Brown, 3 OCB2d 49 (BCB 2010)

(IP) (Docket No. BCB-2694-08 & BCB-2695-08).

Summary of Decision: The Union claims that the DOC violated §12-306(a) (1), (2) and (3) of the NYCCBL by retaliating against two Union Executive Board members for speaking to a class of pre-promotional Captains about Union issues and interfering with their rights under NYCCBL § 12-305. The City argues that the petitioners presented no evidence that they engaged in protected union activity when they addressed the pre-promotional Captains or that DOC took any adverse employment action against them. Further, the City argued that maintaining the integrity of the pre-promotional class and running the Academy in an orderly manner are legitimate business reasons for its actions. The Board finds that, although the Petitioners were involved in protected Union activity when they addressed the class, the DOC did not take any adverse employment action against Brown and Fergus, nor did the DOC's actions rise to the level of interference. Therefore, the Board dismissed the petitions in their entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the
Improper Practice Proceeding

-between-

GUY W. BROWN,

-and-

KATHYANN FERGUS,

Petitioners,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondent.

DECISION AND ORDER

On April 30, 2008, the Correction Captains Association ("CCA," or "Union") filed separate verified improper practice petitions against the City of New York ("City") and the New York City Department of Correction ("DOC") on behalf of members Captain Guy W. Brown and Captain Kathyann Fergus. The petitions were consolidated before the Board for the purpose of the hearings, which took place on July 24 and 27, and October 22, 2009. Petitioners claim that the City and the DOC violated §12-306(a) (1), (2) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by retaliating against petitioners for the protected Union activity of speaking to a class of pre-promotional Captains ("PPCs") about Union issues, and by interfering with their rights under NYCCBL § 12-305. The City argues that the petitioners presented no evidence that Brown and Fergus engaged in protected union activity when they addressed the class or that DOC took any adverse employment action against them. Further, the City argued that maintaining the integrity of the pre-promotional class and running the Academy in an orderly manner are legitimate business reasons for its actions. The Board finds that, although the Petitioners were engaged in protected Union activity, the City did not take any adverse employment action against Brown and Fergus, nor did the City's actions rise to the level of interference. Therefore, we dismiss the Union's petitions in their entirety.

BACKGROUND

After three days of hearing in this matter, the Trial Examiner found the facts to be as follows.

The CCA is the duly authorized collective bargaining representative for Correction Captains at DOC. Guy W. Brown is the Second Vice President of the CCA and Kathyann Fergus is the Secretary of the CCA. They have been employed by DOC since 1987 and 1989, respectively, and

were Correction Captains and CCA Executive Board members at all times pertinent to this case. In the past, CCA Executive Board members have addressed newly promoted Correction Captains or those who attend Correction Captain PPC's classes at the Correction Academy ("Academy"). The Academy is a DOC training facility located in Queens. At all times relevant to this petition, the Commanding Officer of the Academy was Warden Peter Panagi. He reported to DOC's Chief of Administration, Chief Peter Curcio.

In December 2007, the Academy administered a six-week-long class for PPCs. Captains Freeman Williams and Calvin Arthur, both CCA members, were the Coordinator and Assistant Coordinator, respectively, for the December class in question. They were responsible for the day-to-day administration of the pre-promotional class including insuring that the training ran according to schedule and that all required courses were taught. During this class, the CCA was scheduled to address the PPCs for one full day and one-half day on December 7, 2007, and January 4, 2008.

On December 24, 2007, Brown telephoned Arthur to request permission to address the pre-promotional class with Fergus on December 27, 2007, in addition to the previously scheduled dates. Arthur testified that, to the best of his recollection, he then told the executive on duty at the Academy, Assistant Deputy Warden ("ADW") Maurizi, that Brown and Fergus were interested in addressing the pre-promotional class. Williams testified that he and Arthur spoke to someone in the Academy's hierarchy, whom he believed was Maurizi, to obtain permission for Brown and Fergus to address the class. While Panagi would ordinarily address any such requests, he was on vacation at the time. Williams further testified that Arthur informed him that the request was approved and that they then relayed the approval to Brown and Fergus. However, Maurizi testified that neither Williams nor Arthur asked him for permission to allow Brown and Fergus to address the class on

December 27, 2007. Maurizi testified that he heard of the visit only after Brown and Fergus addressed the class, when Curcio called to inquire about it.

