Moriates, 1 OCB2d 34 (BCB 2008)

(IP) (Docket No. BCB-2689-08). **Aff'd**, *Matter of Moriates v. NYC OCB*, Ind. No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.)

Summary of Decision: Petitioners alleged that DEP violated NYCCBL § 12-306(a)(1), (2), and (3) by failing to take sufficient action regarding campaign-related e-mails sent over DEP's e-mail system during the course of an internal union election campaign. Petitioners also complained that DEP refused their request to use the DEP system to respond to such e-mails messages. The City claimed that it addressed adequately the use of its e-mail system, and that it did not violate NYCCBL § 12-306(a)(1), (2), and (3). The Board found, based on undisputed facts, that the Petitioners did not establish that DEP discriminated against them or interfered with their rights. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

STACEY MORIATES and BRENDA GILL

Petitioners,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondents.

DECISION AND ORDER

On March 24, 2008, Stacy Moriates and Brenda Gill ("Petitioners"), members of Civil Service Technical Guild, Local 375, District Council 37 ("Local 375" or "Union") filed a verified improper practice petition, amended on July 3, 2008, against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP," "Department" or "Agency") alleging that the DEP violated New York City Collective Bargaining Law (City of New York

Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (2), and (3), when it did not prevent an employee campaigning for Union office from sending messages over DEP's e-mail system. Petitioners further claim DEP refused to investigate what Petitioners deemed fraudulent use of DEP e-mail system. The City maintains that Petitioners failed to state a *prima facie* case that DEP violated NYCCBL § 12-306(a)(1) and (3), and that Petitioners failed to establish a violation of the NYCCBL § 12-306(a)(2). We find that the pleadings do not make out facts which, if proven, would be sufficient to state a claim that DEP violated NYCCBL § 12-306(a)(1), (2), or (3). Accordingly, based upon this Board's review of the undisputed facts of record, Petitioners' improper practice petition is denied.

BACKGROUND

In 2007, the Union held an election for officers of its Chapter 32 in which multiple slates were competing. One slate was headed by Steve Awad, the other by Richard Stadnycki; both were running for chapter president. DEP has a Flexible Use policy, which regulates employees' use of its e-mail system and "prohibits employees from using Department technology, including e-mail, for lobbying or political purposes." (Ans. ¶ 30). DEP's Director of Labor Relations has stated that DEP's e-mail system should not be used for union election campaigning.

On November 21, 2007, Awad allegedly sent an e-mail with the subject being "Vote for the Steve Awad Team!" (Pet., Ex. A). This e-mail was sent from Awad's personal e-mail account to Chapter 32 members at their DEP e-mail addresses concerning the election campaign.[1] Petitioners,

[1] The Petitioners complained of at least two e-mail messages sent over the DEP system in support of Awad's candidacy from an e-mail account, bearing an address intended to imply it belonged to the Local 375 President. The Local 375 President denied sending these e-mail messages; he stated he was not aware of the messages prior to Petitioner Moriates notifying him of

candidates on Stadnycki's slate, e-mailed the Director of Labor Relations regarding Awad's use of the e-mail system. Thereafter, Petitioners and the Director of Labor Relations engaged in an exchange of e-mail messages, in which Petitioners informed the Director of Labor Relations of the e-mail messages sent from Awad's account as well as the e-mail messages sent from the account appearing to belong to the Local 375 President.

On November 26, 2007, Petitioners sought clarification regarding whether the policy prohibited sending campaign related e-mail messages from outside e-mail accounts, to which the Director of Labor Relations responded such use was not permitted. In addition, Petitioners requested the opportunity to respond to Awad's messages in kind, stating "because unjustifiable damage has been done to Mr. Awad's opposition, his opposition must be given the opportunity by DEP to respond over DEP's e-mail system." (Pet., Ex. G). Petitioners also requested that DEP send a copy of the Local 375 President's letter denying involvement in the e-mail messages purporting to bear his name to all Local 375 members. The Director of Labor Relations stated in an e-mail message dated December 7, 2007, and ultimately forwarded to Petitioner Gill: "I already told them e[-]mail should not be used for campaigning." (Ans., Ex. 5). She also stated in an e-mail dated December 10, 2007 that the matter of the false e-mail address should be handled by Union leadership and that although the integrity of the e-mail was questionable, "there is little that the Agency can do, given the fact that the messages were sent from outside of DEP, from a non-DEP e[-]mail address, and by

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them and that the originating e-mail address did not belong to him. Petitioners allege that Awad sent the e-mail messages from this account and complain that DEP neither acted to determine the authorship of these messages, nor notified DEP employees about the issue. DEP asserts it did not take action against Awad regarding these e-mail messages because it was not established that Awad sent these messages.

an 'anonymous' writer." (*Id.*).

On November 28, 2007, Petitioner Gill forwarded to Awad her November 26, 2008 e-mail exchange with the Director of Labor Relations. Petitioner Gill made the Director of Labor Relations a copied recipient of her e-mail to Awad. To reiterate, in the forwarded e-mail exchange, the Director of Labor Relations stated that under DEP policy, sending campaign literature via DEP's e-mail is not permitted. Specifically, Petitioner Gill asked, "[i]f one sends campaign e-mails from an outside, private e-mail address, this is also not permitted?" (Pet., Ex. B). The Director of Labor Relations responded, "[n]o, that is not permitted because it would still involve using the DEP system to disseminate campaign info." (*Id.*).

On December 12, 2007, DEP's Acting General Counsel sent an e-mail to all DEP e-mail users concerning "Use of DEP e-mail," which discussed DEP's e-mail system in general terms, not specifically referencing Union-related e-mail. (Ans., Ex. 6). The Acting General Counsel's summary of "the essential elements of the Policy with respect to e-mail usage" included a statement that "[e]-mail is to [be] used for business purposes." (*Id.*). In addition, the Acting General Counsel's message noted that during a lawsuit, e-mail may be discoverable, and that e-mail may be obtained through a "Freedom of Information Law request." (*Id.*). She also reminded employees of how to access DEP's Information Security Policy Manual, containing DEP's e-mail policy, and stated "[w]e of course do not want to stifle useful exchanges, but we do want our employees to be thoughtful when they write an e-mail and to consider the possible consequences of a carelessly worded message." (*Id.*).

On December 12, 2007, Awad allegedly sent another e-mail message with the subject "vote

for your team" through the DEP e-mail system, to undisclosed recipients. (Pet., Ex. I). This message included a sample ballot form completed to reflect a vote for Awad and his slate. On December 13, 2007, Petitioner Gill contacted the Director of Labor Relations concerning this message and asked, "[c]an you now take action against Mr. Awad, who doesn't seem to care about DEP's e-mail usage policy." (Pet., Ex. F).

On December 13, 2007, the Director of Labor Relations e-mailed Awad directly concerning the e-mail policy; she stated:

> Steve,
>
> The DEP e[-]mail system is not to be used to campaign for union elections. Please refrain from doing so. I had issued an e[-]mail regarding this before which I understand had been shared with you. I am therefore also referring this matter to appropriate divisions within the agenc[y].

(Ans., Ex 7).

At the time she sent this message to Awad, the Director of Labor Relations also sent a copy of this e-mail message to Petitioner Gill, among other people.

On December 13, 2007, Petitioner Moriates e-mailed the Director of Labor Relations, requesting an investigation to determine who sent the messages from the false e-mail address. Also, in a letter dated December 12, 2007 to the New York City Department of Investigation ("DOI"), Petitioner Moriates requested that DOI perform an investigation of the matter.

The Chapter 32 election was held in December 2007. Stadnycki won the election; Awad lost. Thereafter, for reasons not disclosed in the record of this case, Chapter 32 set the election to be re-run. On March 13, 2008, Petitioner Moriates contacted the Director of Labor Relations concerning an e-mail Awad sent on March 10, 2008 to undisclosed recipients, presumably over DEP's e-mail

system, with the subject being "Chapter 32 and Chapter 8 merger." Petitioner Moriates stated:

> I want authorization within the next few days to use DEP's e-mail system to respond to the personal defamation attacks. I would reach out to a number of DEP's L. 375 employees in a brief (less than one page double-spaced) response. My response is not of a campaign nature.

(Ans., Ex. 8).

The Director of Labor Relations sent an e-mail that same day to several parties, addressed to Petitioners and Awad, which reads as follows:

> Ms. Moriates, Ms. Gill, Mr. Awad:
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> As I have repeatedly indicated to you all, the DEP e[-]mail system is not to be used to further union activity. I am therefore instructing you all once more and asking you to advise your members of this and to be mindful of the Agency's reasonable use policy. Please note that continued disregard for the Agency policies may eventually lead to disciplinary redress against those employees found to be violating the policy.

(*Id.*).

Thereafter, commencing in June 2008, Chapter 32 re-ran its election using mail-in ballots. On June 23, 2008, Awad sent additional e-mail messages over DEP's system to undisclosed recipients in support of his campaign. Later that day, another Local 375 member notified the Director of Labor Relations by e-mail of Awad's latest message; the Director of Labor Relations responded that "the matter will be looked into." (Am. Pet., Ex. Q). On June 25, 2008, the Director of Labor Relations forwarded that e-mail to DEP's Deputy Commissioner for Human Resources, and commented that "I believe some disciplinary action is warranted." (Ans. to Am. Pet., Ex. A).

On July 16, 2008, the results of the Chapter 32 re-run election were published; Awad again lost his bid for chapter president to Stadnycki. Thereafter disciplinary charges for violating DEP's

e-mail policy were brought against Awad and against the other Local 375 member who had used the e-mail to notify the Director of Labor Relations of Awad's latest message.

As relief, Petitioners seek the following: the identity of the individual who obtained the e-mail account with an address appearing to belong to Local 375 President; "the identit[y] and location of the computer(s) from which each of the four (4) campaign e-mails supporting Awad were sent"; DEP's Inspector General's final report regarding the investigation; and an order that "DEP cease and desist from interfering in union business, and harassing union officials who are also DEP employees" and issue "a statement [concerning] the actions to be taken against Awad for having repeatedly violated DEP policy." (Pet. ¶ 3).

POSITION OF THE PARTIES

Petitioners' Position

Petitioners contend that DEP violated NYCCBL § 12-306(a)(1),(2), and (3) by failing to take sufficient action regarding campaign related e-mails sent over DEP's e-mail system during the course of an internal Union election campaign.[2] Petitioners allege that DEP failed to take adequate action

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[2] NYCCBL § 12-306(a) provides in pertinent part:

> It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

because the e-mails were "supporting their favored employee/candidate in a union election." (Rep. at 9). Moreover, DEP violated the NYCCBL when it failed to "acknowledg[e] that 'fraud' was committed over NYC DEP's e-mail system . . . . designed to influence a union election," failed to determine the author of the offending e-mails, and failed to have Awad "experience . . . consequences from his repeated violations of Respondent's policy concerning campaign and other inappropriate e-mails." (*Id*. at 2, 6). Petitioners also allege that the Acting General Counsel's response reminding employees of DEP's e-mail policy was inadequate as it did not address campaign related e-mail.

Petitioners assert that DEP's failure "to discipline Awad, their favored candidate in the union election, after his repeated violation of agency policy is evidence of bias." (*Id*. at 8). Finally, Petitioners complain that DEP decided not to issue the letter from the Local 375 President denying authorship of the e-mails sent under his name. In sum, such acts and omissions show "bias for Mr. Awad and discrimination against Mr. Stadnycki['s] members." (*Id*. at 9).

Concerning DEP's recent decision to take disciplinary action against Awad, Petitioners assert that such action does not void the improper practice because DEP took action "only after the elections had already been completed . . . and their favored candidate [Awad] lost overwhelmingly." (Rep. to Am. Ans. at 4).

City's Position

The City argues that the instant petition should be dismissed. The City contends that, presuming that all of Petitioners' assertions are true, Petitioners do not state a *prima facie* case that DEP violated NYCCBL § 12-306(a)(1) and (3). Specifically, Petitioners have not alleged that DEP's actions were based on anti-union animus.

Further, Petitioners did not demonstrate a violation of the NYCCBL based upon interference under either the "inherently destructive" or "comparatively slight" standards. Concerning the "inherently destructive" standard, Petitioners are unable to establish that DEP's actions jeopardized Local 375's ability to act as bargaining agent or diminished Local 375's ability to represent its members. Concerning the "comparatively slight" standard, Petitioners are unable to establish that DEP's actions were biased against the campaign of Stadnycki or Petitioners. Concerning the alleged violation of NYCCBL § 12-306(a)(2), DEP did not knowingly favor one employee organization over the other and, therefore, did not "dominate or interfere" with the union election. DEP notified all employees of its e-mail policy and, thereby, enforced its e-mail policy in an equal manner. Moreover, Director of Labor Relations "e-mailed Awad directly to instruct him to refrain from using e-mail system for campaign purposes." (Ans. ¶ 50). Thus, the City argues that the petition should be dismissed in its entirety.

In its April 29, 2008 filing, the City filed both a motion to dismiss as well as an answer pleading facts in support of its case. As discussed above, Petitioners thereafter amended their petition, after which time, on July 28, 2008, the City filed an amended answer pleading additional facts.

DISCUSSION

In light of the pleadings filed subsequent to the City's motion, including the amended answer, which alleges new facts, we find that the motion has been superceded by the more complete record now available to the Board, and it is upon that full record that the Board now determines the matter on its merits. The issues before this Board are whether DEP violated NYCCBL § 12-306(a)(1), (2), and (3) by dominating or interfering with Union affairs, or by discriminating against

Petitioners in retaliation for protected activity. Before evaluating the merit of Petitioner's claims we acknowledge that the Petitioners are without an attorney and are appearing *pro se*. Thus, we take particular care in reviewing the record. *Cf. Seale*, 79 OCB 30, at 7 (BCB 2007) ("The principle that claims arise out of the facts asserted and not a petitioner's statutory citations is particularly salient with respect to a *pro se* petitioner.").

After reviewing the full record, we find that the uncontroverted facts are insufficient to support a finding that DEP violated NYCCBL § 12-306(a)(2), and derivatively § 12-306(a)(1). This Board has held that a violation of NYCCBL § 12-306(a)(2) arises under the following circumstances:

> A labor organization may be considered "dominated" within the meaning of this section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges, or recognizing a favored union when another union has raised a real representation claim concerning the employees involved.

DC 37, 51 OCB 36, at 18 (BCB 1993).

For example, in *Seabrook*, 55 OCB 7 (BCB 1995), the Board found that an employer violated NYCCBL § 12-306(a)(2) when it actively permitted the incumbent slate of candidates to engage in electioneering, but denied a similar opportunity to the petitioner who was also a candidate. In that case, the employer's "broad 'non-solicitation and non-distribution' rule . . . prohibit[ed] employees from distributing or posting literature and from soliciting petitions on Department premises." *Id.* at 6. As an exception to the general rule, the employees' certified

representative could, "after notifying the Department, distribute 'official union material.'" *Id*. The incumbent union distributed campaign related leaflets and posting leaflets on bulletin boards at the work location; these leaflets related directly to the petitioner and to his candidacy in the election. *Id.* at 2. The petitioner thereafter requested an opportunity to respond to the leaflets, but his request was denied, per the employer's policy. The employer permitted the incumbent union, as the employees' certified representative, to distribute such material; however, the petitioner was denied a similar opportunity. The Board held that the employer's actions amounted to "interference" under NYCCBL § 12-306(a)(2):

> Interference can . . . be found when an employer enforces a plainly stated rule governing on premises solicitation and distribution of literature so as to allow incumbent union officers to distribute written material on premises criticizing an announced candidate and thereafter to prohibit that individual from responding by distributing a writing on premises. We find that by allowing the incumbents to violate the employer's plainly stated non-solicitation and non-distribution rule, while enforcing it against Petitioner, the Department interfered with the operation of the union in a manner that violates Section 12-306a.(2).

Id. at 9.

Like *Seabrook,* this case concerns an internal union election wherein one party violated the employer's apparently neutral non-distribution rule. However, the undisputed facts in the matter currently before us present a distinguishing contrast from *Seabrook*. In *Seabrook,* the employer explicitly permitted one slate to electioneer in violation of its policy. In the case currently before this Board, there is no allegation that DEP ever granted Awad permission to use the e-mail system while denying such opportunity to Petitioners. In fact, the record reflects that, when notified of violations of its policy, DEP acted to address the situation. In several instances, DEP representatives addressed the matter and took progressive action, which included discussing the

rules with Petitioners, reminding all DEP e-mail users of the Agency's general policy, issuing a written warning directly to Awad, again reminding both Petitioners and Awad of the rule and potential consequences of its violation, and ultimately bringing disciplinary charges against Awad. Petitioners may have been unsatisfied with the pace and extent of DEP's response, and frustrated by Awad's continued violation of the e-mail policy; however, the record does not provide a basis upon which we could conclude that DEP's course of conduct demonstrated domination or interference violative of the NYCCBL. *See DC 37,* 51 OCB 36. While other means "may have been more effective . . . a direct order [from a DEP representative does not appear] to be an unreasonable means to the end sought." *State of New York*, 17 PERB ¶ 4642 (1984) (finding that an employer did not enforce its rules in a non-uniform manner where it "directed removal of the offending material posted by [one party in election] when it was made aware of its presence").[3]

Upon review of the full record, and based upon the unrefuted facts therein, we find that Petitioners do not set forth a *prima facie* case that DEP violated NYCCBL §§ 12-306(a)(1) and (3). To determine whether an employer violated NYCCBL § 12-306(a)(3), and derivatively § 12-306(a)(1), we apply a test pronounced in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and thereafter adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). Under the *Salamanca/Bowman* test, a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory

[3] As discussed above, Petitioners complain that DEP did not adequately address e-mail messages supporting Awad's candidacy, which were sent from an account bearing an address intended to appear to belong to the Local 375 President. Petitioners allege Awad sent such messages; DEP asserts that authorship of these messages was not established. For the purposes of this decision, we assume that Petitioners would be able to bear their burden of proof on this issue.

> 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 (BCB 1987); *Feder*, 81 OCB 27 (BCB 2008).

Applying this standard to the instant matter, we find that Petitioners have not alleged the facts necessary to establish that DEP violated § 12-306(a)(3). The record demonstrates that DEP was aware that Petitioners were candidates in a union election. DEP's knowledge is evident as it responded to Petitioners' request to use DEP's e-mail system to respond to the e-mail messages supporting Awad's campaign. *Seabrook*, 55 OCB 7 (BCB 1995). However, the record does not show that DEP discriminated against Petitioners because of protected union activity.

Petitioners do not allege that any adverse *employment* action was taken against them by DEP. DEP's decision to refuse Petitioners' request to use the e-mail system for the campaign did not constitute an adverse action regarding the terms and conditions of their employment. *Cf. Colella*, 79 OCB 27 (BCB 2007) (finding a violation of NYCCBL § 12-306(a)(3) where the employer took actions regarding petitioner's employment, specifically, petitioner was denied overtime and was terminated). Even assuming *arguendo* that DEP's decision to refuse Petitioners' request detrimentally effected Petitioners' campaign, Petitioners have not alleged facts "which would tend to show that the Department was motivated by a desire to punish or interfere with protected activity."[4] *Seabrook,* 55 OCB 7 at 11. Therefore, we find that Petitioners failed to plead

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[4] In *Seabrook*, the Board stated that:

> Under a variety of circumstances, it is possible that an otherwise proper and legal action of the employer may have a detrimental effect upon the petitioner and can be perceived as being

a *prima facie* case that DEP discriminated against Petitioners in violation of NYCCBL § 12-306(a)(3), and derivatively § 12-306(a)(1). *See UFA,* 1 OCB2d 10 (BCB 2008).

In conclusion, upon review of the record as a whole, we find the facts as set forth in the pleadings do not make out a claim that DEP violated NYCCBL § 12-306(a)(1), (2), and (3). Accordingly, the petition is denied. The allegations raised in the reply to the amended answer concerning disciplinary charges brought by DEP against a Local 375 member other than Awad are beyond the scope of the petition herein and, thus, are not addressed in this Decision. However, our dismissal of this petition is without prejudice to any claims concerning that member which may be asserted hereafter in any other proceeding under the NYCCBL.

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 Stacey Moriates and Brenda Gill docketed as BCB-2689-08, be, and the same hereby is denied.

> discriminatory. This does not necessarily mean that the act constitutes a violation of § 12-306a.(3) of the NYCCBL. To establish such a violation it must be shown that the employer acted with the intent to do petitioner harm; to discourage union activity. Only then would we sustain the element of improper motivation essential to a finding of improper practice within the meaning of §12-306a.(3).

55 OCB 7, at 10 (internal citations omitted).

Dated: New York, New York
September 24, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
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MEMBER