DEA, 4 OCB2d 35 (BCB 2011)

(IP) (Docket No. BCB-2904-10)

Summary of Decision: The Union filed an improper practice petition alleging that an NYPD lieutenant retaliated against Union members in violation of NYCCBL § 12-306(a)(1) and (3) by disciplining them following their refusal, on the Union's advice, to participate in a voluntary mediation program. The Union further alleged that the lieutenant's threats and attempts to coerce Union members into disregarding the Union's advice constituted interference with their § 12-305 rights, in violation of NYCCBL § 12-306(a)(1). The City moved to dismiss, claiming that the Union failed to state *prima facie* violations of the NYCCBL. The Board found that Union's allegations were sufficient to state claims under NYCCBL § 12-306(a)(1) and (3), and denied the motion to dismiss. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DETECTIVES' ENDOWMENT ASSOCIATION, INC.
of the CITY OF NEW YORK,

***Petitioner*,**

-and-

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

***Respondents*.**

INTERIM DECISION AND ORDER

On October 28, 2010, the Detectives' Endowment Association, Inc. of the City of New York ("Union" or "DEA") filed a verified improper practice petition alleging that the City of New York

and the New York City Police Department ("City" or "NYPD") violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] The Union alleges that an NYPD lieutenant attempted to coerce Union members into disregarding the Union's advice not to participate in the Civilian Complaint Review Board's ("CCRB") voluntary mediation process, and threatened to retaliate against other Union members who, on the Union's advice, refused to participate in the process. Further, the Union asserts that the same NYPD lieutenant caused Union members to be disciplined, allegedly in retaliation for their refusal to participate in the mediation process. Instead of an answer, the City filed a motion to dismiss on the ground that the Union failed to state *prima facie* violations of NYCCBL § 12-306(a)(1) and (3), claiming that the petition did not allege any protected union activity nor any "inherently destructive" conduct by the NYPD. The Board finds that the Union's allegations under NYCCBL § 12-306(a)(1) and (3) are sufficient to state a claim. Therefore, we deny the motion to dismiss.

UNION'S ALLEGATIONS OF FACT

The following statements are taken entirely from the Union's amended verified improper practice petition.

The Union is the certified and exclusive bargaining representative for the bargaining unit consisting of all detectives employed by the NYPD. It contends that, on February 24, 2010, the CCRB filed a complaint against Lieutenant Gogarty ("Gogarty") regarding an alleged January 29,

[1] The Union subsequently filed an amended verified improper practice petition on December 15, 2010.

2010 "incident" at the 46th Precinct Detective Squad to which Detectives Vivian Morales-Bell ("Bell") and Tom Larkin ("Larkin") were alleged witnesses. On June 16 and July 15, 2010, Gogarty, Bell, and Larkin testified at a CCRB hearing regarding the incident. Neither Gogarty, Bell, nor Larkin produced their memo books at the hearing.

On June 30, 2010, Bell and Larkin appeared at the CCRB with Union representatives Robert Alongi ("Alongi") and James Moschella ("Moschella"). Lieutenant Jennifer Silver ("Silver") requested that Bell and Larkin participate in the CCRB's voluntary mediation process in the Gogarty matter. Alongi told Silver that the Union had advised its members not to participate in the mediation process. Silver responded that it was up to Bell and Larkin, and not the Union, to determine whether they wanted to participate in the mediation.

Bell and Larkin both informed Silver that they would "follow their union, the DEA, and decline to participate in the mediation." (Am. Pet. ¶ 13). In response, Silver told Bell, Larkin, and the Union representatives that "the DEA was doing an injustice to its members; that it was the only union that declines to participate in the CCRB's mediation process, and that maybe the Department would start giving out Command Disciplines - Schedule "B" violations and taking five (5) paid days from 'your narcotics guys' who have no memo books." (Am. Pet. ¶ 14).

On July 28, 2010, Bell and Larkin were "urged to accept" Command Discipline - Schedule "B" violations with a loss of five paid days each, for failing to bring their memo books to the June 16 and July 15 CCRB hearings. According to the Union, Gogarty, who also failed to bring his memo book to the same hearings, was issued a warning and not a Command Discipline for the same infraction.

On August 11, 2010, Detectives Cheryl Weiss ("Weiss") and Mark Collao ("Collao")

appeared at the CCRB for a scheduled voluntary mediation. A CCRB representative asked them to participate in the mediation. Weiss and Collao both declined to participate, stating that they were following their Union's advice. Shortly thereafter, Silver appeared and asked Weiss and Collao why they would not participate in the mediation. Weiss and Collao informed Silver that "they were just following the advice of their union." (Am. Pet. ¶ 18). Silver replied that "everybody participates in the mediation, including Captains, Lieutenants, and Patrol Officers," and stated that "not participating in the mediation could hold up a promotion; that it could go on their record; and that if they participated in the mediation, any discipline would be a CCRB discipline and would not appear on their record." (Am. Pet. ¶ 19). Weiss and Collao both repeated that they would not participate in the mediation and that they were following their Union's advice.

