Local 375, DC 37, 6 OCB2d 15 (BCB 2013)

(IP) (Docket No. BCB-2995-11)

Summary of Decision*:** The Union alleged that DOHMH violated NYCCBL § 12-306(a)(1) and (3) by denying one of its officers a job reassignment because of his union activities. It argued that DOHMH explicitly stated that the Union officer did not get the reassignment because of his position in the Union, and that such a statement is inherently destructive of important employee rights. The City argued that no such statement was ever made and that it had legitimate business reasons for not placing the Union officer in the position, which ultimately was never filled. The Board found that there is insufficient evidence to prove that the alleged statement was made. Accordingly, the petition was denied. ***(Official decision follows)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 375, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK, and
THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondents.

DECISION AND ORDER

On December 6, 2011, District Council 37, AFSCME, AFL-CIO ("DC 37") and its affiliated Local 375 (collectively, "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Health and Mental Hygiene ("DOHMH") on behalf of its member, Jeffrey Oshins. The Union alleges that DOHMH violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (City of New York

Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it denied Oshins a job reassignment because of his union activities. It argues that DOHMH explicitly stated that Oshins did not get the reassignment because of his position in the Union and that such a statement is inherently destructive of important employee rights. The City argues that no such statement was ever made and that DOHMH had legitimate business reasons for not placing Oshins in the position, which ultimately was never filled. This Board finds that there is insufficient evidence to prove that the alleged statement was made. Accordingly, the petition is denied.

BACKGROUND

The Trial Examiner held a one-day hearing and found that the totality of the record established the following relevant facts.

DC 37 is an amalgam of 55 local unions representing approximately 120,000 public employees. Its affiliated Local 375 represents employees in title of City Research Scientist ("CRS"), and others, at various City agencies, including DOHMH. Oshins has been employed by DOHMH since 1993 in the non-competitive title of CRS, Level II. In August 2011, Oshins was also the Chair of Local 375's legislative and political action committee, as well as the First Vice President of Local 375's Chapter 10. At that time he was employed in DOHMH's Take Care New York and Community Coordination program. On Fridays, Oshins was on part-time release to perform Union duties.

Eduardo Rosario has been a Local 375 Council Representative since August 2010. He testified that sometime around the end of July or the beginning of August 2011, DOHMH's Assistant Commissioner at the time, Brenda McIntyre, telephoned him to relay that Oshins'

position would be eliminated due to a loss of grant funding.[1] Rosario also had conversations regarding the layoff with Michael Aragón, DOHMH's Senior Director of Labor Relations. Aragón testified that he learned of the layoff from McIntryre sometime in June. He stated that he and McIntyre began to look at other divisions for any CRS vacancies to which Oshins could potentially be reassigned in order to avoid the layoff of a more junior employee. They initially identified a position within the Bureau of Asthma in Washington Heights. Aragón presented this option to Rosario and Magdalia Acevedo, the Union's Chapter 10 President, after a labor-management meeting sometime in late July or early August. Acevedo stated that the position was too far away from Oshins' home in Brooklyn, and Rosario agreed that the travel time would be problematic.

According to Rosario, he and Aragón had another conversation during which Aragón asked if the Union would be willing to place Oshins on full-time union leave, so that he would go from one day of release time per week to five. Rosario then asked if the release time would be paid by DOHMH. Aragón responded that, while DOHMH was willing to give Oshins the release time, it would have to be paid for by the Union. Rosario told Aragón that he "could not make a unilateral decision like that" and would have to ask the Union's executive board. (Tr. 35) Rosario stated that, when he did, his colleagues told him that this was a highly unusual suggestion that they had never encountered before.[2]

Aragón explained that he made the suggestion regarding full-time release in an attempt to look out for Oshins' welfare. He emphasized that he has known Oshins for a long time, that he

[1] McIntyre is no longer employed by DOHMH and did not testify at the hearing.

[2] In an affidavit dated March 2, 2012, Rosario stated that he took Aragón's suggestion regarding release time to mean that "the agency preferred, if at all possible, not to employ Mr. Oshins in any capacity." (Union Ex. C, ¶ 12)

likes him, and that he has never had any problems with him. He also stated that he knew that Oshins was active in the Union and took his position very seriously, and so the suggestion was made in an attempt to help him find a position where he would be comfortable. Aragón stated that "[t]here was no malice intended and I wasn't trying to push him out the door." (Tr. 73)

Aragón testified that he and McIntyre continued to look for a suitable position for Oshins. In early August, McIntyre asked him to contact Diana Rodela, the Director of Budget and Administration in the Department of School Health ("School Health"), to ask her to meet with Oshins to determine whether his skill set would be a match for any possible vacancies. Aragón did so, and he asked Rodela to contact Oshins to set up their meeting.

Rosario testified that at some point McIntyre called and informed him that Oshins' options were to either bump a more junior CRS who would consequently be laid off, or, alternatively, there was a position in School Health "that seemed to be a good fit." (Tr. at 30) He stated that he interpreted this to mean that "it looks like [Oshins is] going to get the position and that it was going to resolve itself, that he applied for the job and basically it would be his." (Tr. 48) Rosario admitted that he did not inquire as to the exact positions that were available at School Health. He was not aware if Oshins actually applied for a position or submitted a résumé.

Rosario communicated the options to Oshins. Oshins testified that he decided to explore a position with School Health for two reasons. First, he did not want to bump a fellow union member who would consequently be laid off. Additionally, the CRS that he would bump was a Level IV. Due to the language in the collective bargaining agreement, Oshins believed that if he was unable to perform the duties of this position he could be laid off anyway. Therefore, he felt as if he had no option other than to be reassigned to School Health.

Following his conversation with McIntyre, on August 8, 2011, Rosario sent Aragón an email stating the following:

> Regarding DOHMH[’s] requests of moving of Jeff Oshins, the union finds the various verbal inquiries a bit convoluted and unclear, hence, the union is requesting the agency put its requests in writing. In addition, the union has a few questions concerning for example, what happens to Mr. Oshins if he goes on an interview and turns the offer down? What possible bumping will occur if he accepts or does not accept a position? How did the agency come upon his name and was seniority taken into consideration in your decision making?

(Union, Ex. A) Rosario stated that he sent the email to Aragón rather than McIntyre because Aragón was the person he had been conversing with at that time. When Aragón received the email, McIntyre happened to be sitting right next to him. She told him not to respond and stated that she would do so herself. McIntyre emailed Rosario a response on that same day, stating:

> Mr. Oshins[’] position will be eliminated due to loss of grant funding. He is non[-]competitive CRS and this layoff is in the unit of appropriation code 102 which means he will bump the most junior employee. If this happens the most junior employee will be laid off. The agency makes every effort to reduce the number of employees [by] reassigning them to vacancies. We offer the programs and the employees a chance to meet to make sure they are a good fit for both sides so that employees are not forced fitted into a square peg that they may not like or feel they cannot do the position. Our intention is not to set an employee up for failure.
>
> The position is in School Health’s Central office in LIC and they would like to meet Jeff to see if he would like working in school health (not everyone likes kids) and if they would be a good match. His skillset and work background seems like it would be. If he is not or he does not want the job, he will bump the most junior employee in the unit of appropriation code.
>
> The CRS position he will bump into is very scientific and Jeff has not done this type of work before but according to civil service rules he must be able to do the work of a CRS and as you know in our Agency the CRS position is very differs (*sic*) in regards to type of work, experience and skillset. But he does have the skillset for the position in school health. So he has two choices. He can bump

> a more junior CRS who will be laid off on August 26th and Jeff will start in that employee's position on August 29th or he can meet with school health to discuss the vacancy they have and hopefully it will be a win/win situation and I can save the most junior CRS from being laid off.

(*Id.*)

Oshins testified that he learned of his impending layoff only through communications with Rosario and that he never received notification directly from the Department. Rosario acknowledged that Oshins never received an "at-risk" letter and that this was a departure from DOHMH's normal procedure.[3] Oshins learned about the possibility of a position with School Health when Rosario read him the August 8, 2011 email from McIntyre. When asked what his understanding was about the position, Oshins testified:

> That I was to go ahead and have a kind of little sit down, a meet and greet with School Health, maybe work out any details, a start date and things like that. It was almost them telling me that I had a job with them and that I was looking forward to them saving my job, moving over and starting work with School Health.

(Tr. 108)

Rodela contacted Oshins and they agreed on a mutual time to meet. Oshins subsequently met with Rodela and Shirley Williams-Hall, the Personnel Director of School Health. During the meeting Oshins introduced himself, and they discussed his past experiences. According to Oshins, the meeting lasted approximately seven minutes, and Rodela stated that she would get back to him. Oshins acknowledged that Rodela never promised him a job at the meeting. However, he was confident because he believed that it was previously implied that he would get a position.

[3] It is also undisputed that Oshins' name never appeared on a layoff list.

Rodela stated that she frequently interacts with the DOHMH Human Resources department ("HR") and that, in the past, she has been approached by HR and asked to meet with employees who have been targeted for layoffs to determine if they have the appropriate skill set for a position at School Health. She stated that at the time that Aragón asked her to meet with Oshins, School Health only had openings for nursing positions and for a Special Projects Analyst ("SPA"). Rodela explained that, due to budget deficits, while she may be allowed to post for open positions she does not always receive approval to actually hire for the positions. She stated that the SPA position was a generalist-type position and would require the employee to deal with personnel, budget, payroll, and possibly contract issues.[4] Rodela testified that, when Aragón contacted her, it was clear that the meeting was not to be a job interview, but was simply a meeting to discuss Oshins' skill set.

Rodela testified that when she and Williams-Hall met with Oshins they discussed his skill set as well as his current and past experiences. At the end of the meeting, Rodela thanked Oshins but did not offer him a position. She testified that the SPA position required a tremendous amount of HR and budget experience and that Oshins' experience seemed to be more programmatic than administrative. Shortly after the meeting, Rodela called Aragón and told him that she did not believe that Oshins' skill set would match any of her current openings. She also told Aragón that, regardless, she was unable to fill open positions at that time due to budgetary constraints. Rodela's budget is still frozen and no one has been hired for the open SPA position. Rodela did not recall ever having a conversation with McIntyre about Oshins.

[4] Although the position was posted under the civil service title of Administrative Staff Analyst, Rodela testified that she would consider a CRS for the position if he or she had the necessary skill set.

Aragón telephoned Rosario after Oshins' meeting with School Health. According to Rosario, Aragón stated that McIntyre had told him that "it was not going to work out, because [Oshins] being a [U]nion representative and where he would be sitting there is a fair number of management working in the same area, exempt employees, that it wouldn't work out and that the offer was no longer on the table." (Tr. 34) Rosario testified that he was quite surprised by this comment and that he asked Aragón "what happened with the deal that was on the table that . . . the Department of School Health was a good fit[?]" (Tr. 37-38) He notified Local 375 superiors of the conversation and wrote Aragón an email, dated August 10, 2011, which states:

> As per your telephone call, it was mentioned after Jeff Oshins accepted the DOHMH offer to work at "school health" after his line had been deleted, according to Brenda McIntyre it is now an issue if he indeed works at school health being Mr. Oshins is an officer of the union and his new work location being predominantly staffed by management[.]
>
> You also wanted to know if the union was willing to pick up Mr. Oshins full[-]time. I then stated to you as I had previously mentioned when you first raised this with me last week is DOHMH paying his salary while on release time for a full[-]time basis with the union. You stated no. I stated I am in no position to speak on behalf of the local union for this was a discussion and decision for the executive board of Local Union 375.
>
> I concluded stating to you as I had previously, Brenda McIntryre should put all of her inquiries in writing to the union from here on forward. It is not appropriate to continue such verbal exchanges when they need to be handled in a more formal manner.

(Union, Ex. B)

Aragón denied that he ever made a statement to Rosario regarding Oshins' position with the Union. Additionally, he testified that no one from School Health ever stated that it would be an issue for Oshins to work there because he was a Union officer. Aragón testified that he simply relayed to Rosario that School Health had informed him that Oshins was not a match for

any positions according to their needs. Aragón decided not to respond to Rosario's email because he felt that the statements were untrue. Additionally, Aragón explained that the statements in the email regarding union release time did not require a response since the issue had already been discussed. Although the email states that Oshins accepted the offer, Aragón testified that an offer was never made.

Rodela and Williams-Hall both credibly testified that they were not aware that Oshins was a Union officer when they met with him. Rodela stated that she did not become aware of this fact until she was asked to answer questions for this improper practice proceeding. There are approximately eight staff members in their unit, and all are in union-represented titles. Rodela stated that it has never been an issue to have union officers working in the unit. She testified that she made the decision that Oshins was not a match for the SPA position based on the fact that he did not have the payroll and personnel experience necessary to perform the job.[5]

After it became clear that Oshins would not be working for School Health, McIntyre looked for other possible reassignments. She was able to identify a vacancy for a CRS in the Bureau of HIV/AIDS. Oshins decided to accept this position, in which he is still currently employed.

---

[5] The "Job Description" section of the Citywide Job Vacancy Notice for the SPA position states, in part:

> Reporting directly to the Director of Administrative Services, the [SPA] will be responsible for the analysis of a wide range of personnel and payroll, budget, OTPS, and contract projects including coordinating, scheduling, and tracking of these projects within the Office of School Health.

(City Ex. 3) The Union did not rebut the City's assertion that Oshins did not have the requisite experience for this position.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that DOHMH violated NYCCBL § 12-306(a)(1) and (3) when it denied Oshins a job opportunity on the basis of his union activity. According to the Union, DOHMH initially offered Oshins a position in School Health and subsequently informed the Union that Oshins was not going to get the position because he was an officer of the Union and the majority of the staff was managerial. The Union argues that, regardless of whether this statement was factually correct, the statement itself was inherently destructive of and had a chilling effect on employees' rights to engage in union activity. DOHMH is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions. The Union argues that Aragón's statement was delivered to send a message that Union activity can impact employment opportunities. It was intended to, and indeed has, created a chilling effect on employees' right to engage in Union activity.

The Union makes a number of arguments in support of its assertion that the disputed statement was actually made. First, it stresses that the Board must consider the context in which this statement was made. The Union argues that DOHMH's handling of Oshins' potential layoff was "less than ideal." (Union Br. at 7) The Union was never given any formal written notification of Oshins' potential layoff, his name never appeared on a layoff list, and he did not receive an at-risk letter. Furthermore, all information regarding the potential layoff was communicated to Rosario verbally, despite his repeated requests that such communications be made formally in writing. The Union also asserts that Aragón's suggestion that the Union place Oshins in full-time union leave was improper, as it was an attempt by DOHMH to thrust itself into the Union's internal affairs. The Union argues that Aragón's suggestion also demonstrates

that DOHMH "would be pleased if Oshins were no longer their employee." (*Id*. at 8)

Second, the Union asserts that Rosario's belief that Oshins was being offered a position at School Health was reasonable based on his telephone conversation with McIntyre as well as the language of her August 8, 2011 email. The Union additionally argues that this email is inconsistent with both Rodela's and Williams-Halls' testimony, which it characterizes as "consistent and credible regarding the contents and nature of the meeting with Oshins." (*Id*. at 9) The Union states that the record is clear that Rodela never spoke to McIntyre. Consequently, she never provided McIntyre with any details about a particular position at School Health. The Union argues that this demonstrates that McIntyre and Aragón purposely misled Rosario to believe that Oshins' meeting with School Health was "more than in reality it was." (*Id*. at 10)

Regarding credibility, the Union argues that Rosario's testimony was straightforward, reasonable, and consistent, while Aragón's was evasive. For example, the Union points out that during cross-examination, Aragón did not initially acknowledge that he spoke to Rosario on August 10, 2011. However, after reviewing his affidavit, he then conceded that he did.[6] The Union also argues that Rosario's testimony regarding Aragón's alleged statement is corroborated by Rosario's contemporaneous email. The Union asserts that, as Labor Relations Director, one would expect that Aragón would clear up any misunderstanding, but instead he chose not to respond.

Finally, the Union argues that the duties and assignments for the SPA position are telling, as they include dealing with issues of personnel, payroll, budget, and possibly contracts. Therefore, it is reasonable that DOHMH would not want a vocal union officer to assume a

[6] The Union also argues that Aragon's use of the word "position" in his affidavit was inconsistent with his repeated testimony that there was no particular position that Oshins' was being considered for.

position of this nature. Consequently, the Union urges the Board to find that Aragón made the statement that Oshins was not being offered a reassignment at School Health because of his position with the Union.

City's Position

The City argues that the Union has not established a violation of the NYCCBL because it presented only unsubstantiated assertions and an incomplete statement of events to support its claim that anti-union animus was the motivation behind the decision not to reassign Oshins to a position in School Health. The City argues that, after Oshins' position was eliminated due to a loss of grant funding, DOHMH made several efforts to find him another position, although it was not required to do so. Yet, in his testimony, Rosario attempted to make it appear as if the only options Oshins was presented with were to either bump another Union member or take a position with School Health. On cross-examination, however, Rosario admitted that Aragón had previously advised him of an opening in the Bureau of Asthma. Additionally, while the Union characterizes Aragón's suggestion that the Union could possibly place Oshins on full-time union leave as "unusual," this is merely additional evidence of DOHMH's continued efforts to find Oshins a position so as to avoid the displacement another Union member. Further, after a position with School Health did not work out, McIntyre continued to look for positions for Oshins and he was subsequently reassigned to the Bureau of HIV/AIDS Prevention.

The City also argues that Rosario's testimony is at odds with McIntyre's August 8, 2011 email, which makes it clear that Oshins would simply be meeting with School Health to determine if he was qualified for a position. The Union has presented nothing in support of its claim that Oshins was actually offered a position. Both Rodela and Williams-Hall testified that they never did so.

The City asserts that Rodela and Williams-Hall made a legitimate business decision that Oshins was not qualified for a position with School Health based on neutral, determinative criterion. Both were unaware that Oshins was an officer of the Union when they met with him. Rodela testified that it has never been an issue that the unit has union-represented staff, regardless of the fact that the unit deals with confidential issues. Additionally, there is no proof that Rodela ever spoke to McIntyre regarding her meeting with Oshins. Given these circumstances, and the effort that McIntyre went through to find Oshins a resassignment, it does not follow that she would ever state that Oshins was not being offered a position with School Health because of his Union activity.

The City additionally argues that, even assuming, *arguendo*, Aragón made the statement at issue, this would not rise to the level of inherently destructive conduct under Board precedent. DOHMH did not deny a Union member participation in the grievance process (*CWA, L. 1180*, 77 OCB 20 (BCB 2006)), prohibit attendance at a union meeting (*CWA, L. 1180*, 71 OCB 28 (BCB 2003)), or hinder future bargaining (*ADWA*, 55 OCB 18 (BCB 1995)). Rather, the Union has alleged only an isolated act that did not have the effect of discouraging or inhibiting union members from exercising their rights. Taking the Union's allegations as true, Aragón was merely relaying a decision made by someone else. There was no threat or demand in his statement.

Furthermore, the City argues that no adverse action was taken against Oshins. He was never at risk for layoff, and he knew this fact. There was no threat made or coercive action taken against him. The Union has not argued that Oshins was prevented from carrying out union activity, was discouraged or inhibited from exercising his employee rights, or that any negative consequences resulted from DOHMH's decision not to reassign Oshins at School Health. As

such, the Union has not demonstrated that the conduct alleged was inherently destructive of important employee rights in violation of NYCCBL § 12-306(a)(1). The City also argued that DOHMH's actions did not constitute a violation of NYCCBL § 12-306(a)(3).[7]

DISCUSSION

NYCCBL § 12-306(a)(1) states that it is an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter[.]"[8] This Board has previously stated that "conduct that contain[s] 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 *ADWA*, 55 OCB 19, at 40 (BCB 1995)) (internal quotation marks omitted). "In order for an employer's actions to be found inherently destructive, thus obviating the need for proof of an improper motive, the employer's conduct must carry unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own indicia of intent." *Feder*, 1 OCB2d 27, at 13 (quoting *Great Dane Trailers, Inc.*, 388 U.S. 26, at 33 (1967)) (internal quotation marks omitted).

The Union alleges that DOHMH independently violated NYCCBL § 12-306(a)(1) when

[7] Although the Union cited § 12-306(a)(1) and (3) in its improper practice petition, it is clear from the arguments made in its reply and post-hearing brief that it is actually alleging only a violation of § 12-306(a)(1).

[8] NYCCBL § 12-305 states, 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.

Aragón stated that Oshins would not be reassigned to a position because of his status as an officer of the Union. The Union argues that such a statement is inherently destructive of important employee rights and constitutes a violation of the Act, regardless of the intent behind the statement and regardless of whether it was, in fact, true. However, before determining if such a statement would constitute inherently destructive conduct, we must first make a factual determination as to whether the statement was actually made. Rosario and Aragón's testimonies regarding the alleged statement are directly at odds with one another. Therefore, we will assess their credibility in order to make our determination. At the outset, we recognize that since the events at issue occurred approximately a year and a half prior to the hearing, Aragón and Rosario both had understandable difficulty remembering the dates on which specific events took place. However, this does not, in and of itself, undermine their credibility.

We find Aragón's testimony to be credible. He testified in a clear and detailed manner and appeared to accurately recall the sequence of events that took place. Furthermore, his testimony is corroborated by the testimony of Rodela and Williams-Hall, as well as the documentary evidence. *See COBA*, 2 OCB2d 7, at 52 (BCB 2009) (corroboration strengthens credibility). While the Union argues that Aragón's testimony was evasive, we find that, to the contrary, his candid acknowledgement of a number of facts which the Union takes issue with, bolsters his credibility. *See DC 37, L. 375*, 2 OCB2d 26, at 17 (BCB 2009) (citing *COBA*, 2 OCB2d 7, at 52 (BCB 2009)).[9]

Aragón testified that when he called Rodela to ask her to meet with Oshins she specifically asked if the meeting was to be an interview. Aragón replied that it was not an

[9] For example, Aragón admitted to making the suggestion that the Union could provide Oshins with full-time Union release. He also admitted that Oshins never received an at-risk letter, and that this was a departure from DOHMH's usual procedure.

interview and that Rodela should simply meet with Oshins to determine whether his skill set would be a match for any possible positions. Rodela corroborated this testimony, testifying that Aragón was clear with her that the meeting was not an interview and that it was simply a meeting to assess Oshins' skill set. Aragón and Rodela's testimonies are also corroborated by the email that McIntyre sent to Rosario. This email specifically states that School Health wanted to meet with Oshins to see if he would be a good match. It then states: "His skillset and work background seems like it would be. If he is not or he does not want the job, he will bump the most junior employee…" (Union, Ex. A) While McIntryre expresses her opinion that she thinks Oshins may be a good match for a position at School Health, the email is clear that School Health would first have to assess Oshins to determine this.

On the other hand, Rosario's testimony as a whole was somewhat vague and much of it is logically inconsistent with other evidence. *See James-Reid*, 1 OCB2d 26, at 29 (BCB 2008) (inherently illogical testimony weakens credibility). Rosario testified that McIntyre told him that the School Health position was a "good fit" for Oshins. He interpreted this to mean that "it looks like the person's going to get the position and that it was going to resolve itself[.] [T]hat he applied for the job and basically it would be his." (Tr. 48) The Union argues that McIntyre purposely misled Rosario to believe that this was the truth. However, even if McIntyre said something to Rosario in their telephone conversation that led him to form this belief, the August 8, 2011 email clarified that Oshins was not guaranteed a position at School Health.

Oshins also testified that he believed that he was guaranteed to get a position. However, he had no independent knowledge to support this belief. Oshins stated that he only learned of the possibility of a reassignment to School Health indirectly, when Rosario read McIntyre's email to him. His belief that he was guaranteed a position clearly could not have come solely from the

email, which merely states that he will be considered for a position. Therefore, Rosario presumably communicated his own assumptions, which had no basis in fact, to Oshins. Consequently, we do not find that Oshins' testimony makes reliable Rosario's assumption that a position at School Health was promised to Oshins.

Further, Rosario's testimony regarding the alleged statement is contradicted by Rodela's testimony. According to Rosario, Aragón stated that McIntyre told him that Oshins was not getting a position at School Health due to his status with the Union. However, Rodela credibly testified that she made the decision that Oshins would not be a good fit for a position and that she communicated this decision to Aragón. She did not recall ever speaking with McIntyre about Oshins. Further, she was completely unaware that Oshins was an officer of the Union, and her unit consists largely of union-represented employees. We find Rodela's testimony to be credible, as it was consistent with the testimony of Aragón and Williams-Hall, as well as McIntyre's August 8, 2011 email.

Given Rodela's credible testimony, it is illogical to believe that McIntyre made such a statement to Aragón or that Aragón relayed this information to Rosario. First, McIntyre had no involvement in the decision not to place Oshins in a position at School Health. Second, there were two legitimate reasons why Oshins was not being offered a reassignment to School Health. The Union did not refute that Oshins did not have the requisite experience for the SPA position. Additionally, Rodela communicated to Aragón that there was no funding for the position. This clearly was the case, as the SPA position currently remains unfilled. Moreover, we note that DOHMH had no duty to take the extra steps that it did to accommodate Oshins' desire not to bump another employee. Because of his seniority, Oshins was never at risk for layoff. Given these circumstances, the Board is not persuaded that Aragón, the Senior Director of Labor

Relations, made the alleged statement that Oshins' position with the Union was the reason why he was not being reassigned to School Health.

We emphasize that in finding aspects of Aragón's testimony to be more credible than Rosario's, we are not finding Rosario to have been willfully inaccurate. *See DC 37, L. 375*, 2 OCB2d 26, at 18 (BCB 2009) (citing *SSEU, L. 371*, 79 OCB 34, at 11 (BCB 2007) (credibility findings relate to accuracy, and do not equate to finding that the "testimony [] is wilfully deceptive, intended to subvert the process.")). Rather, we believe that Rosario's testimony was "filtered through the lens of his strongly held conviction" that something was not right with Oshins' layoff.[10] *Id*. at 19 (quoting *Colella,* 79 OCB 27, at 55 (BCB 2007)).

We further note that Aragón did not respond to Rosario's email regarding the alleged statement. However, based on the totality of the evidence and our credibility determinations, we credit Aragón's explanation that he felt the allegations were unfounded and untrue and he simply chose not to dignify those allegations with a response. Consequently, we reject the Union's argument that Aragón's failure to respond to the email constituted an admission to the truth of Rosario's allegations.

In conclusion, we find the proffered evidence that Aragón made the alleged statement unpersuasive. Consequently, we do not reach the issue of whether such a statement is inherently destructive of important employee rights in violation of NYCCBL § 12-306(a)(1).[11]

[10] We note that Rosario's belief that Aragón's suggestion regarding release time reflected that DOHMH preferred not to employ Oshins in any capacity also seems unfounded given DOHMH's efforts to find him a position.

[11] As noted *supra*, the Union did not argue in its reply or post-hearing brief that DOHMH violated NYCCBL § 12-306(a)(3). Consequently, we dismiss this allegation.

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-2995-11, filed by Local 375, District Council 37, AFSCME, AFL-CIO, against the New York City Department of Health and Mental Hygiene, hereby is dismissed in its entirety.

Dated: May 29, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent.

PETER PEPPER
MEMBER