Archibald, et. al v. Jacobson, City, COBA, et. al, 57 OCB 38 (BCB 1996) [Decision No. B-38-96 (IP)]

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

- between -

EMANUAL ARCHIBALD and the CORRECTION OFFICERS DEMOCRATIC ALLIANCE,
Petitioners,

DECISION NO. B-38-96

DOCKET NO. BCB-1757-95

- and -

MICHAEL JACOBSON, COMMISSIONER OF CORRECTION, CITY OF NEW YORK, AND CORRECTION OFFICERS BENEVOLENT ASSOCIATION,
Respondents.
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DECISION AND ORDER

On June 8, 1995, Emanuel Archibald and the Correction Officers Democratic Alliance ("Petitioners" or "CODA") filed a verified improper practice petition and a verified petition for injunctive relief against Michael Jacobson, Commissioner of Correction, the City of New York ("Department" or "City") and the Correction Officers Benevolent Association ("COBA").

Petitioners allege that the Department interfered with their right to participate in union activities in violation of Civil Service Law ("CSL") § 202 and, therefore, that its actions constitute improper practices under CSL §§ 209-a.1(a) and (c) and § 12-306(a) of the New York City Collective Bargaining Law ("NYCCBL"). They also allege that actions of the Department and the City abridged their rights under the United States

Constitution but, in a letter subsequent to the filing of the Petition, they withdrew the constitutional claim from consideration in this forum.

Petitioners allege that COBA committed improper public employee practices by illegally interrupting their campaign for internal union office and by breaching its duty of fair representation toward them in violation of CSL §§ 203, 209-a.2(a), and 209-a.2(c), and of NYCCBL § 12-306(b).

On June 12, 1995, the City and COBA filed verified answers to the request for injunctive relief. On June 15, 1995, the Board of Collective Bargaining ("Board") dismissed Petitioners' request for injunctive relief.[1] In response to the Trial Examiner's inquiry as to whether Petitioners would be submitting replies with respect to the underlying improper practice petition, Counsel for Petitioners stated, in letters dated October 12 and October 16, 1995, that "CODA elects not to submit a reply to the Union's answer." These letters did not address the Department's Answer. Under cover of a second letter dated October 16, 1995, Counsel for Petitioners submitted a request that the Trial Examiner "note and consider" allegedly contradictory "material allegations in the Department's Verified Answer to [the] Petition for Injunctive Relief" with respect to three points of contention. These notations are not contained in

[1] Decision No. B-12-95(INJ).

proper form for a reply and are not verified. However, their substance has been reviewed and found not to be facially contradictory of the Department's Answer.

Background

To maintain security and order in its secured facilities on Rikers Island, the Department of Correction has established a written Code of Conduct limiting access and activity of Correction Officers on Rikers Island and addressing the use of disparaging language.[2] However, by written memorandum and operating procedures, the Department has provided for relaxation

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[2] The Code of Conduct limits employee movement to his/her tour of duty within one of the seven jails. Employees may not travel outside to jails not on their tour of duty, or travel to the Control building, without authorization. Section 3.15.210 of the Code of Conduct provides:

> Members of the Department visiting any institution shall report first to the head of the institution or commanding officer and advise him of the nature and purpose of the visit and sign and note time of arrival and departure on appropriate record. (Chap. 3, p. 47.)

The Code of Conduct also contains broad prohibitions against the use of indecent, abusive, or profane language (§ 3.15.010); and, inter alia, violation of departmental rules and regulations and conduct unbecoming an officer (§ 3.15.030). In addition, the Code of Conduct states:

> A member of the Department, either individually, collectively or through an organization, shall not issue any verbal or written statement embodying misleading, false, erroneous or defamatory information, either expressedly or impliedly, concerning the Department or any member thereof (§ 8.05.030).

of its regulations for a limited time during the period immediately before a union election. During this time, candidates are permitted greater latitude to move about the Island, to visit facilities, and to distribute materials. By Teletype Order of May 17, 1995, the Department directed that electioneering or campaign activity by nominated candidates for COBA office would be permitted on Department property, in accordance with specified procedures, commencing on May 22, 1995, approximately one month before the election scheduled for June 20.

Petitioners are Correction Officers and members of one of five slates of candidates competing for COBA internal elections in May and June, 1995. Petitioner Emanuel Archibald ("Archibald") was a candidate for the presidency as well as leader of the slate of candidates who identified themselves collectively as "Correction Officers for a Democratic Alliance" ("CODA").

On the evening of May 11, 1995, Petitioner Archibald visited the Control Building at Rikers Island while off-duty and in civilian clothes. He carried with him two-sided flyers promoting the CODA slate of officers. It is disputed whether Archibald himself distributed the flyers, as the Department alleges, or only carried them for delivery to another CODA member for distribution at another time, as Petitioners contend. In any

event, Archibald was confronted by a captain, who took the flyers from his possession.

On May 16, 1996, Petitioners were nominated during a union membership meeting, and their names were placed on the official COBA ballot. Ballots for the election were sent to the COBA members shortly thereafter. From May 22 until June 17, 1995, candidates were permitted to campaign, per pre-established Department rules governing the conduct of union elections. Members voted, and ballots were counted on June 20, 1995.

In the instant proceeding, Petitioners assert that "current COBA leadership and other opposition slates distributed campaign flyers for months without said authorization, but no charges have yet been filed." The Department generally denies the allegations.

As to the material which was confiscated from Archibald, one side of the flyer identifies the members of the CODA slate. It also carries a picture of Archibald and the slogan which reads, in its entirety, **"Vote for Emanuel Archibald and the Entire Slate [names of members of the slate, omitted here]** . . . THE BOLD IS BACK! The only slate without ties to management!" (Emphasis in original.) The other side of the flyer states, on letterhead of "Correction Officers Democratic Alliance/City of New York," the following: " Why has 'Law and Order' Mayor Giuliani declared war on New York City Correction Officers? Because . . . . . NIGGERS

DON'T VOTE! Don't be a Nigger (a low class ignorant person of any race, creed, or color). Exercise your Right! VOTE VOTE VOTE. Your job depends on it!" (Emphasis in original.) Petitioners do not dispute the Department's assertion that this language is prohibited by the Department's Code of Conduct.

Petitioner Archibald was ordered to appear before the Department's Deputy Commissioner of Investigations the day after the literature was confiscated, i.e., on May 12, 1995. Donald Winkfield, a CODA candidate for the position of First Vice President and the person who, it is not denied, printed the campaign flyers, was also called in for questioning on May 12. It is disputed as to whether Petitioners requested the presence of a COBA delegate at the interview. No COBA delegate was present, but there is no question but that Petitioners were represented by a private attorney of their choosing.

At the interview, both Archibald and Winkfield refused to answer questions regarding the campaign flyer. Archibald was immediately suspended without pay for ten days, and his badge and revolver were confiscated. Winkfield was released without charges, but Archibald was served with Charges and Specifications relating to his possession and alleged distribution of the flyers ("conduct unbecoming an officer in that [Archibald] was in possession and/or handed out derogatory material on Department property").

Petitioner's suspension ended on May 22, 1995, at which time COBA campaign activity on Department property was permitted pursuant to Department rules. On that day, Archibald submitted a proposed, five-day, campaign schedule. It was substantially approved by the Department on May 23, 1995.

On May 25, 1995, Archibald, who had been assigned to work a non-rotating tour of duty (a non-contractual privilege granted to long-term employees), was reassigned to a rotating schedule of tours, known informally as "the wheel," admittedly to punish him for a letter he had written to the Mayor a month earlier, specifically, on April 15, 1995. The letter was written on behalf of a fellow Correction Officer, Anthony Rivera, who was also a member of the CODA slate. In the letter, Archibald accused the Mayor of targeting the Department for privatization and threatening legal action if a supervisor failed to apologize to Rivera who purportedly registered a safety complaint.

The Department admits that Archibald was reassigned because of the letter which he wrote to the Mayor. In a memo dated May 11, 1995, from a supervisor to the warden, the supervisor wrote that he had reviewed Archibald's letter to the Mayor and that he believed it violated nine rules and regulations. He then wrote, "This inappropriate behavior will not be tolerated and I am directing you to initiate formal disciplinary charges against Officer Archibald. . ." The supervisor then ordered that

Archibald be immediately scheduled into "the wheel" rotation.

Archibald alleges that he spoke to an unnamed COBA delegate about his reassignment to "the wheel" and was given a grievance form to complete. It is disputed whether he asked the delegate to complete the form for him. Archibald did not submit the grievance form.

On May 26, 1995, while candidates of the CODA slate were campaigning at the Control Building in accordance with the approved schedule, representatives of the incumbent slate appeared and announced the terms of a new collective bargaining agreement which had recently been reached. The next day, Archibald submitted a campaign schedule for the remaining campaigning period. The schedule was substantially approved by departmental on May 30, 1995.

Petitioners filed the instant improper practice petition and, simultaneously, a petition for injunctive relief against the Department and COBA on June 8, 1995. On June 15, 1995, the Board denied the request for injunctive relief.

Positions of the Parties

CODA's Position

Petitioners allege that the actions of the Department and of COBA's incumbent officers, before and during the union's internal elections in May and June, 1995, violated NYCCBL § 12-306.

Specifically, they allege that the Department violated § 12-306 when it suspended Archibald for possessing campaign flyers on May 11, 1995. Petitioners contend that the suspension "exemplifies the discriminatory practice of the Department in that current COBA leadership and other opposition slates have distributed campaign flyers for months without said authorization, but no charges have yet been filed." Petitioners also claim that the suspension hindered Archibald's ability to campaign and to obtain nomination at COBA's May 16, 1995, nomination meeting.

Petitioners also claim that the Department violated NYCCBL § 12-306 for changing Petitioner Archibald's work assignment from a steady tour to "the wheel" on May 25, 1995. They allege that the work assignment was to punish Archibald for a letter he wrote to the Mayor regarding what he considered to be mistreatment of fellow CODA slate candidate, Correction Officer Anthony Rivera. Petitioners argue that the assignment of Archibald to a rotating work schedule was intended to, and did, disrupt Petitioners' campaign schedule.

Finally, Petitioners allege that COBA violated NYCCBL § 12-306 by failing to represent Archibald regarding his suspension and reassignment to "the wheel" and by "intentionally interfer[ing]" with their campaign activity by announcing the settlement of contract negotiations while Petitioners were campaigning on May 26, 1995.

As a remedy, Petitioners ask the Board to "make an order directing Respondent Department to:

(1) dismiss the Charges and Specifications against petitioner Archibald, and to cease from instituting like charges against any other members of the CODA slate and to publish the dismissal of same to "all members of the Department," or, in the alternative,

(2) stay all proceedings against the petitioners herein until a final determination is made by a Federal Judge regarding whether respondent Department has any compelling government interest which would permit it to abridge petitioner's 1st Amendment Constitutional Rights,

(3) withdraw any suspension order against petitioner Archibald and grant petitioner back pay for all income lost due to said suspension,

(4) cease and desist from interfering with petitioners' campaign activities or taking any other actions which infringe upon the exercise of petitioners' Constitutional rights as they seek elective Union office,

(5) Restore petitioner Archibald to his steady tour of duty and remove petitioner from "the wheel,"

(6) Publish a retraction to "all members of the Department" of the Department's allegations against petitioner Archibald, including a statement asserting petitioners likely success on the merits in an action to be filed against the Department in Federal Court,

AND respondent COBA to:

(7) Reschedule the holding of the June 20th, 1995, election and deem all ballots case void until a final determination is made on charges to permit petitioners a fair opportunity to campaign without interference, and regain their prior position,

(8) Give over to an appointee of the Board full management of the election when it occurs including

(a) a list of all eligible voters with addresses
(b) the appointment of independent tellers to tabulate the ballots in place and stead of the Honest Ballot

Association, and voiding any agreement with same,

(9) Remail ballots to each and every eligible voter with a notice containing the new election date, and a notice advising voters that the date was changed because of the improper labor practices committed against petitioner Archibald and CODA by respondents Department and CODA,

(10) Immediately provide petitioner with a COBA delegate and union sponsored representation,

(11) To file a grievance on petitioners' behalf and to represent petitioners without divided loyalties or a conflicts (sic) of interest,

(12) To pay over to petitioners the an (sic) amount sufficient to cover the cost of petitioners' retaining independent counsel to protect their rights against any potential conflicts of interest of respondent COBA, and to cover the cost of attorney's fees and expenses incurred thus far,

AND Both respondents to:

(13) Cease and desist in any activity which interferes with petitioners' campaigning activities and their exercise of the 1st Amendment Constitutional Rights.

Department's Position

On the issue of the campaign flyer, the Department maintains that its rules regarding union electioneering were "enforced evenhandedly." First, the Department refers to its rules prohibiting inflammatory and disruptive material and states that it was determined that "Archibald's flyer clearly represents vulgar and inappropriate material." The Department describes the flyer as "carr[ying] an attendant danger" that inmates could see the words "NIGGERS DON'T VOTE" in large-type and "potentially misconstrue it."

As to Petitioners' statement that flyers of other slates were not confiscated when they allegedly were distributed for months before the official election period without Department authorization, the Department generally denies the allegation and states that it has acted to discipline candidates from slates other than CODA when they violated Department electioneering rules. The Department cites its suspension of Officer Carlos Laboy, a candidate on a non-incumbent slate, who attempted to campaign at an unauthorized time and was denied. The Department also cites its reprimand of another, non-incumbent candidate, Officer Saglum Beni, who was seen distributing campaign materials before the official campaign period. He was told to leave the premises and left without charges being filed.

As for Petitioner Archibald's return to "the wheel," the Department states that Archibald's assignment was "not predicated upon his suspension [for alleged violation of Department rules about literature distribution] or on his union electioneering activities." The Department admits that Archibald was reassigned because of the letter which Archibald wrote to the Mayor, which letter the Department characterizes as "intemperate and threatening."

As its first affirmative defense, the Department contends that any claim of discrimination for union activity as to Archibald's suspension and reassignment to "the wheel" must fail, because

Petitioners fail to satisfy the Salamanca test.[3] The Department claims that, at all times, it followed its rules without discriminating against Petitioners. Moreover, the Department argues that it had legitimate business reasons for its actions.

As its second affirmative defense, the Department argues that, with regard to Archibald's reassignment to "the wheel," Petitioners have failed to state a claim under NYCCBL § 12-306. Archibald's letter to the Mayor, for which it admits it suspended Archibald, was not "protected" as § 12-306 contemplates, in the Department's view. Moreover, it argues that the official responsible for returning Archibald to "the wheel" had no knowledge of Archibald's union activity.

As its third affirmative defense, the Department maintains that Petitioners have failed to state a claim that it interfered with CODA's campaign activities. It denies that it administered its campaign rules so as to hinder CODA's campaign. On the contrary, it contends that the flyer in question was not official Union material but was inflammatory in nature, was distributed before the official campaign period began and without prior authorization, and was restrictable under Department rules.

As its fourth affirmative defense, the Department argues that, even if Petitioners could establish a prima facie case of

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[3] City of Salamanca, 18 PERB ¶ 3012 (1985), adopted by this Board in Decision No. B-51-87.

discrimination under Salamanca, the Department had a legitimate business justification for its actions, i.e., the need to maintain order and security at Rikers Island. Further, it argues that discipline and work assignment are subjects exclusively reserved to management under NYCCBL § 12-307b and that the Department has a unilateral right to determine such matters unless its right has been limited by the parties in their collective bargaining agreement. It contends that no such limitation is present here.

Finally, as its fifth affirmative defense, the Department argues that Petitioners' claims are "speculative, hypothetical, conclusory." Respondent claims Petitioners suffered no detriment to their campaign as a result of the Department's actions, and that, if anything, Archibald's popularity was likely increased by "'confronting' management."

Union's Position

As to Petitioners' claim that COBA failed to provide Petitioners Archibald and Winkfield with representation for the May 12, 1995, disciplinary meeting about the campaign flyers, the Union maintains that Petitioners have failed to provide evidentiary support for their contention. The Union notes that legal counsel or an executive board member, not a COBA delegate, normally represents COBA members at meetings with the Inspector

General. The Union claims neither Petitioners nor Petitioners' counsel requested assistance from COBA's counsel or from an executive board member. The Union further argues that Petitioners failed to specify dates, times, names, and places to support their allegations.

Regarding the matter concerning Officer Rivera, which Petitioner Archibald asserts he was championing, the Union denies any knowledge as to whether Rivera requested the Union's assistance, and the Union maintains that Petitioners have failed to offer specifics on this point.

As to the Petitioners' contention that COBA President Stan Israel refused to file a grievance on behalf of Petitioner Archibald because of a "conflict of interest," the Union claims Archibald made no mention of a grievance at a meeting between the two men on May 25, 1995. Instead, the Union maintains that Archibald told Israel that Archibald wished to bring a lawsuit against the Department. The Union alleges that Israel's response was that such litigation was not covered by the Union's legal services plan as it dealt with an electioneering issue. The Union alleges that Israel referred Archibald to the Union's outside counsel. The Union claims Archibald then "dropped the subject."

As to Petitioners' claim that a COBA delegate refused to help Archibald complete a grievance form, the Union disputes the

identity of the particular delegate but does not deny that a delegate from whom Archibald may have sought assistance may have refused it because the COBA grievance form assertedly is simple to complete. Further, the Union maintains that it advises members to call the COBA office for help in filling out the form but does not go so far as to refer members to a COBA delegate. As to Petitioners' claim that COBA's announcement on May 26, 1995, of the collective bargaining agreement was violative under the NYCCBL, the Union asserts that it has a duty to "advise its members expeditiously of any contract settlement and its terms." The Union claims it did not choose to make the announcement on May 26 with the purpose of interfering with CODA's campaigning. The Union asserts that it would have been impossible to make the announcement at such a time that no slate was campaigning and that it made the announcement immediately after it obtained the information. Moreover, the Union claims that, had it delayed the announcement, it would have violated what it said was its duty to advise the membership expeditiously of the terms of the contract settlement.

Discussion

The allegations in the Petition raise the issue of whether the Department violated NYCCBL § 12-306 when it (i) reassigned Petitioner Archibald to a rotating work shift as a result of his

writing a complaint letter to the Mayor and (ii) suspended him for being in possession of the campaign flyers at issue herein.

The Petition also raises the question of whether the Union breached its duty of fair representation (i) when it failed to provide representation at the investigatory meeting to which Petitioners Archibald and Winkfield were summoned, (ii) when it declined to pursue grievances on behalf of Petitioners Archibald and Rivera, and (iii) when the incumbent candidates for Union office announced the terms of a new collective bargaining agreement during the Union election campaign.

While Petitioners do not cite specific subsections of NYCCBL § 12-306 which they claim have been violated by the Department, the complaints facially address rights protected under Subsections (1) and (3) of NYCCBL § 12-306a and § 12-306b. Our analysis focuses first on alleged violations of the Petitioners' rights under Subsections (1) and (3), then their fair representation claims.

§ 12-306a(1) Claims

We have held that Subsection (1) provides a broad prohibition against employer interference in the rights granted under § 12-305.[4] It may be found derivatively when an employer commits any of the other improper practices found in Subsection (3) of § 12-

[4] Decision No. B-47-89.

306a.[5] An analysis of that claim is therefore warranted first.

§ 12-306a(3) Claims

A prerequisite to any determination of improper practice under § 12-306a(3) is a finding that the purported union activity at issue is of a type protected by the NYCCBL, i.e., it must be related to the employment relationship, and it must be engaged in on behalf of an employee organization and must not be strictly personal.[6] If a petitioner can demonstrate that he was engaged in protected activity, then his claim must satisfy the test which we have adopted to resolve claimed violations of NYCCBL § 12-306a(3).[7] In cases involving allegations that a respondent has violated NYCCBL § 12-306a by acting with improper motivation, we adopted the test of causation and allocation of the burden of proof set forth by in City of Salamanca.[8] In such cases, we require the petitioner to show (i) that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity, and (ii) that the employee's

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[5] Id.

[6] See Kane v. HPD, CSBA, and SSEU, Decision No. B-59-88, aff'd sub nom. Kane v. Malcolm MacDonald et al., N.Y. Co. Supreme Court 6/27/89; aff'd 555 N.Y.S.2d 81 (1st Dep't 1990); see, also, Decision Nos. B-17-94, B-71-90, and B-48-88.

[7] Decision No. B-51-87.

[8] 18 PERB ¶ 3012 (1985).

union activity was a motivating factor in the employer's decision. If this is established, the burden shifts to the employer either to attempt to rebut the petitioner's showing or to show that the same action would have taken place even in the absence of the protected conduct.

As to the claim in the instant proceeding that the Department retaliated against Petitioner Archibald for his letter of April 15, 1995, to the Mayor on behalf of Anthony Rivera, a fellow unit member and campaign sympathizer, we find no merit in the claim that the Department discriminated within the meaning of § 12-306(a)(3) by reassigning Petitioner Archibald to "the wheel." The letter which Petitioner Archibald wrote on behalf of Rivera is analagous to a letter which we found not to constitute evidence of protected activity in a similar case.[9] There, this Board denied a claim of improper practice based upon a letter from a shop steward to a public employer concerning abusive treatment by a supervisor toward a co-worker. The letter was determined not to have constituted union-sponsored or union-related activity, based upon the witness' testimony that it was only a memo that would become a grievance "when the union backs it up"; however, no further grievance was ever filed.

Here, Petitioner Archibald characterized his letter as "official notification" that he would take legal action on behalf

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

of a fellow unit member. However, the letter was not prepared on union stationery, nor was it marked as a grievance to be pursued through subsequent steps of the grievance procedure. In these circumstances, the submission of the letter fails to qualify as protected activity. Our inquiry must end there; for, as a matter of law, the absence of evidence, in this context, of protected activity removes a claim from the jurisdiction of the NYCCBL.[10] Even if we were to assume that Archibald's reassignment was in direct retaliation for his having written a letter to the Mayor on behalf of another unit member and campaign sympathizer, the retaliation for activity which was not protected under the NYCCBL would not be actionable under that statute.

As to the flyers which Archibald indisputably brought onto the Department's premises, the Department argues that Petitioner Archibald was not engaged in protected activity on May 11, because the flyers assertedly were not official union material, were not distributed during the appropriate campaign period (during which time the Department relaxed restrictions on literature distribution), contained language which in the Department's opinion was inflammatory, and were not approved for distribution by the Department per departmental rules.

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[10] Decision No. B-16-92; see, also, Decision No. B-14-95, which explains that NYCCBL § 12-305 does not contain language, as does the National Labor Relations Act, § 7, which protects "concerted activities for the purpose of . . . mutual aid or protection."

We agree that Petitioner's actions in bringing the flyers in question onto the Department's premises on May 11 did not constitute protected activity within the meaning of the NYCCBL. We find no provision in the applicable agreement[11] which renders inapplicable the Department's Code of Conduct against language of the following sort: indecent, abusive, or profane (3.15.030); conduct of a nature to bring discredit upon the Department (3.15.250); defamatory information (8.05.030); or conduct by an employee which threatens human life, physical injury, property damage, or security risk on Department property which conduct is likely to be repeated (Standard Operating Procedure Governing the Distribution of Campaign Literature at Departmental Facilities," reprinted from "Stipulation of Settlement and Discontinuance, 79 Civ. 2023 U.S. District Court S.D.N.Y.).

Moreover, we find no provision in the parties' collective bargaining agreement which permits language of the type at issue here. Even Article XXV (Bulletin Boards), which authorizes the posting of notices to union members and requires notices to be on union stationery, provides notices posted on union bulletin boards "shall not contain any derogatory or inflammatory statements concerning the City, the Department, or personnel

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[11] The applicable agreement, dated January 24, 1994, covers the period from July 1, 1990, to September 30, 1991, and applies to the time period in question pursuant to NYCCBL § 12-311d ("preservation of status quo").

employed by either entity."

Finally, our determination that the CODA campaign flyer fails to qualify as protected activity under the NYCCBL is based as well on an earlier decision where the Department interrupted distribution of union literature because it determined that the literature was inflammatory in nature. The literature alleged that the drinking water at a Departmental facility was contaminated with carcinogens of which the Department was aware.[12] The Board denied a claim that the Department had interfered with statutory collective bargaining rights by halting the literature distribution. The union failed to respond to the Department's characterization of the flyers as inflammatory; therefore, the Board accepted the Department's uncontroverted evidence that the material in question had no marks identifying it as union literature, that it contained inflammatory statements concerning the Department, and that the union president had failed to request the required departmental permission to distribute the material.

Although there is a difference of opinion here as to whether Petitioner Archibald was merely conveying campaign flyers to another individual for distribution at a later time, as Petitioners contend, or actually distributing the flyers at that time, as the Department asserts, the text of the flyer is

[12] Decision No. B-48-86.

undisputed, and, in our view, that text is no less inflammatory than that which we previously found not to be protected under the NYCCBL.[13] For all these reasons, we find that the language of the confiscated flyers is removed from protection under the NYCCBL.

Because we find no protected activity either with respect to the language contained in the flyers or with respect to Archibald's letter to the Mayor, we find no violation of NYCCBL § 12-306a(3) and, therefore, no derivative violation of NYCCBL § 12-306a(1).

Moreover, Petitioners have made no claim regarding any disparate application of the Department's Code of Conduct. Their claim with respect to the Department's conduct toward opposition candidates is only that the Department allegedly permitted those candidates to distribute literature before the start of the official campaign period while not permitting Petitioners to distribute literature during the same time period. Petitioners do not contend that the Department permitted other slates to distribute literature that was inflammatory in nature but did not permit their own slate to distribute inflammatory literature.

Our inquiry ends here. We need not reach the question of whether there was disparate application of Department rules regarding electioneering time restrictions, as our finding with

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[13] Id.

respect to the unprotected nature of the literature at issue would preclude a finding of improper practice even if Petitioners were to sustain their burden of proof on this question.

Claims Against COBA

As to the claim that the Union or its agents breached their duty of fair representation to Petitioners, we find Petitioners' assertion unavailing.

The duty of fair representation doctrine was defined by the Supreme Court in Vaca v. Sipes[14] as:

> the exclusive agent's . . . statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[15]

A breach of the duty of fair representation occurs "only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[16] A union is afforded discretion in its handling of grievances, not breaching its duty of fair representation simply because it fails to initiate or advance a grievance, even if the failure is on

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[14] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[15] Vaca, at 177.

[16] Vaca, at 190; see, also, Decision Nos. B-11-95, B-22-94, and B-8-94.

account of negligence, mistake, or incompetence.[17] The burden is on the petitioner to prove that the union has engaged in such conduct.[18]

Here, Petitioners make three claims against the Union. First, they claim that the Union failed to provide Petitioners Archibald and Winkfield with representation for the May 12, 1995 investigatory interview. Second, Petitioners claim the Union either failed or refused to process grievances regarding Petitioner Archibald's suspension and reassignment, and regarding Petitioner Rivera's reassignment on April 15, 1995. Third, Petitioners claim the Union "purposely disrupted" CODA's campaign by announcing the collective bargaining agreement on May 26, 1995.

As to COBA's failure to provide Archibald and Winkfield with representation at the May 12, 1995 interview, Petitioners have failed to support their allegation with facts detailing when and of whom the request was made. The Union has asserted it would have provided Petitioners representation if asked, and we cannot find a violation without factual support to suggest otherwise

In order to prove successfully that the Union breached its duty of fair representation in failing to file grievances for Archibald and Rivera, Petitioners must assert more than Union

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[17] Decision Nos. B-22-94 and B-8-94.

[18] Decision Nos. B-11-95, B-24-94 and B-21-93.

inaction. We find that the allegations alleged with regard to this claim are vague and conclusory. As to Petitioner Rivera's alleged grievance of April 15, 1995, Petitioners' assertions -- that Rivera sought COBA assistance and that COBA has "failed to take action" -- fail to provide the specifics required to sustain their claim under § 12-306(b). They have neither cited dates on which Rivera asked for help nor named any COBA officials whose help was solicited. Further, and more importantly, Petitioners have failed to present any evidence that the Union failed to represent Rivera in this matter when it had provided similar services to other COBA members.

As to Petitioners' claim that Petitioner Archibald was denied fair representation from the Union on two occasions, we also find that Petitioners have failed to allege facts to support the assertion that the Union acted adversely towards Petitioner Archibald in a manner violative of the NYCCBL. While there is evidence to suggest that the incumbent COBA leadership, led by president Stan Israel, was antagonistic towards the Petitioners because of the heat of the campaign, Petitioners must assert more than that. On the other hand, the Union asserts Petitioner Archibald's lawsuit against the Department was not covered by the legal services plan. Further, it is uncontroverted that Archibald did not pursue the matter as a grievance at the May 25, 1995, meeting. Petitioners have failed to sustain their burden

on this point.

Similarly, with regard to Petitioners' claim that the Union refused to aid Petitioner Archibald in filling out a grievance form regarding his reassignment, Petitioners have also failed to sustain the claim that the Union breached its duty here as well. It is uncontested that the grievance form provides a phone number for members to call for help. It is further uncontested that Petitioner Archibald did not in fact call that number. Thus, we find that the Union was not obliged to provide Archibald further assistance under these circumstances.

Finally, as for Petitioners' claim that the incumbent Union leadership "purposely disrupted" CODA's campaign by announcing the collective bargaining agreement on May 26, 1995, we are restricted from inquiring into complaints concerning internal union matters. They are not subject to our jurisdiction unless it can be shown that they affect the employee's terms and conditions of employment or the nature of the representation accorded to the employee by the union with respect to his employment.[19] Unlike federal labor laws protecting the rights of union members in the private sector, the NYCCBL does not regulate internal union affairs.[20] The announcement of a collective bargaining agreement, even if purposely timed to detract attention from the

[19] Decision Nos. B-22-93, B-5-92, and B-23-84.

[20] Decision Nos. B-22-93, B-5-92 and B-22-91.

campaigning CODA slate, does not state a cause of action under the NYCCBL without a showing that the underlying purpose of the announcement pertained to matters related to Petitioners' status as employees.

Other than a conclusory allegation that the announcement of the collective bargaining agreement "purposely disrupted" CODA's campaign and was meant to "distract potential voters," there is no evidence to support a claim that Petitioners' terms and conditions of employment were affected, nor that Petitioners' representation by COBA, vis-à-vis their employer, was deficient.

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-1757-95 be, and the same hereby is, denied in its entirety.

Dated: New York, New York
October 31, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER