

**Fulgieri, 11 OCB2d 34 (BCB 2018)**

(IP) (Docket No. BCB-4212-17)

**Summary of Decision:** Petitioner claimed that DCAS violated NYCCBL § 12-306(a)(1) and (3) when it transferred him to another unit, resulting in a significant loss of overtime earnings, in retaliation for his complaints regarding his workplace. The City argued that Petitioner was transferred at his request and that it had legitimate business reasons to assign him to the new location because it needed to fill a vacancy and because the transfer resolved a conflict between Petitioner and his supervisor. The Board found that Petitioner established a *prima facie* claim of retaliation and that the City's purported business reasons for transferring him were pretextual. 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-*

**CHRISTOPHER FULGIERI,**

*Petitioner,*

*-and-*

**THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT  
OF CITYWIDE ADMINISTRATIVE SERVICES,**

*Respondents.*

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**DECISION AND ORDER**

On May 10, 2017, Christopher Fulgieri ("Petitioner") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Citywide Administrative Services ("DCAS"). Petitioner asserts that DCAS transferred him to another unit, resulting in a significant loss of overtime earnings, in retaliation for his complaints regarding his workplace, including alleged unfair overtime distribution, 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 Petitioner was transferred at his request and that it had legitimate business reasons to assign him to the new location because it needed to fill a vacancy there and because the transfer resolved a conflict between Petitioner and his supervisor. The Board finds that Petitioner established a *prima facie* claim of retaliation. It also finds that the City’s purported business reasons for transferring Petitioner are pretextual. Accordingly, the petition is granted.

### **BACKGROUND**

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

Petitioner has been employed by DCAS as a Laborer since December 2006. He is a member of District Council 37, Local 924 (“Union”). DCAS is responsible for ensuring that City agencies have the resources and support they need to provide services to the public. DCAS’ Asset Management Division manages, operates, and maintains over 55 City-owned buildings throughout the City. Within the Asset Management Division is the Ceremonies Unit, which is responsible for assembling and breaking down stages for various City Hall events throughout the City, and the Paint Shop, which is responsible for painting and plastering in DCAS-maintained buildings. Additionally, DCAS has a Citywide Procurements Division, which purchases goods and services on behalf of City agencies and is responsible for the quality control, warehousing, and distribution of these goods. Within the Procurements Division is a Storehouse facility that employs Laborers. The petition concerns Petitioner’s involuntary transfer in 2017 from the Paint Shop, located at 390 Kent Avenue in Brooklyn, to the Storehouse, located on Metropolitan Avenue in Queens.

Petitioner had been assigned to the Paint Shop since 2013. On December 9, 2016, Petitioner wrote an email to Belinda French, DCAS' Diversity & EEO Officer, concerning an issue with the way his supervisor was filling out his timecards. French responded by stating that Petitioner's issue would be more appropriately handled by the Labor Relations Unit, and that she would forward the email to Michael Slutsky, the Director of Labor Relations. Slutsky then told Petitioner to have his Union representative call him so that he could set up a meeting.

Although Petitioner's email to French did not mention overtime, Slutsky testified that Petitioner's Union representative, Chandler Henderson, called him and asked to set up a meeting to discuss Petitioner's allegation that he was not getting a fair share of overtime. Slutsky stated that in preparation for the meeting he ran overtime reports for Petitioner and other Laborers. He also spoke to Department Director Mary Padavano and obtained a document that listed the occasions on which Petitioner declined to work overtime during 2016. The document was handwritten by Petitioner's supervisor, Giovanni Caggia, and it included calculations of how many hours Petitioner worked in overtime during 2016.<sup>1</sup>

On February 7, 2017, a meeting was attended by Petitioner, Henderson, Slutsky, and two other members of DCAS management—Sheila Grizzle, Deputy Director of Labor Relations, and Nicole Alexander, a DCAS Investigator. It is undisputed that Petitioner raised three separate concerns at the meeting—overtime distribution, how his supervisor was recording his work location, and allegations of nepotism. With regard to the overtime issue, Henderson stated that in accordance with a mayoral executive order, overtime opportunities were required to be distributed equitably. Therefore, he asked Slutsky to provide him with a list of employees eligible for

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<sup>1</sup> According to the document, Petitioner worked approximately 900 hours of overtime in 2016 and earned \$44,199 in overtime pay.

overtime in the next couple of weeks. According to Petitioner, Slutsky stated that DCAS did not have to follow the executive order and could distribute overtime as it pleased.<sup>2</sup> Slutsky also presented Petitioner with the list of overtime refusals and pointed out that Petitioner had received more than \$40,000 in overtime in 2016. Petitioner responded that if Slutsky compared his earnings to other Laborers he would see a disparity that showed that he had earned less.