The Union asserts that, contemporaneously, Brown and Fergus requested and were granted time off from their commands so that they could address the pre-promotional class on December 27, 2007. Their written requests for time off did not specify a reason for the request. Warden Gregory McLaughlin, who is responsible for approving Fergus' leave, authorized her request, but he testified that he was not aware that either Captain would visit the Academy during that time. McLaughlin testified that all he knew of the reason for the request was that Brown told him verbally that he needed Fergus for an hour.[1] There is a dispute whether Brown's request was submitted through the proper channels, and therefore approved.

On December 27, 2007, at approximately 11:30 a.m., Brown and Fergus arrived at the Academy and reported to Arthur and Williams, who gave them access to the pre-promotional class. DOC policy states that upon arriving at a facility, Union Representatives "shall report directly to the head of a facility or his/her designee to state the purpose of their visit." (City Ans., Ex. C). According to Maurizi, neither Arthur nor Williams notified the tour commander that Brown and Fergus were at the Academy to address the class. From approximately 11:30 a.m. to 12:45 p.m., Brown and Fergus addressed the class. Brown and Fergus both testified that Brown answered questions from the PPCs about health and welfare benefits, contract rights, and discipline. Fergus testified that she introduced herself, explained what the PPCs' duties would be as new Captains, mentioned disciplinary procedures, and answered questions about health and welfare benefits. She

[1] There is conflicting testimony over whether CCA President Ronald Whitfield was aware that Brown and Fergus were going to address the PPCs.

did not talk about any particular commissioner or chief. Brown testified that he made statements regarding various DOC managers. Specifically, Brown said, "I didn't like their performance. I didn't like how they were trying to run the Union. In essence they were circumventing a lot of our policies, a lot of our contracts and even our Wittenberg agreement." (Tr. 135-136). Brown testified that he did use profanity, for example, "They're not going to kick my ass." (Tr. 144). Finally, Brown testified that he neither called the DOC's Director of Labor Relations an "asshole" or used any words to that effect, nor did he use similar words regarding any manager at DOC. (Tr. 135-136).

Williams and Arthur were present for part of the time that Brown and Fergus addressed the class. Arthur testified that he could not remember exactly what Brown or Fergus said during the address, but he did remember that they answered a substantial number of questions from the PPCs. Additionally, Arthur said: "All I can tell you is that [Brown] wasn't happy with performances of certain individuals, that I can tell you." (Tr. 47). Williams testified that Brown and Fergus answered the class' questions no differently than other Union officials had at other similar meetings that Williams had attended.

Brown's and Fergus' address delayed lunch and caused a portion of the "anti-gang course" to start later than scheduled. Arthur testified that he believed that the "anti-gang course" was a "filler" that was merely informational and not mandated. (Tr. 28). Williams testified that he believed that the December 2007 class schedule was flexible, which allowed for Brown and Fergus to speak. Additionally, Williams testified that the class completed all required courses and finished the entire PPC training program on time. Although Panagi agreed that all the PPCs completed their course work, he testified that the pre-promotional class curriculums are determined one to two months before the training program begins and there is little flexibility built into the schedule.

On January 4, 2008, McLaughlin asked Fergus to submit a written report regarding her request for time off on December 27. Fergus described the request as "[McLaughlin] wanted to know what I got time due for." (Tr. 104). That same day, according to Brown, ADW Michael Catuosco asked Brown to submit a report "in reference to why I went to the Academy" on December 27. (Tr. 137). Brown testified that Catuosco told him that Curcio had requested the report.

On January 9, 2008, McLaughlin asked Fergus to submit an addendum to her written report regarding her request for time off on December 27, 2007. In the report, Fergus stated that McLaughlin's stated reason for the addendum was that "he cannot grant any [leave] to attend any union business unless he has written notification from the CCA . . . [and that] only [DOC Director of Labor Relations] can release me for union business." (Fergus Pet., Ex. 4). Additionally, Panagi ordered Arthur and Williams to write reports on the events of December 27, 2007. Although Captains regularly write reports as part of their responsibilities, Arthur, Williams, Fergus and Brown had not written reports of this nature before.

Panagi testified that the next time the CCA addressed a pre-promotional class, in January 2008, he greeted some of the Union's Board members upon their arrival and attended a brief part of the meeting. On January 24, 2008 Curcio ordered Brown and Fergus to attend a meeting in his office. Captain Patrick Ferraiuolo, CCA First Vice President; Captain William Inman, CCA Legislative Chairman; Curcio; Panagi; Whitfield; Brown and Fergus all attended this meeting. According to Fergus, at the meeting, Curcio said that he controls the Academy, that the Academy "was his house," that he was in control of who can enter the Academy, and who can address the Captains. (Tr. 109-11). Fergus also testified that Curcio referred to his barring a past CCA president from attending the Academy, though Fergus was unaware of any instances when that particular past

president was barred. She also testified that Curcio referred to possible disciplinary action against her, Brown, Arthur, and Williams. Fergus further testified that Curcio stated that they did not have the right to utilize time due, that only the DOC Director of Labor Relations could release them to conduct Union business, then stated: "[Y]ou guys need to know who your President is." (Tr. 109-111).

Brown testified that Curcio never directly stated that he wanted to control the Union at the meeting. According to Brown, "we" ended the meeting by stating that Curcio's actions were illegal because Curcio could not dictate what he could say to his members. (Tr. 149-150). Brown testified that he "felt threatened. I felt like this was going to be something that he was going to retaliate against us for. And in the end when we were walking out he made a statement about you guys need to find out who your president is. And that made everybody feel a little leery about what was going to come next." (Tr. 141-142).

According to Panagi, Curcio's "demeanor was very professional" as he addressed three particular issues during the meeting; the proper policy and protocol for requesting leave by Union Board members, the appearance by the Union at the Academy to speak to pre-promotional groups, and professionalism and decorum. (Tr. 173-174). Panagi also recalled that "[Curcio] made a statement to the fact that the Academy is his house… and it is a departmental facility and that unprofessional conduct while in the Academy, particularly in a scenario like this where a group of promotional candidates are being addressed, is unacceptable and a violation of rules and regulations." (Tr. 175). Panagi testified that Curcio asked Whitfield if he knew that Brown and Fergus planned on going to the Academy to address the class prior December 27, and Whitfield responded that he did not. Panagi testified that it was then that Curcio said to Brown and Fergus:

"When you guys figure out who the President is, please let me know." (Tr. 176).

Panagi described the meeting at that point as "very heated," that Brown and Fergus were "very angry and hostile, not receptive to anything that the Chief had said." (*Id.*). Panagi testified that Brown called the meeting "bullshit" and accused Curcio of "union-busting." (*Id.*). He described Fergus as hostile, accused Curcio of harassment and restricting their movement and speech as Union Board members. According to Panagi, he attempted several times to redirect the meeting back to the issues regarding the Academy and training, but the attempt was futile. He testified that the meeting concluded when Brown and Fergus both got out of their chairs and Brown told Curcio that "You think I am a big dumb black guy and I have more education than you and I'll show you." (Tr. 177). At that point, Brown and Fergus proceeded to leave the room.

Between January 24, 2008, and January 2010, DOC held two PPCs' classes at the Academy and the CCA addressed the PPCs at both of them. Additionally, as of July 27, 2009, DOC had not preferred any disciplinary charges against any of the Captains involved with the occurrences surrounding December 27, 2007.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that it has shown that the Respondent violated NYCCBL § 12-306(a)(1), (2) and (3) by interfering with Brown's and Fergus' rights, retaliating against Brown and Fergus for their protected Union activity, and chilling Union speech.

There is no dispute that Brown and Fergus addressed the pre-promotional class on December 27, 2007. Both Brown and Fergus had been openly involved in the CCA for many years and both

were members of the CCA Executive Board at the time in question. Therefore, DOC's allegations that Fergus and Brown improperly utilized time due for union business, coupled with DOC's attempt to control CCA's Union-related access to and discussions with incoming CCA members, clearly interfered with Brown's and Fergus' rights pursuant to NYCCBL § 12-305 to engage in protected union activity.

The Union argues Respondent objected to the contents of Petitioners' address and, as such, attempted to limit the Union's future access to PPCs and arranged for a member of management to attend a future address to curb the Union's freedom of speech. Additionally, Respondent departed from its customary practice by requesting written reports and addenda from Brown and Fergus almost immediately after they addressed the PPCs. As a result of DOC's open acknowledgment that it has permitted CCA access to the PPCs in the past and its sudden change in procedure, it is clear that DOC was motivated by anti-union animus. Further, on January 24, 2008, after complying with the orders to write reports, Brown and Fergus were called to explain themselves in a meeting where Curcio made multiple threatening statements in front of members of the CCA Board.

The Union contends that the City failed to prove that DOC had legitimate business reasons for their actions. First, despite the fact that Brown and Fergus allegedly deviated from proper procedure to obtain access to the Academy, DOC did not initiate any disciplinary action against any of the Captains in question. Second, Williams and Maurizi testified that the schedule for the PPCs was somewhat flexible. Third, the class that was delayed as a result of Brown's and Fergus' address was not a mandatory or required course for graduation from the pre-promotional training program. Finally, the pre-promotional class in question graduated from the training program on-time, without delay. Therefore, DOC did not have a legitimate business reason for taking any action against

Brown and Fergus.

Finally, if DOC is allowed to continue to use its overbearing methods towards the CCA's interactions with the PPCs, it will dominate the CCA to the point where the CCA will no longer be an independent employee operation, a clear violation of NYCCBL § 12-306(a)(2).

The course of conduct, therefore, shows that DOC has violated the NYCCBL by chilling Union speech, interfering with Brown's and Fergus' rights, and retaliating against them for their protected Union activity, including forcing them to explain their actions following a closed door address to the Union's incoming membership.

City's Position

The City argues that the Union failed to prove a violation of NYCCBL § 12-306(a)(1), (2) or (3) because Petitioners were not engaged in protected union activity, Respondents took no adverse action against Petitioners, had legitimate business reasons for addressing the CCA and requesting reports, and did not dominate the union.

The City argues that Brown and Fergus did not discuss Union and labor management issues during their address to the PPCs on December 27, 2007. Instead, Brown and Fergus made an address which consisted of negative personal opinions, opprobrious comments, and disparaging remarks directed at management. Brown admitted that he made comments about management and that he used profanity during his address. Additionally, the testimony of various individuals present at the December 27, 2007, address support the City's assertion that Brown's and Fergus' critical address was not Union activity.

Furthermore, the City alleges that Brown's and Fergus' visit was unauthorized and disruptive. Brown and Fergus violated protocol and accessed the Academy without knowledge or proper

authorization of the Union President or the acting tour commander of the Academy, Maurizi. Although the CCA President routinely makes a request to address the PPCs and management routinely allows them to do so, these requests are usually made several weeks in advance. In fact, Curcio did grant the President of the Union the opportunity to address the December 2007 PPCs. Curcio even gave Whitfield an extra half-day, for a total of one and a half days, of Union time with the December 2007 PPCs.

Additionally, the City argues that the Union failed to demonstrate that DOC retaliated against the Petitioners. DOC took no adverse employment action against Petitioners as a result of the events surrounding December 27, 2007. For example, neither Brown nor Fergus were disciplined as a result of the events of December 27, 2007, and there is nothing uncharacteristic about the reports the Captains were requested to write. Furthermore, the CCA was not banned from addressing future classes of PPCs. In fact, the CCA addressed the PPCs in every class at the Academy from January 4, 2008 until January 2010.

The City concedes that Curcio was aware that Brown and Fergus were members of the CCA and that they addressed the PPCs on December 27, 2007. However, the Union has failed to demonstrate a *prima facie* showing of wrongful intent. Curcio's meeting on January 24, 2008, was an opportunity for him to inform the CCA of the necessary protocol and decorum when addressing the PPCs. Additionally, Curcio's statements do not constitute acts of retaliation, but rather were a chance to express the possible consequences of violating the proper protocol and decorum. Therefore, DOC took no discriminatory action as a result of December 27, 2007, and, even assuming for the sake of argument that they did, said actions were motivated by legitimate business interests.

The City also argues that DOC and Curcio had legitimate business reasons for all of their

actions. For example, Curcio requested reports from Brown, Fergus, Arthur and Williams, and held the meeting on January 24, 2008, in order to maintain order at the Academy and ensure that employees observed Departmental procedures. The Union failed to show that the Department's concern for order, protocol and decorum were invalid.

Additionally, the City argues that DOC's actions were not motivated by anti-union animus. Days after the December 27, 2007, address, the Union was allowed to address the December 2007 pre-promotional class, as well as all future classes of PPCs. Moreover, Curcio met with the Union on January 24, 2008, to discuss protocol and keep an open dialogue. Therefore, there is no evidence that DOC was acting with the intent to punish or discourage Union activity. Further, the disputed statements which Curcio made on January 24, 2008, do not amount to an attempt to control the CCA as to constitute domination under NYCCBL § 12-306(a)(2).

Therefore, Respondents have not shown that any violation of the NYCCBL occurred. Brown's and Fergus' actions were not protected Union activity, DOC took no adverse action against them, and DOC had legitimate business reasons for their actions. Thus, the petition should be dismissed in its entirety.

DISCUSSION

The Union claims that DOC interfered with Brown's and Fergus' rights and retaliated against them for engaging in protected union activity in violation of NYCCBL § 12-306(a)(1), (2) and (3). [2]

[2] NYCCBL § 12-306(a)(1) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
> (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;

NYCCBL § 12-306(a)(3) provides that it shall be an improper practice for a public employer or its agents "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization." In determining if an action violates NYCCBL § 12-306(a)(3) and derivatively NYCCBL § 12-306(a)(1), this Board, in *Bowman*, 39 OCB 51 (BCB 1987), adopted the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny. The Board requires that a petitioner 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 Edwards*, 1 OCB2d 22, at 16 (BCB 2008).

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* showing, "the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *DC 37*, 1 OCB2d 5, at 64 (BCB 2008); *see also CEU, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

With respect to the first prong of the *Salamanca-Bowman* test, we have long stated that an

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> (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. . . .
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> * * *
>
> NYCCBL § 12-305 provides, in relevant part:
> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

activity that the Board would deem to fall within the protection of NYCCBL § 12-305 must be related, if only indirectly, to the employment relationship between the City and bargaining unit employees. *See SSEU*, 79 OCB 34, at 9 (BCB 2007); *COBA*, 53 OCB 17, at 11 (BCB 1994). In the instant matter, Brown and Fergus were acting in their official capacity as Union Executive Board members. Despite the Respondents' assertions to the contrary, the issues discussed at the December 27, 2007, address were linked to Union benefits and labor relations. The evidence shows that health and welfare benefits, contract rights, and discipline were discussed.

Though the City points to *Palmer-Moses*, 63 OCB 30 (BCB 1999), for the proposition that speech that is disparaging to an employer is not protected, that decision found that the employees' activity was not protected for other reasons. In that matter, petitioners' remarks concerned their and their colleague's purported observations with regard to race and religion and made no reference to concerns about collective bargaining issues. In holding that the employees' actions were not protected, the Board stated: "The mere fact that Frazier-Lee and Palmer-Moses were Union members is not enough to bring their 'exuberant' conduct and 'personalized' statement by two African-American women of their perception of preferential treatment of white employees … within the realm of protected union activity." *Palmer-Moses,* 63 OCB 30, at 18.

The facts in the instant matter are readily distinguishable, as Petitioners' actions here related directly to the business relationship and were in furtherance of the collective welfare of their members. Although Brown and Fergus certainly made disparaging remarks, those remarks arose in the context of a discussion of collective bargaining issues. We have held that even disparaging speech constitutes protected activity when it is indirectly related to the business relationship and is in furtherance of the collective welfare of employees. *See PBA*, 63 OCB 16, at 8 (BCB 1999) (union

member who placed a sign that protested captain's arrest and summons quotas in his automobile window was engaged in protected activity); *UFA*, 1 OCB 2d 10, at 22 (BCB 2008). In the instant matter, the fact that the speech may have been disparaging is not determinative of whether the activities in question were protected.

Finally, if management has knowledge of the protected union activity, a petitioner establishes the first prong of the *prima facie* case. See *Local 376, DC 37*, 73 OCB 15 at 13. Here, the City admits that Respondent was aware that Petitioners were CCA Executive Board members and that Petitioner addressed the PPCs on December 27, 2007. Therefore, we find that Petitioner has satisfied the first element of the *Bowman-Salamanca* test.

However, the Petitioners must establish that the employer took an adverse employment action against the employees in question to prove a claim of retaliation. *Local 375, CTSG,* 3 OCB2d 14, at 16 (BCB 2010); *Andreani*, 2 OCB2d 40, at 28 (2009) ("crucial determination in [NYCCBL § 12-306(a)(3)] claims [is] whether a petitioner has alleged an adverse employment action taken by an employer."); *Moriates*, 1 OCB2d 34, at 13 (BCB 2008), *aff'd, Matter of Moriates v. NYC OCB*, Ind. No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.) (failure to allege adverse action fatal to NYCCBL § 12-306(a)(3) claim). In the instant matter, the DOC did not discipline either Brown or Fergus in any way for their Union activity. Furthermore, there is no indication that DOC made any negative notations on their employment records or took any other action which could be construed as negatively affecting Petitioners as a result of their protected Union activity. This Board has repeatedly held that negative discussion in a performance evaluation of an employee's protected activity may independently constitute an improper practice. *See, e.g., CEU, Local 237*, 67 OCB 13, at 10-11 (BCB 2001); *CWA*, 39 OCB 58, at 18 (BCB 1987); *see also, DC 37*, 43 OCB 8, at 11-14

(BCB 1989). Here, we have no such action.

Although both Brown and Fergus were asked to write reports regarding the events surrounding December 27, 2007, we do not consider such to be an adverse employment action under these circumstances. The requests for the reports appeared to be an investigation into whether their presence at the Academy was properly authorized, which is a legitimate inquiry. It does not appear that the requests for reports were aimed at determining what was said during their visit to the Academy. Finally, the Union continues to address PPCs at the Academy. Therefore, the Union has not demonstrated that DOC took any adverse action against Brown or Fergus, or against the Union, stemming from Respondents actions.

NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter. . . ." In *ADWA*, 55 OCB 19 (BCB 1995), this Board adopted the test enunciated in *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967), to determine if an independent violation of § 12-306(a)(1) has been established, to wit:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

55 OCB 19, at 27 (quoting *Great Dane Trailers, Inc*., 388 U.S. at 34). *See also Feder*, 1 OCB2d 27, at 12-14 (BCB 2008) (explaining the inherently destructive standard for an independent NYCCBL § 12-306(a)(1) violation); *Local 2627, DC 37*, 71 OCB 27, at 7-8 (BCB 2003).

For the reasons we enunciated above, we find that the employer has not engaged in conduct that could be described as discriminatory. Furthermore, though Curcio's demeanor in the January 24, 2008, meeting may not have been as calm as described, his statements regarding protocol and possible disciplinary consequences do not rise to the level of interference. Contrary to the Union's contention, we do not view Curcio's statements regarding the consequences of what he believed to be violations of DOC protocol as an impermissible threat that would undermine the representational and organizational rights of the Union. An employer may give its opinion of possible adverse consequences of a Union's proposed action without committing an improper practice. *Local 2507, DC 37,* 2 OCB2d 28, at 12 (BCB 2009); *see City of Albany*, 17 PERB ¶ 3068 (1984). Absent evidence of improper motive, which we do not find in this matter, advising employees of such "ramifications" cannot be deemed to be an improper practice.

Additionally, the Union points to Panagi's testimony that he attended a brief portion of the CCA speech to the next pre-promotional class as an action that would chill future Union speech. However, we do not find that the brief appearance at one subsequent class is sufficient to cause the effect that the Union claims. Therefore, we find that Respondents' conduct was not inherently destructive of employee rights, and thus does not constitute an independent violation of NYCCBL § 12-306(a)(1). Finally, the record does not support the Union's claims that the City dominated or interfered with the administration of the Union in violation of NYCCBL § 12-306(a)(2). Accordingly, we dismiss the petitions in their entirety.

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 docketed as BCB-2694-08 be and the same hereby is, dismissed in its entirety.

ORDERED, that the improper practice petition docketed as BCB-2695-08 be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
October 26, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER