COBA v. City & DOC, 53 OCB 17 (BCB 1994) [Decision No. B-17-94 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

--between--

CORRECTION OFFICERS BENEVOLENT
ASSOCIATION, Petitioner, DECISION NO. B-17-94

--and--

DOCKET NO. BCB-1525-92

THE CITY OF NEW YORK and THE NEW YORK
CITY DEPARTMENT OF CORRECTION,
Respondent.
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DECISION AND ORDER

On September 15, 1992, the Correction Officers Benevolent Association ("COBA," "the Union" and "Petitioner") filed an improper practice petition pursuant to §12-306 of the New York City Collective Bargaining Law ("NYCCBL"),[1] and Title 61 of the Rules of the City of New York, §1-07(d),[2]

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[1] Section 12-306 of the NYCCBL provides, in pertinent part:

> **a. Improper public employer practices.** 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 . . . administration of any public employee organization;
>
> (3) to discriminate against any employee for the purpose of . . . discouraging membership in, or participation in the activities of, any public employee organization. . . .

[2] Section 1-07(d) of the Rules provides, in relevant part:

> **Improper practices.** A petition alleging that a public employer or its agents . . . has engaged in or is engaging in an improper practice in violation of §12-306 of the statute may be filed with the board within four (4) months

(continued...)

seeking a cease and desist order to permanently enjoin the City of New York ("the City" and "Respondent") and the Department of Correction ("the Department" and "Respondent") from interfering with and/or coercing COBA members in the exercise of rights protected under §12-305 of the NYCCBL.[3]

On September 28, 1992, the City and the Department, by their counsel, the Office of Labor Relations, filed an Answer. Pursuant to § 1-14(b)(1) of the Rules,[4] the Trial Examiner requested clarification of certain matters raised in the Petition. A response was filed in November, and, on February 15, 1994, Respondents informed the Trial Examiner that a response to the Union's clarification letter would be filed. On July 1, 1994, Respondents advised the Trial Examiner that, due to internal problems, it was uncertain whether a response would be filed; none has been filed to date. Petitioner

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[2](...continued)
thereof by . . . any public employee organization . . . together with a request to the board for a final determination of the matter and for an appropriate remedial order. . . .

[3] Section 12-305 of the NYCCBL provides, in relevant part:

> **Rights of public employees and certified employee organizations.** 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....

[4] Section 1-14 of the Rules provides, in pertinent part:

> (b) **Trial Examiners.** All trial examiners . . . are . . . hereby authorized:
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> (1) To conduct and be in full charge and control of any and all hearings and investigation;
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> (2) In connection with such hearings . . . to receive evidence, and in connection therewith, to do any and all things necessary and proper to effectuate the policies of the statute and these rules.

has filed no Reply.

BACKGROUND

Several weeks before the incidents which gave rise to the instant proceeding, the Correction Captains Association ("CCA"), which represents captains employed by the Department, introduced legislation before both the New York City Council and the New York State Legislature seeking to change certain pension benefits available to CCA members. The President of COBA appeared before both the City Council and the State Legislature to speak in opposition to the legislation, which COBA contends would require future Correction Officers to pay the increased cost of improved pensions for Captains.

In June, 1992, Marron Hopkins, Chief of the Department, received a report that CCA and COBA members were distributing literature to employees of the Department regarding the legislation at issue. Hopkins issued a teletyped order on June 11, 1992, to all commanding officers re-stating Departmental Orders No. 7580-0, dated October 20, 1988, ("departmental orders") about the distribution and posting of union literature as well as about the solicitation on departmental premises of signatures for petitions. The departmental orders provide, in pertinent part, as follows:

> Distribution or posting of literature or soliciting of petitions or any other similar activities on departmental premises is prohibited unless provided for by collective bargaining agreement and/or departmental policy and procedure. However, certified or designated employee organizations upon notification to the Department's Office of Labor Relations . . . shall be permitted to distribute official union material at the [Rikers Island] Control Building. Such distribution shall be accomplished so that minimum disruption and distraction is created in the area.
> Any requests for exceptions to this prohibition as it relates to unions and their members shall be cleared through the Office of Labor Relations whose decision will be based on applicable law, policy and procedures.
>
> At no time shall materials be distributed within the institutions except

as provided by Memorandum #002-84, dated June 8, 1984[5] or at authorized union meetings.

Article XXV of the COBA collective bargaining agreement provides that union notices must be printed on union stationery, must be used only to notify employees of matters pertaining to union affairs, and must not contain derogatory or inflammatory statements about the City, the Department or their personnel.[6] Also, Article XVII, § 1, of the COBA contract requires that time spent by Union officials and representatives in the conduct of labor relations shall be governed by the provisions of Executive Order No. 75, as amended,[7] which concerns released time policy, and that no employee shall engage otherwise in union activities during the time the employee is assigned to the employee's regular duties. Finally, Article XVIII of the COBA contract prohibits "discrimination by the City against any Correction Officer because of Union activity." The COBA contract makes no provision for solicitation of petition signatures.

Similarly, Article XXIV of the applicable CCA collective bargaining agreement[8] provides that union notices must be printed on union stationery,

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[5] "Union Election Campaigning," relating to solicitation of votes by candidates for union office.

[6] The terms of the 1984-87 COBA collective bargaining agreement, entered December 12, 1986, were extended by the 1987-90 COBA Economic Agreement and Memorandum of Understanding. Pursuant to Section 12-311d of the NYCCBL, the terms of the economic agreement were continued in effect pending negotiations for the successor agreement covering the period from July 1, 1987, to June 30, 1990, signed on January 21, 1994, and succeeded by the collective bargaining agreement covering the period from July 1, 1990, to September 30, 1991, also signed on January 21, 1994.

[7] "Time Spent on the Conduct of Labor Relations Between the City and Its Employees and on Union Activity," dated March 22, 1973.

[8] The terms of the 1987-90 CCA collective bargaining (continued...)

must be used only to notify employees of matters pertaining to union affairs, and must not contain derogatory or inflammatory statements about the City, the Department or their personnel. Also, Article XVI, § 1, of the CCA contract requires that time spent by Union officials and representatives in the conduct of labor relations shall be governed by the provisions of Executive Order No. 75, as amended,[9] which concerns released time policy, and that no employee shall engage otherwise in Union activities during the time the employee is assigned to the employee's regular duties. Finally, Article XVII of the CCA contract prohibits "discrimination by the City against any Correction Captain because of Union activity." The CCA contract makes no provision for solicitation of petition signatures.

On January 13, 1987, the Department's Director of Labor Relations, William F. Lewis, promulgated a memorandum entitled "Union Representatives Rights to Conduct Business on Department Premises." Attached to the memorandum was a form letter advising unions, in pertinent part, as follows:

> Union Representatives other than those regularly working at the work location shall have access to a particular location to exercise their right to administer the labor contract (e.g., investigate, process and assist in the early resolution of grievances, participate in Labor/ Management meetings). The following conditions shall be adhered to in granting this access:
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> 1. The Union Representative(s) must call ahead to the Facility Head to advise him/her of the nature

[8](...continued)
agreement, entered on August 30, 1991, were continued in effect pursuant to Section 12-311d of the NYCCBL, pending negotiations for the successor agreement covering the period from November 1, 1990, to January 31, 1992, entered on January 27, 1993.

[9] See Note 7, supra.

of their business and their estimated time of arrival. Upon arrival, they shall first report directly to the office of the head of the Facility or Division or his/her designee and explain the purpose of their visit.

2. The Head of the Facility or Division or his/her designee shall make available to the Union Representative a place within the work location where authorized business may be conducted with minimum disruption to the institution.

3. The Union Representative may not engage in any activity other than that which was specifically requested and authorized, and shall confine their activity to the place provided.

* * *

Concerning the ability of delegates and alternate delegates to service the union members at the work site, the following guidelines shall be maintained:

1. The Union must, in writing, file with the Department's Office of Labor Relations and with the Facility or Division Head, the names of their principal representatives and all other delegates and alternates. Any changes in such designations must be filed promptly and in the same manner.

2. The Delegate or Alternate is required to discuss first with the location Head, any problems or grievances as they may arise in a location and attempt to reach a mutual solution.

3. The Delegate or Alternate and the Head of the Facility or Division are to agree on an orderly procedure for handling grievances or related matters of mutual concern. This procedure should be calculated to minimize work disruption. . . .

POSITIONS OF THE PARTIES

Petitioner's Position

COBA alleges that, in June, 1992,[10] various Correction Captains, named

[10] COBA's letter of explanation specifies the dates as June 5, 8, 9, 10 and 11, 1992.

in COBA's unverified letter of explanation, solicited signatures of Correction Officers for a petition to support legislation advocated by the CCA. COBA also alleges that the solicitation occurred while both Correction Captains and Correction Officers were on duty and that the solicitation took place in the Control Building on Rikers Island, at the Manhattan Detention Complex, and in the housing area of the Department's James A. Thomas Center in East Elmhurst, Queens. On one occasion, COBA maintains, Assistant Deputy Warden Glen Sylvester directed COBA Vice President Howard Figueroa to leave the area while at the same time he permitted Correction Captains to solicit signatures.

COBA argues that, because of its press releases and public appearances by COBA's president, the City and the Department were aware that COBA opposed the legislation advocated by Correction Captains. COBA states that Respondents failed to stop CCA members from soliciting signatures of COBA members and that Respondents permitted a supervisor to harass COBA officials despite complaints, unspecified as to date and substance, by COBA board members. COBA contends that Respondents' knowledge of COBA's concerted activities with respect to the pension legislation was the motivating factor behind their failure to stop the solicitation and their alleged harassment of COBA officials.

Therefore, the Union concludes that, by permitting superior officers to solicit support for legislation which the City and Department allegedly knew COBA opposed, Respondents interfered with, restrained and/or knowingly acquiesced in the coercion of its members in the exercise of their rights under NYCCBL §12-305 in violation of Subsection (1) of the NYCCBL §12-306a.

In addition, the Petitioner contends that, by permitting superior officers to solicit the support of COBA members who were on duty for legislation which the City and Department allegedly knew COBA opposed, Respondents interfered with the administration of COBA in violation of Subsection (2).

Finally, COBA alleges that the Chief of Operations, whom the Petition

does not identify, and William Sipser, Assistant Commissioner of Labor Relations, failed to take action on a complaint by COBA that superior officers were permitted to solicit Correction Officers at roll call while COBA officials were denied access to their members at roll call. By so doing, Petitioner alleges that Respondents discriminated against COBA for the purpose of discouraging membership or participation in the activities of that union in violation of Subsection (3). As a remedy, COBA seeks an order directing the Respondents to cease and desist from the allegedly coercive and discriminatory practices.

Respondents' Position

Respondents state that, at dates unspecified in the Answer, the Department's Assistant Commissioner for Labor Relations, William Sipser, held conversations with CCA and COBA executive board members about each union's wish to distribute literature to Department employees. The Department states that, on one occasion, COBA was granted permission to distribute information which had been submitted for approval in accordance with Departmental policy and procedures, but that, when the Department determined that the literature which was approved was not the same as COBA representatives were actually distributing, the Department revoked permission to distribute literature. The Department describes the literature actually circulated as derogatory and inflammatory. The text of the COBA literature which allegedly was circulated states, in pertinent part:

> Your bosses (Captains, Assistant Deputy Wardens, Deputy Wardens, Wardens and Chiefs) are the same highly paid bosses who treat you unfairly, ignore parking problems, ignore bus delays and then give you late slips, harass you, won't give you a day off for an emergency, discriminate against you, are responsible for in-human treatment by HMD, put you on charges for [expletive deleted] and try to take your job, endanger your life by cutting posts, expose you to deadly diseases without proper protection . . . It is an outrage that the bosses want to fund their pension improvement on the backs of Correction Officers . . . All Officers are urged to . . . voice your opposition to the Bosses Pension Bill which RIPS-OFF CORRECTION OFFICERS.

The Department states that it engaged in no action condoning the

distribution of literature by either union. In fact, the Department states that, when both unions were engaged in the unauthorized distribution of literature about the pending pension legislation, Assistant Commissioner Sipser took steps to stop it. Respondents deny the allegation that they violated Subsections (1), (2) and (3) of NYCCBL § 12-306a. They argue that the Petition fails to identify the employer's agent responsible for the discriminatory conduct alleged and fails to establish knowledge on the part of the public employer concerning union activity which COBA argues motivated the allegedly discriminatory action. Respondents contend that COBA's allegations are speculative and conclusory. As to the specific allegation that CCA members were not stopped by agents of the Department from soliciting COBA signatures, Respondents deny knowledge and information sufficient to form a belief.

Respondents argue that the determination of who can distribute material and make solicitations on Respondents' premises is reserved to management by NYCCBL §12-307b.[11] They further argue that COBA has demonstrated no right under NYCCBL to solicit and distribute information on departmental premises. Respondents argue that, if it is found that the Department did approve CCA's solicitation and distribution of literature, they are not required to provide COBA and CCA with equal access to COBA members on the Department's premises, because CCA does not rival COBA for representation of COBA's constituency.

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[11] Section 12-307 of the NYCCBL provides, in pertinent part:

> **b. [M]anagement rights.** It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies . . . direct its employees; take disciplinary action . . . ; maintain the efficiency of governmental operations; determine the methods, mean and personnel by which government operations are to be conducted . . . ; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization. . . .

Respondents contend that the right to distribute literature on issues unrelated to attempts to organize and represent employees extends only to that which the employer permits because of what Respondents argue is the employer's right to control the subject and type of literature which may be distributed on its premises. Respondents contend that COBA has failed to show that access to its members has been denied unreasonably or arbitrarily.

Finally, Respondents contend that COBA has failed to allege facts which, if proven, would demonstrate that Respondents have dominated or interfered with the administration of COBA or affected the representation of present and future members of the bargaining unit. To support this contention, Respondents state that COBA has failed to demonstrate anti-union animus on the part of Respondents. Further, Respondents maintain that neither disciplinary action alone nor restricting the distribution of literature on the employer's premises is sufficient to constitute interference with an employee's rights under the NYCCBL. Respondents seek dismissal of COBA's petition.

DISCUSSION

The action of which COBA complains is the alleged failure by the Department to stop the CCA petition solicitation while at the same time denying the COBA distribution of literature. As a prerequisite for finding a violation of the NYCCBL, we must find that the union activity which is the target of the allegedly improper practice enjoys statutory protection.[12]

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[12] Decision No. B-2-93, B-16-92 and B-4-92.
Cf. Salem Leasing Corp., 774 F.2d 85, 89 n. 9, 120 LRRM 2691, 2694 n. 8 (4th Cir., 1985); an employee of a non-union shop, who had successfully passed his probationary period and performed his duties satisfactorily, was discharged shortly after he made reference, in a casual, off-duty conversation in the presence of a supervisor, to union benefits he obtained through a prior job. The Fourth Circuit affirmed the National Labor Relations Board, which held that the fact that the employee was not engaged in concerted activity did not prevent a finding of

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Without attempting to define or enumerate activities which the Board would deem to fall within the protection of NYCCBL §12-305, we have stated that such an activity must, at least, be indirectly related to the employment relationship between the City and bargaining unit employees.[13] We have also stated that such an activity must, at a minimum, be in furtherance of the collective welfare of employees, as distinguished from the welfare of an individual.[14] This two-pronged test has been applied in the context of

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[12](...continued)
discriminatory treatment based on anti-union animus, under the National Labor Relations Act (as amended), 29 U.S.C. § 158(a)(1) and (3)(1976) ("NLRA").

Were we to analogize the Salem rule about "concerted" activity to activity which is not protected under the NYCCBL, then a finding that the literature distribution in the instant proceeding is not protected would not preclude a finding of improper practice under our Collective Bargaining Law, assuming the facts as alleged were proven, but for our own precedent recently set out in B-2-93, requiring a finding that a violation of our statute must be grounded on protectable activity.

[13] B-48-88 at 13 (Petitioners alleged failure to be promoted because of involvement in litigation initiated by union compelling civil service examinations and establishment of hiring list), quoting Board of Education of Deer Park Union Free School District, 10 PERB 4594, at 4689 (1977), aff'd, 11 PERB 3043 (1978) ("Although the concept of protected activity should not be limited to activities immediately and directly related to the employment relationship, it must, at least, be indirectly related to that relationship"; student achievement cards prepared by teachers and mailed at union expense to parents, in part, to promote public image of union are not protected).

[14] Id., and Decision No. B-2-87 at 11-12 (What is protected activity within the meaning of the NYCCBL is considered by the Board in this case of first impression insofar as § 12-305 protects the right of public employees to form, join or assist a public employee organization that has not been
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participation in litigation,[15] the filing of a grievance,[16] and the filing of a written statement in support of a grievance.[17] It does not apply in the context of union representation during an investigatory interview which may

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[14](...continued)
certified as a collective bargaining representative of public employees; petitioner-member of an established employee organization was found to be proceeding on the basis of grievances of a personal, rather than collective, nature, there being no allegation on the record that the established union of which he was a member either authorized him to act or was even aware of his actions).

See, also, B-71-90 (Petitioner probation officer, alleging retaliation for his instigation of litigation "in conjunction with the Union's consent and support" challenging employer's denial of a promotional opportunity, proceeded "personally and individually," thus failing to satisfy the second prong of the two-pronged test enunciated in B-48-88 for determining whether participation in litigation qualifies as activity protected within the meaning of the NYCCBL), and City of Saratoga Springs, 18 PERB 3009 (1985) (acting fire lieutenant who was also a union officer and negotiator, closed down a fire station in response to a reduction in minimum staffing standard and contacted news media to explain that he had taken the action in his capacity as acting lieutenant and not as spokesman for the union; initiation of disciplinary proceedings, motivated by unprotected activities, was not violative of the Taylor Law).

Cf. Rosen v. PERB, 72 N.Y.2d 42, 530 N.Y.S.2d 534 (1988) (Section 202 of the Taylor Law, the state analogue to § 12-305 of the NYCCBL, does not afford protection to concerted activities of employees which fall short of attempts to form, join or participate in, or refrain from forming, joining or participating in an employee organization).

[15] Decision No. B-48-88 and B-71-90.

[16] Decision No. B-36-91.

[17] Id.

lead to discipline.[18] Private sector case law is replete with holdings that solicitation and distribution of union literature is protected activity. However, these cases largely arise in the context of organizational activities. The Petitioner herein has not cited to us cases which would support an argument that distribution of literature and solicitation of petition signatures carried out in contravention of mutually negotiated restrictions is protected within the meaning of the applicable statute; nor has our own research indicated any such cases within our jurisdiction or that of either the Public Employment Relations Board ("PERB") or the National Labor Relations Board in a non-organizational context. Our research suggests the opposite.

In Decision No. B-48-86,[19] we held that the destruction by the Department of Correction of the literature at issue there was a management prerogative, because COBA did not deny there that the material in question had no marks to identify it as union literature, nor that the material contained inflammatory statements concerning the Department, nor that union had not requested permission to distribute the material.[20]

There is support for this in case law under PERB's jurisdiction. PERB has held that disruptive speech is not protected activity under the Taylor Law when a public employee, who was also a union representative, engaged in a personal attack on the employer's agents, concerning progress in on-going contract negotiations, during an employer-sponsored conference in violation of

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[18] Decision Nos. B-43-91 and B-17-91.

[19] Seelig v. Department of Correction.

[20] We also held in that decision that restricting access to departmental premises was within management prerogative as the restriction did not prevent COBA from reasonably representing its constituents and employer's refusal of access was not improper, since the necessity for such access was not established.

previously set ground rules.[21] PERB has also held that, although editing a union newsletter comes "within the ambit of protected activity since this activity is embraced within the right to 'form, join and participate in any employee organization of [his] own choosing[,]'"[22] where such an employee is a "vociferous and outspoken opponent of the [employer's] program and has made public attacks on the Director's competency[,]" "the fact that [the employee] expressed his attitude in a protected medium does not preclude the [employer], for purposes of the Act, from considering these comments when making staffing deployment changes."[23]

Further, PERB has held that the right of an employee to participate in the activities of the employee organization of his choosing . . . is not unlimited . . ." as where an employee threatened one supervisor, used foul language against another supervisor, and created a disturbance on still another occasion.[24]

As to whether the literature in the instant case was inflammatory or derogatory and thus not protected by our Law, we refer to the rules of pleading in proceedings before this Board. Section 1-07(i) of the Rules

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[21] Deitz et al. v. State of New York; New York State Public Employees Federation v. State of New York, 25 PERB 4528 (1992).

[22] State of New York, 10 PERB 3108 (1977); Village of Depew, 24 PERB 4560 (1991). Cf. Plainedge Public Schools, 13 PERB 3037 (1980), wherein the Board held: "An employee engaged in a protected activity does not lose that protection merely because he makes inaccurate statements that disturb the employer. The employee retains his protection unless his statements are shown to indicate an 'intent to falsify or maliciously injure the respondent.'" See, also, Binghamton City School Dist. 22 PERB 3034 (1989).

[23] Amityville Teachers' Association v. Amityville Union Free School District, 25 PERB 4562 (1992).

[24] State of New York v. Ronn A. Ben Aaman, 11 PERB 3084 (1978).

provides that a petitioner may serve and file a reply to the respondent's answer which "shall contain admissions and denials of any additional facts or new matter alleged in the answer." This section of the Rules also provides that "[a]dditional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply."

COBA did not file a reply, despite the Trial Examiner's requests over a three-month period for clarification of questions raised by the Petition. The application of Section 1-07(i) requires us to accept as true Respondents' uncontested assertion (i) that the distribution of the literature in question was derogatory, inflammatory and not approved prior to distribution and (ii) that it was distributed at facilities other than the Control Building, thus not conducted in a manner consonant with the applicable contract and departmental orders, and thus not protected activity.[25]

Our inquiry would normally end with that finding; for, as a matter of law, the absence of evidence of protected activity by the Petitioner removes its claim from the protection of the improper practice provisions of the NYCCBL.[26] However, we inquire further because of the allegation that Respondents herein may have granted a benefit to one union to the detriment of the Petitioner by permitting the one to engage in one form of unprotected activity while not permitting the other union to engage in another form of unprotected activity.

We have addressed the subject of conferral of a benefit in two contexts: (i) the granting of vacation leave and overtime pay to union dissidents[27] and

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[25] We need not reach the questions of whether the employer's restriction on access prevented COBA from reasonably representing constituents, or whether the Respondents established a need to refuse access.

[26] Decision No. B-16-92.

[27] Decision No. B-7-86 (COBA v. Department of Correction & (continued...)

(ii) the conferral of privileges for union delegates, in which only one union was involved.[28] A review of our case law indicates that the instant allegation, i.e., that the public employer conferred a benefit on one union to the detriment of another, has not been presented heretofore for determination.

The law with respect to conferral of a benefit is derived from the application of various sections of the NYCCBL. Section 12-306**a(1)** prohibits a

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[27](...continued)
City of New York; where petitioner contended that the City granted vacation leave and tour changes to correction officers in order for them to attend an anti-COBA rally, resulting in the granting of overtime in violation of departmental procedures and in violation of Section 306a, the Board granted the respondents' motion to dismiss the improper practice petition, reasoning (a) that the allegations did not suffice to show that it was the policy or purpose of the City to assist COBA dissidents or that the City was motivated by anti-COBA animus and (b) that no facts were alleged to indicate that the respondents were aware of the alleged anti-COBA sentiments of the officers requesting leave or the purpose for which they requested it. Moreover, the Board found that no facts were alleged indicating that the leave requests of the COBA dissidents were treated differently from those of COBA supporters).

[28] Decision No. B-21-79 (Patrolmen's Benevolent Association v. McGuire; PBA unsuccessfully sought privileges for union delegates which would preclude their transfer from the situs of their respective territories and commands, arguing that a transfer in the absence of a dire emergency enables the employer to "punish" an "active" union delegate under the guise of ministerial prerogative. The Board held that such privileges, if granted, might be viewed by many Police Officers as an encouragement of active participation in internal union activities. In the absence of a negotiated contractual provision setting forth the rights and obligations of the parties with respect to such a privilege, the Board reasoned, the granting of such a privilege by the public employer would amount to an impermissible encouragement of union activity and thus would violate the Subsections "a" and "b" of the NYCCBL.)

public employer from interfering with, restraining or coercing public employees in the exercise of their rights under NYCCBL § 12-305. Subsection 12-306**a(3)** prohibits discrimination against any employee for the purpose of discouraging membership in, or participation in the activities of, any public employee organization.[29] Similar prohibitions are imposed by Section 12-306**b(1)** upon a public employee organization.[30]

In B-21-79, we found no violation of the NYCCBL when the public employer refused to refrain from exercising its managerial prerogative -- which was not limited by the applicable collective bargaining agreement -- to re-assign union delegates temporarily. We stated that the restriction on the employer's prerogative which the union sought to obtain by way of its improper practice petition could be interpreted as an encouragement of active participation in internal union activities and, as such, an impermissible conferral of a benefit to the employee organization. We stated that Subsections "a" and "b" of § 12-306, when read together, prohibit actions by either labor or management which discriminate in such a way as to encourage participation in the affairs of a public employee organization, including the granting of benefits to employees in return for their protected activities on behalf of the union.

The New York City Collective Bargaining Law is intended to prevent interference with or discrimination against the exercise of rights under the

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[29] See Note 1, supra.

[30] Section 12-306 of the NYCCBL provides, in pertinent part:

> **b. Improper public employee organization practices.** It shall be an improper practice for a public employee organization 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, or to cause, or attempt to cause, a public employer to do so. . . .

Law, but the allegation here -- that a benefit was granted to one union with the intent to interfere with or discriminate against the exercise of Petitioner's rights under the NYCCBL -- must be dismissed for lack of evidence supporting the claim. Therefore, we dismiss the instant Petition without prejudice to any rights which the Petitioner may possess in any other forum.

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-1525-92 be, and the same hereby is, dismissed.

DATED: New York, New York
September 27, 1994

MALCOLM D. MacDONALD
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