Petitioner also expressed his concerns about how his supervisor was recording his work locations on his “blue sheets.” The blue sheet is a document used to identify where trades titles are working on a given day in the event that there are questions about an employee’s whereabouts. According to Petitioner, his supervisor was “falsifying” his blue sheets by listing him as being on shop detail every day, rather than out in the field working with other titles such as Plasterers, Bricklayers, and Masons. (Tr. 36) Petitioner explained that the reason he was concerned about this was because he believed that if he were to seek a promotion to one of these titles, any experience he had working out in the field with these titles would help him achieve the promotion.<sup>3</sup>

The final issue discussed at the meeting was Petitioner’s concern regarding “possible nepotism.” (Tr. 37) In particular, he believed that there was a Laborer who was related to a Foreman, as well as one who might be related to either Padavano or Caggia. At the hearing in this matter, Petitioner elaborated that one of the Laborers he was referring to received favorable treatment because Caggia reported that he was working with the Masons on the blue sheets, while Caggia always recorded on the blue sheets that Petitioner was in the shop.

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<sup>2</sup> Although Slutsky testified at the hearing in this matter, he was not questioned about his response to Henderson’s statements regarding the mayoral order, and we make no finding regarding the accuracy of this comment.

<sup>3</sup> At the hearing in this matter, Petitioner listed specific examples of Laborers who he believed were promoted in part because of experience they had obtained as a Laborer assisting other titles. Slutsky and Anderson, on the other hand, testified that blue sheets do not play any role in promotions and are instead used for disciplinary investigations.

It is also undisputed that at some point during the meeting, Petitioner requested to be transferred into the Ceremonies Unit. However, the witnesses' testimony differs regarding what was said concerning this request. According to Petitioner, there was a vacancy in that unit and so he asked to be moved there "to be protected," while his allegations were investigated. (Tr. 43) Slutsky responded that Petitioner should speak with the supervisor of that unit because Petitioner had been transferred in 2013 to the Paint Shop as a result of issues he had with the Ceremonies Unit supervisor.<sup>4</sup> Petitioner contends that Slutsky then suggested the possibility of a transfer to the Storehouse. According to Petitioner, he told Slutsky that he did not want to go to the Storehouse because he would not be able to make nearly as much overtime there and it would be a hardship on his family. Petitioner told Slutsky that if the Storehouse was the only option then he would stay at the Paint Shop. Petitioner testified that the meeting then ended and he and Henderson stayed in the room to talk for a few minutes. Henderson told him that if DCAS did attempt to transfer him to the Storehouse, the Union would fight it because the transfer would be retaliation for his complaints.

Slutsky, Grizzle, and Anderson all denied that they discussed the possibility of transferring Petitioner to the Storehouse at the February 7, 2017 meeting, or that Petitioner stated that he did not want to be transferred there. These witnesses concede that Petitioner asked to be transferred to the Ceremonies Unit, and testified that he told them that he had already spoken with the supervisor of that unit, who was fine with Petitioner returning to work there. However, both Slutsky and Grizzle testified that Slutsky told Petitioner that a transfer to the Ceremonies Unit

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<sup>4</sup> There is little testimony regarding Petitioner's transfer from the Ceremonies Unit to the Paint Shop. Slutsky testified that in 2013 Petitioner contacted him about "personality issues" he was having with his supervisor. Slutsky stated that, in the "interest of good labor relations" he had Petitioner moved to the Paint Shop. (Tr. 85)

would not be possible due to his previous issues with the unit supervisor. Instead, Slutsky told Petitioner “you’re going to stay where you are.” (Tr. 91) Slutsky testified that Petitioner’s request to be transferred was made only in connection with the Ceremonies Unit.

It is uncontested that the meeting ended with Slutsky stating that Petitioner’s allegations would be investigated and that Slutsky would get back to him. However, it is unclear what, if any, investigation DCAS actually conducted. Slutsky testified that it is not his role to investigate and, therefore, he referred the allegations to the Director of Discipline, but he was not aware whether the Director of Discipline did anything regarding the allegations. Alexander testified that as far as she knew, no investigation was conducted. Additionally, Padavano testified that an investigation into the issue of the blue sheets was not conducted until after Petitioner was transferred out of the unit.<sup>5</sup> (Tr. at 156)

Later in the same day as his meeting with Petitioner, Slutsky had a meeting with another Laborer, Petrus Victor, who worked in the Storehouse. Victor was having issues with his supervisor and requested a transfer to a different unit. Slutsky stated that after this meeting, “it occurred to me . . . [that] I might as well switch the two Laborers, since those locations are the only locations where we use that title.” (Tr. 92) Slutsky testified that generally when there is a conflict between a supervisor and a subordinate, he contacts the supervisor to see what the issue is from his or her point of view. Depending on the situation, he then tries to resolve the conflict by bringing the parties together to meet, considering a transfer, assigning them different work, or providing them with additional training. With respect to transfers, Slutsky stated that the criteria he looks at in making the decision is whether the location can accommodate that person and the

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<sup>5</sup> Padavano also stated that at some point she was questioned by the Deputy Director of Labor Relations regarding the hiring of her neighbor.

duties and responsibilities they are capable of performing. He also needs to obtain authorization from the directors of the locations. However, he stated that he does not take overtime availability into account when making such a transfer. In particular, he denied that he deliberately assigned Petitioner to the Storehouse because there was less available overtime. Slutsky contacted Padavano as well as the supervisor at the Storehouse and obtained their approval to make Petitioner's transfer. Slutsky admits that Petitioner's transfer to the Storehouse was involuntary.

On March 2, 2017, Slutsky met with Petitioner to inform him of the transfer. Petitioner was accompanied to the meeting by local Union president Kyle Simmons.<sup>6</sup> Slutsky testified that Petitioner protested the transfer and stated that it would negatively affect how much overtime he would earn. Slutsky responded that overtime is not guaranteed under the collective bargaining agreement ("Agreement"). Simmons also protested Petitioner's transfer and stated that under the Agreement, DCAS had to give Petitioner 30 days' notice before it could transfer him. Slutsky responded that he can transfer Petitioner without notice because there was no such contractual clause. Simmons stated that he was going to file a grievance.

Padavano testified that she was not responsible for Petitioner's transfer. In particular, she stated that Slutsky called her after the February 7 meeting and told her that Petitioner had requested a transfer and wanted to know whether she would approve of switching his location with Victor's. Padavano didn't consent immediately because she had to speak with her supervisor first. After her supervisor told her it was OK with him, Padavano agreed to the transfer.

The day after Petitioner was notified of the transfer, Padavano held a meeting with the Laborers at the Kent Avenue location to inform them that Petitioner had been transferred to the Storehouse and to explain why. Elsayed Kasab, a Laborer from the Machine Shop, which is also

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<sup>6</sup> Grizzle also attended the meeting, although Anderson did not.

located at Kent Avenue, was present and testified about the meeting. In pertinent part, Kasab's testimony was corroborated by a recording of the conversation.<sup>7</sup> A transcript of the conversation follows:

Padavano: So I asked for a meeting with all of you guys today, because of, everybody heard about what happened with Chris [Fulgieri]. And I want to explain something to everybody, and I'm not sitting here . . . myself or giving you excuses. Chris went upstairs complaining about overtime, and I don't know the whole dynamics with him and Mike Slutsky. Next thing I know Mike Slutsky calls me do I want to transfer him with someone else, so I said yes. So that was my fault. Mike Slutsky also wanted to know if there's anybody else that's not happy, because there are Laborers in the Storehouse that are not happy. So anybody that's not happy, you can speak to me. You can speak to me offline, speak to me alone, or you can speak now. I'm giving everyone the opportunity.

Kasab: Opportunity about what?

Padavano: About here, about the overtime, about me, about your supervisors, about the work. Again, you can talk to me offline but I wanted to say it to everyone face-to-face . . . Everybody here, I'm sure you heard all the buzzing in the hallways and, like I said I just wanted to be the one to tell everyone.

Kasab: I'm good.

Padavano: Ok, again, you don't have to say it, I'm here all day, anybody can come in today or Monday, Tuesday, whenever.

[inaudible]

Kasab: What happened here, stays here. You know what I'm saying? This is for all of us, you know what I'm saying?

Padavano: Well I'm gonna tell you all this, and Mike knows this. Last year I sat in this room with Chris and told him, leave the dirt here. Don't go running upstairs and say I'm not getting any overtime. Listen— you're not happy with something you come to me . . . You've all been in my office. So you can walk in the door. I didn't do this, he did. He went upstairs and he went on and on and

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<sup>7</sup> Although Padavano was unaware of it at the time, one of the Laborers recorded the conversation. The recording of the meeting was entered into the record as Petitioner Ex. A.



on, and this wasn't his first visit I guess upstairs, and it was about overtime. And they run the figures and they see what kind of overtime everyone makes, which you all heard about also, and you know, he just brought light to himself . . . .

Kasab: To be honest with you Mary I asked Danny, I say what's going on because I don't know about . . . all I know is that he's got two kids and both of them are sick. Danny told me that was his request . . . .<sup>8</sup>

Padavano: He went there requesting a transfer, is what he did, and he got it.

Kasab: Between us, there's no way, chance he can come back...?

Padavano: Nope. He went upstairs and asked for a transfer, he went up there and said he wasn't happy here, it wasn't enough overtime and he wanted to be transferred . . . . We have a new Laborer right now, Petrus Victor from the Storehouse, he will be assigned to the machine shop.

(Petitioner Ex. 1) Kasab testified that the reason he asked Padavano whether Petitioner could come back was because he felt the need to "defend" Petitioner since he was a good worker and had been there a long time. (Tr. 31) Kasab explained that he knew that being transferred to the Storehouse would cause Petitioner to lose overtime money that he needed for his family. (Tr. 31) Kasab stated that after Padavano gave her speech, "that shut everybody up." (Tr. 30)

Padavano testified about the conversation with the Kent Avenue Laborers and explained that when she talked about Petitioner going "upstairs" she was referring to the 17<sup>th</sup> floor of One Centre Street, where DCAS's Labor Relations Department is located. Additionally, her comment that Laborers should "leave the dirt here" meant that she wanted employees to follow the proper chain of command if they had a workplace issue rather than going straight to Labor Relations. She also explained that when she told the Laborers that Slutsky wanted to know if anybody else wasn't

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<sup>8</sup> Kasab testified that Danny is his supervisor in the Machine Shop.

happy, she asked this because she “didn’t realize that Chris was that unhappy, so Mike said, if anybody else is unhappy, we can see if we can transfer them too . . . .” (Tr. 147) According to Padavano, she did not say this in a threatening manner, but just wanted to let the Laborers know that if they had any issues that they could speak to her at any time.

Petitioner stated that since he has been transferred to the Storehouse he has made “almost nothing” in overtime. (Tr. 53) More specifically, he stated that he worked approximately 50 to 60 hours of overtime in 2017 after his transfer on March 3, but that was work done with the Ceremonies Unit. A comparison of Petitioner’s W-2 forms from 2016 and 2017 demonstrates that he earned less in 2017.<sup>9</sup>

## **POSITIONS OF THE PARTIES**

### **Petitioner’s Position**

Petitioner argues that DCAS violated NYCCBL § 12-306(a)(1) and (3) by transferring him to the Storehouse in retaliation for workplace complaints he made with the assistance of his Union. It is undisputed that DCAS had knowledge of Petitioner’s union activity. Additionally, Petitioner contends that this is a rare case where there is an outright admission of improper motive. Furthermore, Petitioner argues that Padavano was a “critical decisionmaker regarding the transfer” since Slutsky did not have the authority to make the transfer without her approval. (Pet. Br. at 5) In Padavano’s March 3, 2018 speech she explicitly stated that Petitioner was transferred because he made complaints regarding the workplace. Petitioner contends that Padavano’s message was clear to the Laborers that anyone who takes his complaint to the Union, or to Labor Relations, “can

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<sup>9</sup> However, Petitioner’s 2017 earnings include two months of working in the Paint Shop where he was still able to work overtime.

expect swift retribution.” (Pet. Br. at 6) Thus, Petitioner contends that he has made out a *prima facie* showing of retaliation.

Petitioner also argues that DCAS did not provide a legitimate business reason for transferring him. There was no evidence of poor performance or any misconduct by Petitioner. Although Slutsky and Padavano stated that Petitioner was being transferred because he was “not happy” in the Paint Shop, Petitioner never said that he was unhappy— only that he wanted his job records to be accurate and to receive his fair share of overtime. (Pet. Br. at 6) Furthermore, Petitioner avers that “if the point of the transfer was to cure [his] ‘unhappiness,’ then sending [him] out of the Division in which he had always worked, to a job that entailed a serious pay cut, would only exacerbate the problem.” (Pet. Br. at 7) Instead, Petitioner contends that he was transferred as punishment for making workplace complaints and to scare other Laborers away from doing the same. This is made clear by Padavano’s explanation that it was Petitioner’s own fault that he was transferred because he brought attention to himself by complaining to Labor Relations rather than leaving the “dirt” in-house.

Consequently, Petitioner argues that the Board should grant the petition. As a remedy, Petitioner requests that the Board order DCAS to reinstate him to the Paint Shop and to make him whole, including but not limited to compensating him for approximately \$43,000 in lost overtime.

### **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 transfer Petitioner was made for legitimate business reasons. First, it argues that the only evidence of retaliatory motivation that Petitioner has offered is based on temporal proximity. The City contends that there is no other evidence in the record to suggest that anyone at DCAS held anti-union animus. In particular, the sequence of events shows that, although

Slutsky was aware of Petitioner's overtime complaints prior to the February 7 meeting, he never contemplated a transfer until Petitioner requested one. The City contends that there was no conversation about a possible transfer to the Storehouse, nor did Petitioner protest such a transfer at the February 7, 2017 meeting. Slutsky, Grizzle and Alexander each testified consistently to this fact, whereas Petitioner did not present any evidence to corroborate his version of the facts. The City argues that "the selection of the Storehouse location for his transfer arose only after a vacancy was created by [Victor's] transfer." (City Br. at 21) As such, the only protest against a transfer to the Storehouse was clearly made at the March 2 meeting, after Petitioner was informed of the transfer. Therefore, the City contends that Petitioner's claim of improper motivation is wholly conclusory and, thus, he has not established a *prima facie* case of retaliation.

Furthermore, the City contends that the transfer would have occurred even in the absence of Petitioner's complaints about overtime based on his request for a transfer and DCAS's need to fill a vacancy in the Storehouse created by Victor's transfer out of that unit. Additionally, it argues that DCAS had legitimate business reasons to transfer Petitioner based on his conflict with his supervisor in the Paint Shop. According to the City, Petitioner's complaints about how his supervisor was recording his work location were "illusory" and were founded on his "mistaken notion" that the records would affect his ability to achieve a promotion. (City Br. at 19) Slutsky testified that DCAS routinely implements transfers when situations of conflict arise in order to maintain efficiency and order in the workplace. In fact, this is exactly what DCAS had done a few years earlier when it transferred Petitioner out of the Ceremonies Unit due to a conflict he had with the supervisor there. This conflict is also the reason that DCAS could not accommodate Petitioner's request to be transferred back into that unit. Slutsky reasonably determined that such an arrangement would be too risky given the history between Petitioner and the supervisor of the

Ceremonies Unit. Additionally, Slutsky needed to transfer Victor out of his unit to rectify another workplace conflict. Thus, the City contends that DCAS had legitimate business reasons to transfer Petitioner to the Storehouse. It therefore requests that the petition be denied.

### **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 City does not dispute that Petitioner was engaged in union activity when he attended the February 7, 2017 meeting with his Union representative and made complaints about his supervisor. 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) (BCB 2007) (internal quotation marks omitted). "The petitioner may carry its burden of proof by deploying evidence of proximity in time, together with other relevant evidence." *CTSG, L. 375*, 7 OCB2d 18, at 15 (BCB 2014) (citing *CWA, L. 1180*, 77 OCB 20, at 14 (BCB 2006)) (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, we find that Petitioner has presented sufficient evidence of an improper motivation for his transfer to the Storehouse. When Padavano addressed the Laborers to explain why Petitioner was transferred, she stated that the transfer occurred because Petitioner “brought light” to himself by making complaints to Labor Relations about overtime assignments, rather than keeping the “dirt” in-house. (Petitioner Ex. A) Furthermore, she stated that Petitioner had been warned in the past not to bring workplace complaints to Labor Relations. These statements clearly demonstrate animus towards Petitioner’s protected union activity: the complaints he made to Labor Relations. In addition, Slutsky testified that he could not transfer Petitioner without first obtaining Padavano’s approval, which she gave. Further, Petitioner’s transfer to the Storehouse occurred shortly after Petitioner complained to the Director of Labor Relations about his supervisor. Consequently, the Union has presented sufficient evidence to demonstrate that the transfer was improperly motivated. We therefore find that the Union has established 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)). Here, we do not find that the City has sufficiently rebutted the evidence of animus. Although Padavano explained that her statements to the Laborers were intended to instruct them to talk to her first, the statements deviated from her intended message. She expressly told the Laborers that Petitioner was transferred for making complaints about overtime assignments. She

also stated that anyone else who was not “happy” working there should let her know. (Petitioner Ex. 1; Tr. 148) She admitted that she said this because Slutsky told her that anyone else who was “unhappy” could be transferred to the Storehouse as well. (Tr. 147) Additionally, Kasab testified that he knew that Petitioner would not get overtime in the Storehouse and that Padavano’s speech “shut everyone up.” (Tr. 30) Therefore, it is reasonable to conclude that the Laborers understood Padavano’s comments to mean that if any Laborers made complaints or had issues with the workplace they could be transferred as well.

It is clear that Petitioner’s protected activity formed at least one basis for the decision to transfer him. However, we must also assess whether DCAS nevertheless had a legitimate business reason to transfer him. In the case of a decision based on a dual or mixed motive, “even if it is established that a desire to frustrate union activity is a motivating factor, the employer is nevertheless held to have complied with the NYCCBL where it is proven that the action complained of ‘would have occurred in any event and for valid reasons.’” *Local 768*, 63 OCB 15, at 18 (BCB 1999) (quoting *CWA, L. 1180*, 43 OCB 17, at 19 (BCB 1989)). Here, the City contends that it had legitimate business reasons for Petitioner’s transfer because he asked for a transfer, because he had a conflict with his supervisor, and because DCAS needed to fill a vacancy that opened up in the Storehouse when another Laborer requested a transfer.

Based on the evidence presented, we are not persuaded that Petitioner would have been transferred to the Storehouse had it not been for the complaints he made about his supervisor’s assignment of overtime, inaccurate completion of his blue sheets, and nepotism at the February 7, 2017 meeting. First, we credit the testimony of Slutsky, Grizzle and Anderson that the topic of a transfer to the Storehouse did not occur during the February 7, 2018 meeting. However, Slutsky admitted that Petitioner’s transfer request during the February 7, 2017 meeting was made only in

relation to a transfer to the Ceremonies Unit. Further, he stated that his decision to transfer Petitioner to the Storehouse was made after that meeting and that the transfer was involuntary. Given that Petitioner requested the February 7 meeting in part to address his concerns that he was not being assigned a fair amount of overtime, it is reasonable to conclude that Slutsky knew that Petitioner would be upset by a transfer to the Storehouse where there were fewer overtime opportunities. Even assuming Slutsky was not aware that there were few overtime opportunities at the Storehouse, he became aware at the March 2, 2017 meeting when Petitioner and Union President Simmons vehemently opposed the transfer and stated that his family would be harmed by it. Nevertheless, Petitioner was transferred over these objections. As such, we conclude that the intent in transferring Petitioner was punitive rather than a legitimate way to solve the issues he brought forth to management.

We also find the City's argument that it needed to transfer Petitioner because he had a conflict with his current supervisor unpersuasive. There is no record evidence to demonstrate that Petitioner and his supervisor did not get along or otherwise had experienced conflict while working together. The evidence indicates only that Petitioner believed his supervisor was unfairly distributing overtime and misrepresenting his location on the blue sheets. It does not follow that once an employee makes a complaint regarding his or her supervisor that a "conflict" exists that must be rectified by permanently transferring the employee to another location.<sup>10</sup> Slutsky's determination at the end of the February 7 meeting that Petitioner should remain in the Paint Shop is consistent with this conclusion. Therefore, we cannot conclude that the decision to transfer

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<sup>10</sup> Indeed, even assuming there was a demonstrated conflict, Slutsky testified that other ways to resolve conflict include investigating any alleged misconduct, holding a meeting with the employee and the supervisor, reassigning the employee to different work, or re-training where appropriate. The record shows that none of these options were explored.



Petitioner to the Storehouse was legitimately based on the need to resolve a conflict with his supervisor.

Finally, we do not find that the City has presented sufficient evidence to demonstrate that it had a legitimate need to transfer Petitioner to the Storehouse in order to fill a vacancy created by Victor's transfer request. The City failed to demonstrate any reason for the selection of the Paint Shop as the appropriate location for Victor, or that Petitioner should be the person moved to create a vacancy. The City relies solely on the unpersuasive claim that Petitioner's complaints about his supervisor constituted a "conflict" requiring Petitioner's transfer, a claim we reject for the reasons set forth above. Further, while the City asserted that DCAS had made similar simultaneous transfers in the past, it did not present any evidence of such. Thus, the City has not presented any legitimate business reason as to why Petitioner was selected to be involuntarily transferred to the Storehouse.

In light of the above, we find that the City's justifications for transferring Petitioner are pretextual. We cannot conclude based on the evidence that he would have been transferred to the Storehouse were it not for the workplace complaints he raised in the February 7, 2017 meeting. Consequently, we find that DCAS violated NYCCBL § 12-306(a)(1) and (3) when it transferred Petitioner in retaliation for his protected union activity. We therefore order DCAS to return Petitioner to his previous position in the Paint Shop and to make him whole for any financial loss.<sup>11</sup>

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<sup>11</sup> We acknowledge that records were entered into evidence regarding Petitioner's overtime earnings that demonstrated a loss of overtime in 2017. As the record is insufficient to determine a precise figure, and/or any additional lost earnings beyond 2017, we direct the parties to discuss an appropriate make whole remedy.

**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 Christopher Fulgieri, docketed as BCB-4212-17, be, and the same hereby is, granted; and it is further

ORDERED, that DCAS return Christopher Fulgieri to his previous position in the Paint Shop; and it is further

ORDERED, that DCAS make Christopher Fulgieri whole for any financial loss; and it is further

ORDERED, that DCAS 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: October 16, 2018  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

CAROLE O'BLENES  
MEMBER

GWYNNE A. WILCOX  
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### IMPARTIAL MEMBERS

Susan J. Panepento, Chair  
Alan R. Viani

### LABOR MEMBERS

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 34 (BCB 2018), determining an improper practice petition between Christopher Fulgieri and the New York City Department of Citywide Administrative Services.

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

**ORDERED**, that the improper practice petition, docketed as BCB-4212-17, be, and the same hereby is, granted as to claim that the New York City Department of Citywide Administrative Services violated NYCCBL § 12-306o(a)(1) and (3) by transferring Christopher Fulgieri in retaliation for engaging in protected union activity; and it is further

**ORDERED**, that the that the New York City Department of Citywide Administrative Services return Christopher Fulgieri to his previous position in the Paint Shop; and it is further

**ORDERED**, that the that the New York City Department of Citywide Administrative Services make Christopher Fulgieri whole for any financial loss; and it is further

ORDERED, that the New York City Department of Citywide Administrative Services 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 Department of Citywide Administrative Services  
(Department)

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