were more interested in becoming Firefighters than performing medical care. He expressed his belief that “[i]t’s disgusting what the system has created, and detrimental to the delivery of good patient care.” (Tr. at 52) He then stated that he “made a very strong statement earlier that this demonstration project is predicated on a lie. I could tell you, my wife has told me that, when I have purposely withheld information from her, that, in essence, I have lied to her.” (*Id.*)

Faeth went on to address why he disagreed with the FDNY’s claim that Firefighters should be able to administer the albuterol because they arrive on the scene of an emergency before an ambulance. He explained that the FDNY’s claim that Firefighters could arrive over three minutes sooner than EMS response units was deceiving, because in practice the FDNY was dispatching fire trucks ahead of ambulances, even when there was a closer ambulance available. He said it was “bad medicine” to give Firefighters 384 additional calls per day, when they did not have the desire to do pre-hospital care and were not trained to do a true medical assessment. (Tr. at 55) He then stressed that “[i]f the FDNY wants the . . . firefighters to be able to do everything an EMT is entrusted to do, this is your opportunity to tell them. There is a mechanism and training to achieve that level of care. You need to vote no on this misleading and inappropriate initiative.” (*Id.*) He concluded his initial testimony by stating that:

Speaking here today, on the record, against my own employer, I’m standing in front of [a] train, because it’s in defense of my

profession, the medical care providers, and the public that we serve. By myself, I will get run over, I know that. But if enough of you stand with me against this, I think we can derail that train.

(Tr. at 56)

Later in the meeting, Faeth responded to some commentary that was made after his initial testimony. He stressed that the proposal would be “sending people with very little training to administer meds, and that’s very scary to me.” (Tr. at 57) He further explained that this was “like having an electrical problem at your house, and you receive a plumber.” (*Id.*) He called this “an inappropriate response model.” (*Id.*)

A representative of the United Firefighters Association, which represents the City’s Firefighters, also testified against the proposal at the SEMSCO meeting. According to Faeth, this representative testified that Firefighters were spread too thin as it was and that giving them an additional 384 calls per day would exhaust the members and take a toll on their equipment.

At the end of the meeting, SEMSCO voted not to adopt the FDNY’s proposal.

#### Faeth’s removal from the FDNY Ceremonial Unit

As noted above, from approximately 2007 until 2017, Faeth served as a member of the FDNY’s Ceremonial Unit. The Ceremonial Unit is the FDNY’s color guard and serves as the public face of the FDNY. It consists of approximately 175 members from the FDNY’s Fire Command and 75 from EMS. There are approximately 500 Ceremonial Unit events per year, including Medal Day, Memorial Day, 9/11 ceremonies, parades, graduations, promotions, and funerals, which are considered to be the most important function of the Ceremonial Unit.

Captain Mark Guerra is the Executive Officer of the Fire Commissioner and of the Ceremonial Unit. He has been employed by the FDNY for 30 years. Guerra testified that to become a member of the Ceremonial Unit, candidates must fill out an application and submit



recommendations from other members of the Ceremonial Unit or from the FDNY's administration. Guerra stated that this recommendation is extremely important, and if an application is approved the member will be given a tryout period to participate in events and to demonstrate that he or she is a good fit for the Unit.<sup>7</sup> Captain Guerra testified that it was a mark of distinction to be a member of the Ceremonial Unit, and Faeth stated that he considered membership in the Unit to be an honor. Faeth explained that members of the Ceremonial Unit attend training once or twice a year at which they are informed of the etiquette, rules and regulations, and code of conduct of the Unit. They also practice marching and perform a mock color guard.

In addition to marching and performing other ceremonial activities, members of the Ceremonial Unit take care of every detail of the events, including coordinating parking, serving the food, and seating people. They may also be responsible for greeting and interacting with elected officials, dignitaries, and other high-profile individuals. Captain Guerra testified that a Ceremonial Unit member would have to exhibit a high level of trust before they would be assigned to handle such VIP attendees.

Members of the Ceremonial Unit are distinguished by a white rope that appears on the right arm of their uniform. Faeth testified that he often would attend Ceremonial Unit events in his role as a Union officer rather than as a Unit member. In those cases, he would not wear the white rope on his uniform. When attending as a Union officer he often interacted with high-profile individuals by shaking their hand, introducing himself as a Union officer, and thanking them for attending the event. However, when working an event as a Ceremonial Unit member, Faeth testified that he had

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<sup>7</sup> During the "tryout," the member will be evaluated to see how he or she looks in their uniform, whether they can march well, whether they have a good sense of decorum, and whether they are generally a good citizen within the FDNY.

very little interaction with these individuals and that, if he did, it was usually limited to directing parking or seating them.

When Ceremonial Unit events arise, members of the Unit are notified by e-mail or text and will respond if they are available and interested in working the event. Captain Guerra explained that a list will then be established, and when choosing members to work the event, the Ceremonial Unit first looks for members who are off-duty during the event. They then list the members according to the amount of overtime they have already earned and make a selection based on these hours as well as the member's experience.<sup>8</sup> If a member performs at a Ceremonial Unit event during his regular work schedule, he is released from work and is not paid overtime.<sup>9</sup> If a member is chosen to work the event they are notified, and if they do not receive a notification it is understood that they were not chosen.

Faeth explained that he generally performed work for the Ceremonial Unit whenever he could, but that his availability was sometimes limited by his schedule. Faeth testified that after he gave his testimony at the SEMSCO meeting, he applied for overtime with the Ceremonial Unit on a few occasions and did not receive a response. Then the opportunity to work for the St. Patrick's Day parade arose, and he requested to work. Faeth stated he had always worked this event in the past if he was not attending as a Union official. When he did not receive a response, he decided to call the Ceremonial Unit to find out what was going on. Although he initially did not receive an answer, a few days later he received a call informing him that FDNY Chief James Leonard had been directed by Commissioner Nigro to remove him from the Ceremonial Unit.

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<sup>8</sup> If overtime is the deciding factor, Guerra stated that the person who has less hours will typically be chosen to better equalize the overtime distribution.

<sup>9</sup> Guerra testified that this occurs about 10% of the time.

Captain Guerra confirmed that the decision to remove Faeth from the Ceremonial Unit was made by Chief Leonard and Commissioner Nigro. He stated that the decision was made “[b]ecause of [Faeth’s] testimony in front of SEMSCO in January of 2017.” (Tr. at 117) In particular, he believed that what led to the decision was “[t]he language [Faeth] used with regard to a lie from the [FDNY.] [I]t was felt that he was basically calling the Commissioner and the Chief of Department . . . liars.” (Tr. at 121) Captain Guerra explained that this language went against the Ceremonial Unit’s code of conduct. This code of conduct is not written down anywhere but Guerra testified that it is explained to members that:

We work for the Commissioner and the Chief of the Department and the administration of the [FDNY], that we may not agree with all of their terms . . . [or] their policies or whatever it might be, but that, when we act as members for the ceremonial unit, we have to take our personal feelings, our professional feelings, and put them aside, and that you are there to represent the Commissioner and the Chief of the Department in the ceremonial unit, absolutely.

(Tr. at 118). Captain Guerra further explained that because the Ceremonial Unit members have access to important people such as the Mayor, the Fire Commissioner, and the Chief of the Department, it is “very important to have very strong relationship with the fire department . . . and to support their ideals.” (*Id.*) He stated that Faeth’s testimony at the SEMSCO meeting did not reflect the higher standard that is expected of members of the Ceremonial Unit.

Captain Guerra testified that Union members are not prohibited from being members of the Ceremonial Unit and that there is nothing in the code of conduct that would require them to waive their rights as Union members. Furthermore, although he acknowledged that the SEMSCO meeting was not a Ceremonial Unit event, he stated that “no matter what” Ceremonial Unit members do, “whether [they] are at home with [their] family, or . . . acting within [their] rights as

a Union member, that [they're] always acting as a member of the ceremonial unit, or a member of the FDNY.” (Tr. at 127)

Captain Guerra testified that if a Ceremonial Unit member violates the code of conduct, he would typically have a conversation with the Commanding Officer of the Unit and determine whether they should bring the issue up to the administration of the FDNY. He stated that a small infraction might consist of something such as a member being late to an event or improperly dressed for it. An example of a more egregious violation would be if a member was charged with a criminal offense. Captain Guerra was aware of two cases where a member had been permanently removed from the Unit. In one instance, the member lied to Guerra and the Commanding Officer about her ability to be at an event, thereby violating the Absence Control Policy. In the other instance, the member was removed by the Commissioner and Chief of the Department for comments he made “against the FDNY administration” in the newspaper, *The Chief*.<sup>10</sup> (Tr. at 115) Guerra stated that he knew of about 15 instances in which members were temporarily suspended from the Unit.

Captain Guerra testified that in the two-year period between January 2015 and January 2017, Faeth worked about seven events, which are generally between five and eight hours each. Therefore, Guerra estimated that Faeth worked approximately 40 hours of overtime during that time period. (Tr. at 121) Faeth testified that this period of time was not indicative of the amount of time he would have spent performing Ceremonial Unit work after April 2017, because at that time he ceased being an officer of the Union. Therefore, for many of the events that he had

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<sup>10</sup> No further details were provided about these incidents. Nor was any evidence presented suggesting that the removal of these employees was related to union activity.

previously attended as a Union official, he would have been available to work as a member of the Ceremonial Unit.

### **POSITIONS OF THE PARTIES**

#### **Union's Position**

The Union argues that the FDNY violated NYCCBL § 12-306(a)(1) and (3) by removing Donald Faeth from its Ceremonial Unit in retaliation for his testimony at the January 11, 2017 SEMSCO meeting. It asserts that it is undisputed that the FDNY had knowledge of Faeth's testimony since FDNY representatives were present at the meeting. Furthermore, the Union contends that the testimony constituted protected union activity because it was directly related to the collective welfare of Faeth's fellow bargaining unit members and was made in his capacity as an officer of the Union, while he occupied a seat on SEMSCO that was designated to represent the Union's interests.

The Union contends that the City has conceded that Faeth's testimony at SEMSCO was a motivating factor in its decision to remove him from the Ceremonial Unit. In fact, according to Captain Guerra, Faeth's testimony at the SEMSCO meeting was the *only* factor in the decision. Furthermore, Faeth's removal from the Ceremonial Unit was an adverse employment action because he lost the honor and status of being a member of the unit and he lost overtime opportunities. The Union asserts that the City's estimate of how much overtime Faeth lost is incorrect, since Faeth ceased being an officer of the Union in April 2017 and would have had greater availability thereafter to participate in Ceremonial Unit events.

The Union further asserts that the FDNY did not have a legitimate, non-retaliatory business reason for removing Faeth from the Ceremonial Unit. The Union argues that the Board should reject the City's claim that the FDNY's decision was merely a neutral application of the

Ceremonial Unit's code of conduct. The City acknowledges that the SEMSCO meeting was not a Ceremonial Unit event and that Faeth was not wearing the Ceremonial Unit's white rope when he testified. However, Captain Guerra testified that under the Ceremonial Unit's code of conduct, the FDNY may remove any member of the Unit for expressing disagreement at any time with the FDNY's administration. The Union contends that this vague and overbroad policy is unlawful because it would require Ceremonial Unit members to surrender their rights under the NYCCBL to engage in protected union activity.

Furthermore, Faeth's testimony did not fall outside of the wide range of speech that is protected by the NYCCBL. The Union contends that, contrary to the City's assertion, Faeth did not call the FDNY's Commissioner and Chief liars, nor did he claim that any representative of the FDNY had made a false statement. Rather, he explained to SEMSCO that the FDNY's position to support the proposal at issue was misleading because it omitted important information. Regardless, even if Faeth's testimony could be construed as an assertion that the FDNY's Commissioner and Chief had lied, the Union contends that this would still not rise to the level of flagrant or egregious speech that might lose its protection under the NYCCBL.

The Union also argues that there is no support for the City's claim that it had a legitimate reason to remove Faeth from the Ceremonial Unit because his testimony somehow impaired his ability to interact with dignitaries and FDNY officials. Faeth's participation in the Ceremonial Unit rarely included interactions with such individuals. Moreover, the City has failed to provide any evidence that Faeth acted inappropriately in any of his limited interactions with high-profile individuals or with dignitaries whom he continues to be responsible for performing emergency care on through his membership in the FDNY's Dignitary Protection Unit. Furthermore, Faeth had numerous opportunities as an officer of the Union to interact with high-profile individuals and

was never accused of acting inappropriately in that capacity. Consequently, the Union argues that the Board should reject the City's baseless justifications for the FDNY's retaliatory actions.

### **City's Position**

The City argues that the Union has failed to establish a *prima facie* claim of retaliation and contends that the decision to remove Faeth from the Ceremonial Unit was instead made for legitimate business reasons. First, it argues that Faeth's testimony at the SEMSCO meeting did not constitute union activity because Faeth did not identify himself as a Union member or officer, nor did he state that he was testifying on behalf of the Union. Instead, the City argues that his statements highlighted the personal nature and individual purpose of his testimony and show that he was asking SEMSCO to stand "with [him]" and not with the Union.<sup>11</sup> (City Br. at 24) The City also points out that Faeth attended the meeting on his own time and did not request Union release time.

The City contends that its decision to remove Faeth from the Ceremonial Unit was not made because he testified against the FDNY's proposal but because he demonstrated a lack of discretion in his testimony "in selecting the language he used to advocate his position." (*Id.*) In particular, the City claims that Faeth essentially called the FDNY Commissioner and Chief of Department "liars" and, thus, he did not abide by the "higher standard of conduct that is expected of Ceremonial Unit members." (City Br. at 18) Furthermore, the City contends that removing Faeth from the Ceremonial Unit is consistent with what it has done in the past when others have spoken publicly against the FDNY administration, such as in the case where a member made comments in *The Chief*.

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<sup>11</sup> In particular, the City highlights the portions of Faeth's testimony where he stated that he had "no strings attached" because he could have retired 4 years ago. (City Br. at 24) It also points to Faeth's statement that he was standing in front of a train "by [himself]." (*Id.*)

The City also claims that it had a legitimate business reason for its actions. According to the City, the Ceremonial Unit is the “public face of [the FDNY] brand” that has become very prominent since the events of September 11, 2001. Given the access Ceremonial Unit members have to high-profile individuals, the FDNY must be sure that its members will “exercise the appropriate discretion at all times and not use their unique access to advance other agendas.” (City Br. at 20) Furthermore, the City contends that “Ceremonial Unit members must build tremendous trust before they are assigned to escort VIPs.” (*Id.* at 21) Although members such as Faeth might only have seating and parking duties at these events, Captain Guerra testified that they may still have access to important individuals.

The City avers that the instant matter is analogous to *DC 37, L. 376, 4 OCB2d 58* (BCB 2011), where the Board found an employee’s conduct, including calling a supervisor a “political hack” and stating that he “got his job as a political appointment,” was not protected union activity.

*Id.* at 15. The City contends that Faeth’s remarks regarding the SEMAC votes being predicated on a lie are similarly disparaging and should not protect him from the consequences of his actions.

Finally, the City seeks to distinguish Faeth’s former membership in the Ceremonial Unit from his continued membership as a member of the Dignitary Protection Unit because it argues that the latter is based on his skills as a Rescue Paramedic whereas the former is based on “citizenship within the Department, ability to interact with people, and decorum.” (*Id.* at 21) Furthermore, the City contends that while working with the Dignitary Protection Unit, Faeth is generally outside in an ambulance or in a separate hotel room from the dignitary.



### **DISCUSSION**

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. This 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 Feder*, 4 OCB2d 46, at 42 (BCB 2011).

Regarding the first prong, the record clearly demonstrates that Faeth was engaged in union activity when he testified at the SEMSCO meeting at issue. Faeth attended the meeting as an alternate representative of the Union and occupied the seat designated solely for that purpose. He did so at the Union President's request, and he wore a pin with the Union's emblem on it when he spoke. *See CWA, L.1182*, 8 OCB2d 18, at 12 (BCB 2015) ("employee statements and actions that are organized, prompted or encouraged by an employee organization will, in general, be found to be protected concerted activity . . .") (quoting *County of Tioga*, 44 PERB ¶ 3016, at 3061 (2011)) (internal quotations and editing marks omitted). Furthermore, this Board has previously found that public testimony that is critical of a public employer constitutes protected union activity. *See Local 1757, DC 37*, 6 OCB2d 13, at 16-17 (BCB 2013) (citing *UFA*, 1 OCB2d 10, at 20-21 (BCB 2008) (public criticism of working conditions is protected activity); *DC 37*, 1 OCB2d 6, at 29 (BCB 2008) (testifying at an arbitration is protected activity); *DC 37, L. 376*, 79 OCB 38, at 16 (BCB 2007) (testifying at an improper practice proceeding is protected activity)).

We do not find it material that Faeth did not specifically identify himself as a Union representative at the beginning of his testimony, particularly since he had been attending SEMSCO meetings and speaking as a representative for the Union for approximately 18 years. Nor are we persuaded by the City's contention that Faeth was speaking only on behalf of himself as an individual. His testimony was given on behalf of the Union and his comments regarding the issues faced by EMS workers clearly pertained to the entire bargaining unit. As such, we find that Faeth's statements were related to the employment relationship between the FDNY and the bargaining unit employees and were made in furtherance of the collective welfare of the employees. *See Local 375, DC 37, 5 OCB2d 27, at 14 (BCB 2012) (citing Local 1087, DC 37, 1 OCB2d 44, at 26 (BCB 2008); COBA, 53 OCB 17, at 11 (BCB 1994))*. His testimony therefore constitutes protected union activity.

As to the second prong of the *Bowman* test, "a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions which are the subject of the complaint." *OSA, 7 OCB2d 20, at 19 (BCB 2014) (quoting DC 37, L. 376, 79 OCB 38, at 16) (internal quotation marks omitted)*. "[T]ypically, motivation is proven through the use of circumstantial evidence, absent an outright admission." *Colella, 7 OCB2d 13, at 22 (BCB 2014) (internal quotation and editing marks omitted) (quoting Burton, 77 OCB 15, at 26 (BCB 2006))*. Here, however, it is undisputed that Faeth was removed from the FDNY's Ceremonial Unit because of his testimony at the SEMSCO meeting. We therefore find that the Union has successfully proffered a *prima facie* case of retaliation.

Once a union has established a *prima facie* case, "the employer may attempt to refute this showing on one or both elements or demonstrate that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct."

*DC 37, L. 1113, 77 OCB 33, at 25 (BCB 2006) (quoting Local 237, CEU, 77 OCB 24 (BCB 2006)).* The City argues that it did not remove Faeth from the Ceremonial Unit because he testified at the SEMSCO meeting. Instead, it asserts that it removed him from the assignment because he “accus[ed] the Fire Commissioner and Mayor of basing their position on a lie and advancing an agenda based on false pretenses.” (City Br. at 22) The City claims that the language Faeth used in his testimony violates the FDNY Ceremonial Unit’s code of conduct and that, therefore, it had a legitimate business reason for removing Faeth from the Unit.

This Board has generally recognized that the labor relations process “must tolerate robust debate of employment issues, even if occasionally intemperate.” *Local 376, 4 OCB2d 58, at 13 (BCB 2011) (quoting Village of Scotia, 29 PERB ¶ 3071 (1996)) (citing Hawthorne Mazda, Inc., 251 NLRB 313, 319-20 (1980) (the “use of strong language in the course of protected activities supplies no legal justification for disciplining an employee except in those circumstances where the conduct is flagrant or egregious”)).* However, the Board has also stated that “an employee is not immunized against otherwise appropriate and proper disciplinary procedures merely because the actions leading to discipline occurred during otherwise protected activity.” *CSTG, L. 375, 7 OCB2d 16, at 26 (BCB 2014) (citing Ornas, 65 OCB 12, at 7 (BCB 2000)).* Thus, when analyzing employee speech made during otherwise protected union activity, the Board looks to the context and tone of the speech to determine whether it was “so egregious or inappropriate as to lose the protection of [the NYCCBL.]” *CWA, L. 1182, 8 OCB2d 18, at 17; see also CSTG, L. 375, 7 OCB2d 16, at 26-27.*

In the instant matter, Faeth’s attendance and his testimony at the January 11, 2017 SEMSCO meeting was made in his role as a designated representative of the Union. We do not find the “tone” or content of any of Faeth’s statements was so flagrant or egregious as to lose

protection under the NYCCBL. Taken in context, his statement that the votes taken at the SEMAC meeting were “predicated on a lie” alleges that the FDNY’s proposal omitted important information or was being advanced for reasons other than its stated purpose.<sup>12</sup> In a similar case, the Public Employment Relations Board (“PERB”) found these types of statements were “not particularly controversial or offensive in a labor relations setting.” *Village of Scotia*, 29 PERB ¶ 3071. Part of the language at issue in *Village of Scotia* was a statement made by a union official in a letter to the Village Board of Trustees accusing the Chief of Police of being out to “publicly shaft his men and the P.B.A. and suck up to the Mayor” by supporting a proposal for a centralized 911 dispatch system that he did not agree with in order to secure his job. Although PERB stated that it did not condone the specific language, it nevertheless found the statements constituted protected union activity. We find that Faeth’s statements here are of a similar nature and, overall, his comments showed his commitment to his profession and the mission of the FDNY to provide emergency medical services.

Furthermore, this Board has previously determined that certain statements accusing management of being “liars” did not lose their protection under the NYCCBL in their specific contexts. *See CWA, L.1182*, 8 OCB2d 18 (finding that a Facebook post in a private union group stating that “[s]omeone needs to do something about those lying ass supervisors” was protected union activity); *CSTG, L. 375*, 7 OCB2d 16 (finding emails from a union official to DEP’s Director of Labor Relations and a Deputy Commissioner that accused management of lying on the witness stand at an OATH hearing and described a supervisor as abusive and hypocritical did not lose their

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<sup>12</sup> In particular, he stated that the proposal was “not about patient care” but was instead about “securing firefighter jobs and funding.” (Tr. at 47)

protection under the NYCCBL). Thus, under these facts, we find that Faeth's statements were not so egregious as to lose the protection of the NYCCBL.

Additionally, we are not persuaded by the City's argument that *DC 37, L. 376, 4 OCB2d 58* is analogous to the instant matter and should lead to a different conclusion. In that case, the Board found that a shop steward was initially engaged in protected union activity when he raised workplace issues with a supervisor on behalf of fellow employees. However, the Board found that additional comments made to the supervisor amounted to personal, disparaging attacks that did nothing to further the collective welfare of the union members and did not relate to the collective bargaining process.<sup>13</sup> Here, Faeth's comments were confined to describing issues that affected the entire bargaining unit and voicing his opposition to the FDNY's albuterol proposal, which was the subject of the SEMSCO meeting. Thus, unlike in *DC 37, L. 376*, Faeth's statements related to workplace issues and were made in furtherance of the collective welfare of his fellow Union members.

Finally, we do not find that a violation of the FDNY's unwritten code of conduct for the Ceremonial Unit establishes a legitimate business reason for Faeth's removal from the assignment. Captain Guerra generally testified that the Ceremonial Unit code of conduct requires consistent loyalty to the Commissioner and Chief of the Department. He stated that members of the Ceremonial Unit are held to a higher standard than other employees and are expected to maintain that loyalty at all times, whether on duty or off-duty. Assuming the code of conduct is as broad as stated, it does not outweigh the right to engage in protected union activity under the NYCCBL. There was no evidence, other than Faeth's protected union activity, to demonstrate that he had ever

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<sup>13</sup> In particular, the shop steward stopped talking about the workplace issues at hand and began a heated rant during which he called the supervisor a "political hack," told him that he "got his job as a political appointment." *DC 37, L. 376, 4 OCB2d 58*, at 13.

violated the code of conduct or would be likely to do so in the future. In fact, the totality of the evidence leads us to conclude otherwise. This evidence demonstrates that Faeth had attended numerous Ceremonial Unit events in his role as a Union official and that he had interacted with high-profile individuals over the years without receiving a single complaint about his conduct. Furthermore, his continued service on the Dignitary Protection Unit demonstrates that the FDNY still considers him to be a trustworthy employee. Even if he does not always personally interact with these dignitaries, he is regularly in a position to do so should any of them need medical care. As such, we find that Captain Guerra's testimony regarding the reason for Faeth's removal from the Ceremonial Unit is merely a pretext for retaliation. *See Local 30, IOUE*, 8 OCB2d 5, at 23 (BCB 2015) (quoting *SBA*, 75 OCB 22, at 24 (BCB 2005)) ("When the [alleged legitimate business] reasons provided are unsupported and/or inconsistent with the record, this Board will find that the employer committed an improper practice.")

In light of the above, we conclude that Faeth would not have been removed from the Ceremonial Unit absent his SEMSCO testimony. Consequently, we find that the FDNY violated NYCCBL § 12-306(a)(1) and (3) when it took an adverse employment action against Faeth in retaliation for his protected union activity.

**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 District Council 37, AFSCME, AFL-CIO, and its affiliated Local 2507, docketed as BCB-4225-17, be, and the same hereby is, granted; and it is further

ORDERED, that the FDNY restore Donald Faeth to his membership in the Ceremonial Unit; and it is further

ORDERED, that the FDNY make Donald Faeth whole for lost overtime compensation, if any; and it is further

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

Dated: June 14, 2018  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER

PAMELA S. SILVERBLATT  
MEMBER

CAROLE O'BLNES  
MEMBER

CHARLES G. MOERDLER  
MEMBER



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Alan R. Viani

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Charles G. Moerdler  
Gwynne A. Wilcox

**CITY MEMBERS**

M. David Zurndorfer  
Pamela S. Silverblatt

**DEPUTY CHAIRS**

Monu Singh  
Steven Star

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

We hereby notify:

That the Board of Collective Bargaining has issued 11 OCB2d 18 (BCB 2018), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, and its affiliated Local 2507 and the New York City Fire Department.

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

ORDERED, that the improper practice petition, docketed as BCB-4225-17, be, and the same hereby is, granted as to claim that the New York City Fire Department violated NYCCBL § 12-306(a)(1) and (3) by removing Donald Faeth from its Ceremonial Unit in retaliation for engaging in protected union activity; and it is further

ORDERED, that the that the New York City Fire Department restore Donald Faeth to his membership in the Ceremonial Unit; and it is further

ORDERED, that the that the New York City Fire Department make Donald Faeth whole for lost overtime compensation, if any; and it is further



ORDERED, that the New York City Fire Department 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 conspicuously posted for a minimum of thirty days from the date of posting, and must not be altered, defaced, or covered by any other material.

The New York City Fire Department  
(Department)

Dated: \_\_\_\_\_(Posted By)  
(Title)