OSA, 6 OCB2d 26 (BCB 2013)

(IP) (Docket No. BCB-3072-13)

Summary of Decision*:** The Union alleged that DDC violated NYCCBL § 12-306(a)(1) by interfering with employees' statutory rights when it sent an email to employees instructing them to disregard a Union representative's advice and stating that the representative's email was inappropriate. The City argued that DDC had the managerial right to send the email, that there is no evidence that the email had a chilling effect on employees' exercise of their rights, and that the email did not rise to the level of inherently destructive conduct. The Board found that the email interfered with employees' exercise of their statutory rights, in violation of NYCCBL § 12-306(a)(1). Accordingly, the petition was granted. ***(Official decision follows)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF DESIGN & CONSTRUCTION,

Respondents.

DECISION AND ORDER

On March 6, 2013, the Organization of Staff Analysts ("OSA" or "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Design and Construction ("DDC"). The Union alleges that DDC violated NYCCBL § 12-306(a)(1) by interfering with employees' statutory rights when it sent an email to employees instructing them to disregard a Union representative's advice and stating that the

representative's email was inappropriate.[1] The City argues that DDC had the managerial right to send the email, that there is no evidence that the email had a chilling effect on employees' exercise of their rights, and that the email did not rise to the level of inherently destructive conduct. The Board finds that the email interfered with employees' exercise of their statutory rights, in violation of NYCCBL § 12-306(a)(1). Accordingly, the petition is granted.

BACKGROUND

The Union is a public employee organization representing over 4,500 members in various staff analyst titles at a number of City agencies. Cecilia McCarthy is the Union Chapter Chairperson and has been employed by DDC for approximately 12 years. According to the Union, McCarthy regularly communicates with DDC Labor Relations managers on behalf of the Union and has assisted members with numerous grievances. The Union states that McCarthy regularly uses email throughout the course of these communications.

In late October and early November 2012, the effects of Hurricane Sandy devastated New York City. On October 28, 2012, City officials activated the City's coastal emergency plan, which led to the shutdown of the public transit system for several days. During this time, many City work locations opened at a later hour or were closed. On October 26, 2012, the Commissioner of the New York City Department of Citywide Administrative Services ("DCAS") sent a memorandum addressed to Agency Heads ("Sandy Memo"). The subject of this memo was "Time and Leave Policy for October 28, 29, and October 30, 2012." (Pet., Ex. A) The memo stated, in relevant part:

[1] The Union, in its petition, also alleged a violation of NYCCBL § 12-306(a)(3). However, on May 29, 2013, the Union withdrew this portion of its claim.

> In accordance with City policy, as specified in PSB No. 440-14: Time and Leave Policy in the Event of a City-wide Emergency (attached), all employees must make every effort to overcome transportation difficulties caused by Hurricane Sandy and report to work. However, unscheduled absences must be charged against either annual leave or compensatory time balances. In cases where an employee has no applicable leave balances, annual leave will be advanced for this purpose. Lateness found by an Agency Head to have been caused by unforeseen transportation circumstances beyond the ability of the employee to control shall be excused with no charge to leave balances. There shall be no requirement for the employee to provide proof of transportation delay.

(*Id*.)

John Doran served as one of several Assistant Commissioners of Public Buildings for DDC until his retirement on or about November 16, 2012. On November 5, 2012, Doran sent an email to a number of Directors at DDC advising them of the policy as stated in the Sandy Memo and directing them to instruct their direct reports accordingly. Specifically, Doran's email stated:

> For the week of October 29th, if you made it into the office you can charge the whole day (7 hrs.) and will be paid accordingly. There is no penalty for arriving late or leaving early. If you did not make it in for any day during the week you must charge the time to "annual leave" or lacking annual leave to "absence without pay[.]" Please advise your direct reports accordingly.

(City Ex. 3) The record does not reveal how individual employees were notified of the policy.

On November 7, 2012, at 11:11 a.m., McCarthy sent an email to 18 DDC employees who the Union described as OSA chapter activists who had expressed concern with the City's policy regarding absences during Hurricane Sandy.[2] The email stated:

> [F]yi… I informed OSA about this response regarding the leave procedures to be followed related to Hurricane Sandy (10/29/12). I requested that OSA advise me whether OSA or DC 37 has taken any action to have all absences due to Hurricane Sandy excused.

[2] The City acknowledged that these 18 employees are all OSA members and stated that all but three worked in the Technical Services Unit for which Doran was Assistant Commissioner.

> OSA has now informed me that OSA members should put in for excused time, if they are denied excused time they should contact OSA . . . starting Wednesday (11/7). They should call the grievance department and will be asked a series of questions. OSA will then look at the responses to see if we have a potential grievance. I will keep you posted. Thanks.

(Pet., Ex. B)

In response to McCarthy's email, at 1:30 p.m. on November 7, 2012, Doran sent an email addressed to the same 18 DDC employees. It was also cc'd to McCarthy, as well as to a DDC Assistant Commissioner, the Director of Budget, and the Supervisor of Contract Administration. Doran's email stated:

> Please disregard the email you received in Time and Leave Policy related to Hurricane Sandy from Cecelia McCarthy dated 11/7/2012. DDC's executive decision is, if you missed a complete day of work as a result of Hurricane Sandy or the resulting commutation problems resulting from the storm, your time should be charged to annual leave or lacking sufficient annual leave time you will be advanced annual leave by the Agency. If you came to work late or left work early you can charge this time to excused absence and will be paid for the entire day. If the Union wishes to grieve this decision the proper course of action is to obey the executive order and grieve later. I issued an email to all directors reporting to me advising them of this executive decision and for the Union to issue instructions directly to employees in contradiction to the email I issued was inappropriate.

(Pet., Ex. C)

On November 9, 2012, OSA's Chief Negotiator/Chief Grievance Officer, Tim Collins, sent Doran an email regarding his November 7, 2012 email. In his email, Collins stated that McCarthy was acting under OSA's direction when she sent the November 7, 2012 email advising Union members as to how to deal with absences that occurred during the Hurricane. The email further stated:

> I recognize management's right to transmit interpretations of time and leave matters. However, as you should know, the Union

> always has the right to communicate and advise its members. By telling employees represented by OSA to disregard their own Union, and by stating that Union instructions are inappropriate, you are interfering with our members in the exercise of their rights. Your attempt to restrain our members from acting in concert to challenge agency actions could be construed as an improper practice. Please know that we will not hesitate to file the necessary petitions to protect the rights of our members. Before doing so, we felt it appropriate to give DDC the chance to respond, and rectify this matter.

(Pet., Ex. D) According to the Union, Collins also contacted DDC's Director of Labor Relations, requesting that Doran's email be retracted and that an apology be offered. The Union states that DDC did not retract Doran's email or issue an apology. On March 6, 2013, the Union filed the instant petition.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that DDC, through Doran's November 7, 2012 email, violated NYCCBL § 12-306(a)(1).[3] The Union argues that McCarthy's email constituted protected union activity. It contends that Doran's email expressly condemned Union-related activity by instructing employees to disregard McCarthy's email and the recommendations in it, which it called "inappropriate." Therefore, the email interfered with Union activities regarding a course of action the Union was taking to deal with employees' rights.

The Union further argues that the email restrained the statutory rights of OSA members because a recipient employee would reasonably conclude that following the Union's advice would be detrimental to their working relationship and employment with DDC. Consequently,

[3] NYCCBL § 12-306(a)(1) provides that "it shall be an improper practice for a public employer or its agent to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter[.]"

the Union argues that Doran's email was inherently destructive and had a chilling effect on these employees, who were led to believe that protected activity was being discouraged.

City's Position

The City asserts that the DDC acted within its express managerial rights under NYCCBL § 12-307(b) when Doran sent an email seeking to clarify misinformation provided to employees by an OSA delegate.[4] The City contends that Doran's email simply sought to correct a mistake of fact offered by McCarthy and to make clear the City's position on leave so that it was consistent with DCAS's policy, as promulgated in PSB 440-14.

The City argues that the Union has not offered any concrete evidence that Doran's email had an actual chilling effect on DDC employees or discouraged their participation in protected Union activity. It asserts that Doran's email merely clarified that the proper course of action to take if an employee disagrees with a policy is to "obey now, grieve later." (Ans. ¶ 65) In this way, the City argues that the email acknowledged employees' rights to file grievances related to perceived contractual violations, provided they first obey the order.

The City also contends that the email did not constitute interference because the statements in the email were not threatening or coercive. Furthermore, the City argues that the email did not rise to the level of inherently destructive conduct, as it did not have far-reaching effects that would hinder future bargaining, nor did it constitute conduct that discriminated solely

[4] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the [C]ity . . . acting through its agencies, to . . . direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; determine the methods, means 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 . . . .

on the basis of participating in union activity. There has been no denial of the Union's ability to communicate with its members, nor has there been any effort by DDC to limit the Union's access to the agency's email or foreclose the ability of the Union to challenge DDC's actions related to the Sandy Memo. Consequently, the City asserts that it has not violated NYCCBL § 12-306(a)(1).

DISCUSSION

NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter[.]"[5] This Board has previously held 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." *DEA*, 4 OCB2d 35, at 9 (BCB 2011) (quoting *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010)). Two categories of conduct have been held to be inherently destructive of important employee rights. "One creates visible and continuing obstacles to the future exercise of employee rights and jeopardizes the position of the union as bargaining agent or diminishes the union's capacity effectively to represent the employees in the bargaining unit." *CIR*, 51 OCB 26, at 41-42 (BCB 1993) (internal quotation marks and citations omitted). "The second type directly and unambiguously penalizes or deters protected activity." *Id*. at 42 (internal quotation marks and citations omitted).

[5] 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.

We have previously found that speech or conduct that has the potential to chill or discourage an employee from participating in union activities is a violation of NYCCBL § 12-306(a)(1). For example, in *Civil Service Technical Guild, Local 375*, 3 OCB2d 14 (BCB 2010), a supervisor confronted a subordinate in a heated manner about a pending grievance and told him he should "let it go." There, the Board found that even if the supervisor's intention was not to threaten or intimidate the employee, under those circumstances it was reasonable for the employee to believe the statements to be an implicit threat and a demand that he drop the grievance. *Id*. at 14; *see also SSEU, L. 371*, 3 OCB2d 22, at 15-16 (BCB 2010) (manager's statement that "nobody could threaten [him] with the Union" found to be a veiled threat, as an employee could reasonably conclude that any Union involvement would be detrimental to their working relationship with manager). We also found a violation in *District Council 37, Local 376*, 73 OCB 6 (BCB 2004), when a hearing officer made statements in a Step II determination that the Board found to discourage and inhibit union members from choosing a particular individual as a union representative. There the hearing officer wrote that the representative's statements at a Step II hearing were "irrelevant, inappropriate and contentious." *Id*. at 7. She also stated that "[t]he membership of Local 376 would be wise to discourage and inhibit such imprudent conduct by its elected Vice President." *Id*. The Board stressed that the hearing officer's intentions in writing these statements were irrelevant. *Id*. at 11. Rather, the statements were found to be an independent violation of § 12-306(a)(1) because of their chilling effect on union activity. *Id*.

In the instant case, a Union representative sent an email to a select group of DDC employees who had expressed concern with the City's policy regarding absences during Hurricane Sandy. The email advised these particular employees that they should request that

their absences be excused and that, if the request was refused, the employees should contact the Union and answer some questions so that a potential grievance could be explored. DDC responded, through Doran's email, by telling these employees to "disregard" the advice from their Union. (Pet., Ex. C) Doran's email then clarified that the employees should use their annual leave to cover any absences related to the Hurricane and transportation issues. It stated that if the Union wished to file a grievance, it could do so after the employees first obeyed DDC's instructions. The email closed by telling employees that it was "inappropriate" for their Union representative to directly email the Union members and provide instructions in "contradiction to the email [Doran] issued." (*Id*.)

Public employees have a fundamental right to seek advice from their Union as well as to file and pursue grievances. *See Town of Huntington*, 26 PERB ¶ 3073, at 3140 (1993); *Doctors Council*, 59 OCB 12, at 10 (BCB 1997). Here we find that by instructing employees to "disregard" the Union's email and the advice within and by labeling such advice "inappropriate," DDC's email discouraged employees from following the Union's advice and participating in a grievance. Although Doran's email may have acknowledged employees' rights to file grievances, we find that the entire email taken in context discourages employees from engaging in protected activity. Essentially, DDC's statement was akin to instructing the employees to "let it go." *See CTSG*, 3 OCB2d 14, at 14.

Moreover, the fact that DDC did not agree with the Union's advice does not make the advice "inappropriate," nor does the advice lose its protection under the NYCCBL. *See State of N.Y. (Div. of Parole)*, 41 PERB ¶ 3033 (2008) (union official's email advising employees to report to work on Election Day and claim holiday pay was protected conduct, despite the fact that the employer disagreed with the official's advice, as it was not intentionally false,

maliciously aimed at injuring the employer or undeniably frivolous); *Comsewogue Union Free Sch. Dist.*, 15 PERB ¶ 3018, at 3029-30 (1982) (rejecting school district's argument that union official did not have a protected right to advise employee to ignore a supervisor's directive because the advice constituted insubordination); *Binghamton City Sch. Dist.*, 22 PERB ¶ 3034, at 3080 (1989) ("[A]n employee engaged in a protected activity does not lose that protection merely because he makes inaccurate statements that disturb the employer.") (quoting *Plainedge Public Schools*, 13 PERB ¶ 3037, at 3056 (1980)). Here, the Union representative's email did not instruct employees to disobey a work order. Rather, it advised them that if they believed they were entitled to a benefit-- here, an excused absence-- they should apply for this benefit. Although DDC had already advised employees that they were not entitled to the benefit and therefore they should not request it, the Union clearly believed that it was possible that denial of an excused absence violated the parties' collective bargaining agreement. Significantly, the Union representative's email asked the employees to call and consult with the Union should their request for an excused absence be denied so that it could best assess whether there was a potential grievance.

Further, we note that it is immaterial whether Doran's email actually discouraged employees from participating in protected Union activity. This is because "[t]he standard is not whether a specific employee was actually chilled in the exercise of protected rights, but rather whether the employe[r's] action has the necessary effect of chilling employees in the exercise of protected rights." *Greenburgh #11 Union Free Sch. Dist.*, 33 PERB ¶ 3018, at 3059 (2000) (citations omitted). Doran's email unambiguously informed employees that they should "disregard" their Union's advice. Consequently, we find that the email would reasonably deter employees from contacting and consulting with their Union. Without the participation of

employees who felt they had been aggrieved, the Union may not have been able to properly evaluate the scope of a potential grievance. Further, individual employees' grievance rights may not have been preserved if they had not first applied for, and then been denied, an excused absence.

Accordingly, we find that DDC's November 7, 2012 email both deterred employees from engaging in protected activity and diminished the Union's capacity to effectively represent its members. Consequently, we find that the email interfered with employees' exercise of their statutory rights in violation of NYCCBL §12-306(a)(1).[6]

[6] Although the Union requested that we order DDC to retract its November 7, 2012 email, we find that the email did not constitute a written rule or procedure that requires rescission. Rather, we find that the email constituted a written statement from DDC management that violated NYCCBL § 12-306(a)(1). Consequently, we find that the order requiring DDC to post the attached Notice adequately addresses the violation.

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-3072-13, filed by the Organization of Staff Analysts, against the City of New York and the New York City Department of Design and Construction be, and the same hereby is, granted to the extent that the New York City Department of Design and Construction has violated New York City Collective Bargaining Law §12-306(a)(1) by discouraging Union members from following a Union representative's advice; and it is further

ORDERED that the New York City Department of Design and Construction cease and desist from discouraging Union members from engaging in protected conduct; and it is further

ORDERED that the New York City Department of Design and Construction post the attached Notice to Employees for no less than thirty (30) days at all locations used by the New York City Department of Design and Construction for written communications with the bargaining unit employees.

Dated: September 23, 2013
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 6 OCB2d 26 (BCB 2013), determining an improper practice petition between the Organization of Staff Analysts, and the City of New York and the New York City Department of Design and Construction.

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, Docket No. BCB-3072-13, filed by the Organization of Staff Analysts, against the City of New York and the New York City Department of Design and Construction be, and the same hereby is, granted to the extent that the New York City Department of Design and Construction has violated New York City Collective Bargaining Law § 12-306(a)(1) by discouraging Union members from following a Union representative's advice; and it is further

ORDERED, that the New York City Department of Design and Construction cease and desist from discouraging Union members from engaging in protected conduct; and it is further

ORDERED that the New York City Department of Design and Construction post the attached Notice to Employees for no less than thirty (30) days at all locations used by the New York City Department of Design and Construction for written communications with the bargaining unit employees.

New York City Department of Design and Construction
(Department)

Dated: _____ **(Posted By)**
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.