Silver then left and another, unnamed CCRB representative appeared and attempted to convince Weiss and Collao to participate in the mediation. They again stated that they would not participate in the mediation and that they were following their Union's advice. Weiss and Collao attempted to leave the CCRB but were told that the information required to sign them out had been misplaced. They were signed out and able to leave after 20 minutes.

POSITIONS OF THE PARTIES

City's Position

The City contends that the Union's petition must be dismissed because it fails to state a claim under either NYCCBL § 12-306(a)(1) or (3).[2] Citing to the Board's analysis in *Bowman*, 39 OCB

---

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

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

51 (BCB 1987), the City asserts that the Union fails to allege that Bell or Larkin engaged in protected union activity, which is the first prong of the *Bowman* test to determine whether a public employer discriminated against an employee, in violation of NYCCBL § 12-306(a)(3).

The City argues that Bell and Larkin's refusal to participate in a CCRB mediation, on the advice of their Union, does not constitute activity protected by the NYCCBL. It contends that the Board has held that not all union activity is protected by the NYCCBL. In support, the City cites to a number of decisions in which it asserts that the Board found that the alleged activity was not protected under the NYCCBL, including: insisting upon a probationary period longer than the statutory six months; union submission of a letter to the employer to prevent members' eviction from employer-owned housing; and employee voluntary submission of a statement describing an incident with an abusive supervisor.

By refusing to participate in the mediation on the advice of their Union, the City contends, Bell and Larkin were not exercising any union or collectively-bargained right, nor does their action have even a tenuous connection to union activities. Moreover, the refusal to participate in a

---

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public organization;

NYCCBL § 12-305 provides, in pertinent 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.

mediation "purportedly on the advice of a union" does not "transform such activity to that which is protected by the NYCCBL." (Mot. p. 7). Having failed to establish a *prima facie* claim, the City concludes that the Union cannot state a cause of action for retaliation pursuant to NYCCBL § 12-306(a)(3).

The City also contends that the Union failed to allege any conduct by the NYPD which was "inherently destructive" of Union members' NYCCBL § 12-305 rights. It therefore cannot support a claim of interference under NYCCBL § 12-306(a)(1), in the absence of a showing of anti-union animus. The City asserts that "intrinsic in the analysis of an interference claim" is a finding that management's conduct is related to the employee rights found in NYCCBL § 12-305. (Mot. p. 9). In the petition, the NYPD's purported threats to Union members who refused to participate in CCRB mediations is wholly unrelated to any employee rights found in NYCCBL § 12-305. Even drawing all inferences in favor of the Union, the alleged conduct does not rise to the level of "inherently destructive" of union rights, as that term has been interpreted by the Board. Consequently, the Union's claims are not actionable under the NYCCBL § 12-306(a)(1).

Union's Position

The Union argues that the Board should deny the City's motion to dismiss because the facts alleged in its petition are sufficient to state claims against the City for violations of NYCCBL § 12-306(a)(1) and (3). It alleges that the City and the NYPD, through Silver, violated these statutory provisions by threatening to retaliate against the Union membership, including but not limited to Bell and Larkin, for following the Union's advice not to participate in the CCRB's voluntary mediation process. The City and the NYPD further violated the statute, according to the Union, when Silver caused Bell and Larkin to be disciplined for failing to bring memo books to the CCRB hearings

while Gogarty was issued a lesser discipline for the same infraction. The Union claims that the City and the NYPD also violated NYCCBL § 12-306(a)(1) when Silver attempted to coerce Weiss and Collao into not following the Union's advice with regard to participation in the mediation process. The Union disputes the City's contention that the union activity at issue is not protected under the NYCCBL.

In support of its argument that the City interfered with employee rights in violation of NYCCBL § 12-306(a)(1), the Union alleges that the City, via Silver's threats against Union members, attempted to make participation in the CCRB's "voluntary" mediation program mandatory, an action akin to unilaterally imposing a working condition without negotiation. The Union asserts that this Board has previously found that the "same type of conduct" violated NYCCBL § 12-306(a)(4), and constituted a derivative violation of NYCCBL § 12-306(a)(1).[3] The Union alleges that the City's attempt to bypass the Union and deal directly with Union members regarding participation in CCRB mediations further interfered with Union members' rights to bargain collectively through certified employee organizations of their own choosing. Silver's conduct in disparaging the Union in front of its members for advising them not to participate in mediation, bypassing the Union on the issue, and threatening Union members was also "inherently destructive" of employee rights as it served to undermine the Union's effectiveness to represent its members.

The Union contends that its petition sets forth the elements of a retaliation claim, pursuant to NYCCBL § 12-306(a)(3), by alleging that Bell and Larkin followed the Union's advice not to be intimidated into participating in the CCRB mediation and "not have such participation unilaterally

[3] We note that the Union has not alleged a violation of NYCCBL § 12-306(a)(4), and we will not infer such an allegation from the pleadings.

imposed on them." (Rep. p. 6). In so doing, they exercised their § 12-305 right to "bargain collectively through certified employee organizations of their own choosing." (*Id.*). The Union claims that Bell and Larkin's refusal to allow the City to "force them" to participate in the mediation resulted in the City taking disciplinary action against them in retaliation. (*Id.*).

DISCUSSION

The issue before the Board in determining whether to grant the City's motion to dismiss is whether the Union's allegations are sufficient to state claims of improper practice under the NYCCBL. Specifically, we will consider whether the Union's allegations–that the City and the NYPD, through Silver, threatened to retaliate against Union members for refusing, on the Union's advice, to participate in the CCRB's voluntary mediation process, and did retaliate against Bell and Larkin by taking disciplinary action against them for failing to bring their memo books while issuing a lesser discipline to another employee for the same infraction–state claims under NYCCBL § 12-306(a)(1) and (3).

On a motion to dismiss, the facts alleged by the petitioner must be deemed to be true, and the only question presented for adjudication is whether a cause of action has been stated. *PBA*, 73 OCB 13, at 10 (BCB 2004). We have long held that, when deciding a motion to dismiss a petition alleging a statutory violation, "we deem the moving party to concede the truth of the facts alleged by the petitioner. More than that, we accord the petition every favorable inference, and we construe it to allege whatever may be implied from its statements by reasonable and fair intendment." *Fabbricante*, 61 OCB 38, at 8 (BCB 1998); *see Nelson*, 47 OCB 36, at 8 (BCB 1991). At this juncture, it is not the function of this Board to resolve questions of credibility and weight, which are

properly determined after an evidentiary hearing. *See PBA*, 73 OCB 13, at 10. If a finding is made that the petition, on its face, does state a claim, then the respondent has an opportunity to submit an answer. *Id.*

We find that the Union has alleged sufficient facts to state a claim of interference under NYCCBL § 12-306(a)(1). This Board has previously held that conduct that "contained an innate element of coercion, irrespective of motive, [can] constitute conduct which, because of its potentially chilling effect . . . is inherently destructive of important rights guaranteed under the NYCCBL." *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010) (quoting *ADW*A, 55 OCB 19, at 40 (BCB 1995)). In *SSEU, L. 371*, for example, we held that a supervisor's statement during a staff meeting that nobody could threaten him with the union was an implicit threat that was inherently destructive of employee rights. *Id.* at 15-16; *see also DC 37, L. 376*, 73 OCB 6, at 11 (BCB 2004) (manager's conduct found to be inherently destructive where intention was to 'discourage and inhibit' the union members from selecting the local's vice president as their representative).

In the instant matter, the Union has alleged that the NYPD discouraged members from following the Union's advice not to participate in the CCRB's mediation process, and threatened discipline or retaliation, *i.e.*, failure to promote, to employees who stated that they would follow that advice. Construing the Union's allegations to accord them every favorable inference, we find that these allegations, if proven, could support a claim of interference. Consequently, they are sufficient to state a claim that the NYPD's actions were inherently destructive of employee rights granted under NYCCBL § 12-305.

We find that the Union has also alleged sufficient facts to state a NYCCBL § 12-306(a)(3) claim for retaliation. As the parties correctly state, in order to state a retaliation claim, the petitioner

must allege that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity, and the employee's union activity was a motivating factor in the employer's decision. *Bowman*, 39 OCB 51, at 18-19. At the outset, we emphasize that our present task is not to make a factual determination as to whether the conduct alleged by the Union is protected union activity. Rather, we are simply determining whether the petition sets forth sufficient facts which, if true, state a claim.

According the petition every favorable inference, we find that the Union has sufficiently alleged that certain of its members engaged in protected union activity by consulting with their union concerning their participation as witnesses to an incident with potential disciplinary ramifications that had been referred to the CCRB's mediation process. The members then represented to Silver that the Union had advised them not to participate in such process. Accordingly, Silver had knowledge of the union activity. The Union further contends that Bell and Larkin, two members who refused to participate in the mediation on the Union's advice, were treated differently, allegedly for failing to bring memo books to the CCRB hearing, than another detective who committed the same infraction. This alleged disparate treatment by management creates an inference of discrimination for prohibited purposes sufficient to require the City and the NYPD to respond on the merits.

In light of the above, we deny the motion to dismiss. Taken as a whole, the facts as alleged in the petition could, if proven, establish that the actions taken by the City and the NYPD violated NYCCBL § 12-306(a)(1) and (3).

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 motion to dismiss the improper practice petition, Docket No. BCB-2904-10, filed by the City of New York and the New York City Police Department, be, and the same hereby is, denied; and it is further

ORDERED, that the City of New York and the New York City Police Department serve and file their answer to the improper practice petition filed by the Detectives Endowment Association, Inc. of the City of New York within ten (10) days of receipt of this Interim Decision and Order.

Dated: June 29, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER