LEEBA, 7 OCB2d 21 (BCB 2014)

(IP) (Docket No. BCB-4044-14)

Summary of Decision: LEEBA alleged that Local 237 violated NYCCBL § 12-306(b)(1) when it distributed "false and misleading" information to its members regarding LEEBA during the course of a representation election. Local 237 argued that the statements communicated to its members were non-coercive and truthful, and thus did not constitute unlawful threats. Additionally, Local 237 argued that LEEBA had sufficient time in which to rebut the statements. The Board found that Local 237's statements did not constitute a violation because, in the specific context of a representation election, they were not coercive. Further, the Board found that Local 237's statements did not interfere with employees' rights to choose their representative because LEEBA had ample time to rebut the statements and in fact did so. Accordingly, the improper practice petition was dismissed. ***(Official decision follows)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CITY EMPLOYEES UNION, LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

DECISION AND ORDER

On May 15, 2014, the Law Enforcement Employees Benevolent Association ("LEEBA") filed a verified improper practice petition against the City Employees Union, Local 237, International Brotherhood of Teamsters ("Local 237"). On June 7, 2014, LEEBA filed an amended verified improper practice petition to supplement its factual allegations. LEEBA

alleges that Local 237 violated § 12-306(b)(1) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it distributed "false and misleading" information to its members regarding LEEBA during the course of a representation election. Local 237 argues that the statements communicated to its members were non-coercive and truthful and thus did not constitute unlawful threats. Additionally, Local 237 argues that LEEBA had sufficient time in which to rebut the statements. This Board finds that Local 237's statements did not constitute a violation because, in the specific context of a representation election, they were not coercive. Further, we find that that Local 237's statements did not interfere with employees' rights to choose their representative because LEEBA had ample time to rebut the statements and in fact did so. Accordingly, the improper practice petition is dismissed.

BACKGROUND

On May 25, 2005, Local Law 56 of 2005 ("Local Law 56") was enacted, amending NYCCBL § 12-307(a)(4) to add certain titles to the uniformed level of bargaining and create a new level of bargaining. Thereafter, the City of New York ("City") and various unions filed representation petitions with the Office of Collective Bargaining ("OCB"). LEEBA filed a petition docketed as RU-1255-08, seeking to remove the titles of Taxi and Limousine Inspector and Associate Taxi and Limousine Inspector (collectively, "TLC Inspectors") from Local 237's Certificate No. 67-78 and requesting that LEEBA be certified to represent those two titles in a separate bargaining unit. On January 10, 2014, the Board of Certification issued *DC 37*, 7 OCB2d 1 (BOC 2014), in which it determined the appropriate unit placement of several Local Law 56 titles. As a result, several new bargaining units were created. Specifically, the Board denied LEEBA's request to certify the TLC Inspector titles into a separate bargaining unit and

instead created a new bargaining unit comprised of the TLC Inspector titles as well as Special Officer titles from a number of mayoral agencies.[1] Local 237 was the bargaining representative for these titles in the unit from which they were removed. However, since LEEBA had established an interest in the TLC Inspector titles, the Board stated that "if LEEBA wishes to represent all the employees in this newly created unit, it must so inform the Board within 30 days of issuance of this Decision and Order and within 90 days of the issuance of this Decision and Order, it must submit a current and sufficient showing of interest in order to raise a question concerning representation in the newly created unit." *DC 37*, 7 OCB2d 1, at 81.

On January 22, 2014, LEEBA informed OCB of its interest in representing the unit, and on March 25, 2014, it submitted a showing of interest that OCB thereafter determined to be current and sufficient. A pre-election conference was held on May 9, 2014, and ballots were mailed to eligible employees on June 6, 2014. Ballots that were postmarked by June 27, 2014 were collected and impounded, pending review by the New York County Supreme Court of the Board's decision in *DC 37*, 7 OCB2d 1.

As part of Local 237's campaign in the representation election, on or around March 14, 2014, it published a two-page chart comparing the benefits offered to Local 237-represented City employees with those offered to LEEBA-represented employees.[2] The chart compared: cost of

[1] The bargaining unit is comprised of: Taxi and Limousine Inspector (Title Code No. 35116), Associate Taxi and Limousine Inspector (Title Code No. 35143), Special Officers (Title Code No. 70810) and Supervising Special Officers (Title Code No. 70817) employed at the Administration for Children's' Services, the Department of Juvenile Justice, the Department of Health and Mental Hygiene, the Department of Homeless Services, and the Human Resources Administration. *See DC 37*, 7 OCB2d 1, at 87.

[2] LEEBA states that this chart was handed out to voters by various shop stewards. This chart also appeared on a Local 237-affiliated Facebook page. On June 4, an updated chart was created that removed a reference to a $1500 deductible for prescription drugs. Hard copies were then re-distributed to voters and the updated chart was posted on Local 237's website.

dues; wage increases obtained in 2008 and 2009; benefits for prescription drugs, legal services plans, and education; and disability, dental, life insurance, vision, optical and hearing aid coverage. The chart also compared what it termed the "political power" of each union. (Pet., Ex. 2) For example, it stated that Local 237 has 20,000 members while LEEBA has "88 NYC employees" and "100 security guards [at a] casino in Pennsylvania." (*Id*.) It also stated that Local 237 has offices in NYC while LEEBA has only "mail drops at various locations outside [of] the city." (*Id*.) LEEBA claims that this comparison is almost entirely false. However, Local 237 contends that the comparison is supported by and consistent with LEEBA's own benefits summary documents.

Thereafter, on or around May 8, 2014, Local 237's President issued a letter regarding the upcoming election. The letter was mailed to the homes of eligible voters and states:

> This June 6 will be one of the most important days of your working life.
>
> The New York Board of Collective Bargaining has announced that a group called "LEEBA" or, Law Enforcement Education and Benevolent Association -- may run against Teamster Local 237 in an election to decide who will represent members of your job title. Ballots will be mailed to members' homes on the 6th. I urge you to support your union, Local 237.
>
> LEEBA claims that because it calls itself a "law enforcement" group, it can promote your interests. But *LEEBA is a sham*, nothing more than a paper organization:
>
> (1) LEEBA has no office or staff. It lists addresses in Pennsylvania and Catskill, New York, over 100 miles from the City. Neither is an office. These addresses are what fraud professionals call "letter drops" -- addresses at which phony groups pay to receive mail, while trying to create the false impression they have a real building. *For these services, LEEBA's dues are twice as high as Local 237's.*

> (2) LEEBA has less than 88 members, who work in upstate New York. LEEBA has never represented city law enforcement officers. Not once.
>
> (3) Unlike Local 237, LEEBA has no welfare fund of its own. LEEBA promises it will buy you a drug coverage plan. *Look at the small print.* LEEBA's "plan" will force you to pay for $1500 of prescription drugs every year before your coverage kicks in. You will lose your Local 237 dental coverage under LEEBA, including our network of over 5,000 dentists. *Older members beware: LEEBA has no retirement coverage at all!*
>
> LEEBA says its name -- *which it gave itself* -- will magically win respect for law enforcement members. The truth: The International Brotherhood of Teamsters represents tens of thousands of police, sheriffs and correction officers across the United States. The Teamsters are a real law enforcement union, through which you, the members, can affect politics and bargaining on a local and national level.
>
> For yourselves and loved ones who depend on your coverage, don't risk what we have. Vote to protect your family. **Vote Local 237 Teamsters.**

(Pet., Ex. 1) (emphasis in original)

LEEBA contends that this letter contains false and misleading information. For example, LEEBA states that it represents 200 Environmental Police Officers ("EPOs") at the Department of Environmental Protection ("DEP") who are called upon to work in New York City on a regular basis. Local 237, on the other hand, claims that the letter is not false and misleading as it contains statements that are consistent with public filings and statements made by or on LEEBA's behalf.[3]

[3] Local 237 contends that its statements are consistent with: LEEBA's representation to the U.S. Department of Labor in its 2012 terminal LM-3 filing, in which it stated that LEEBA ceased to exist in 2012 and had zero members at the end of the 2012 reporting period; a United States District Court for the Southern District of New York published decision, *Vandermark v. City of New York*, 615 F. Supp. 2d 196 (S.D.N.Y. 2009), which stated that EPOs are charged with protecting the *upstate* watershed and are only *periodically* called to provide supplement support to the New York City Police Department during manpower shortages; a letter from the New

On or about May 19, 2014, LEEBA's President issued a two-page response letter that specified what LEEBA contends are the errors in Local 237's communications. This letter was addressed to "Future Members" and states:

> First and foremost, as president of the Law Enforcement Employees Benevolent Association (L.E.E.B.A.) I want to congratulate TLC, DHS, HRA, JJ, ACS and DOHMH on uniting together and sending a clear message that you are breaking the shackles that have held you back for years under the oppression of Local 237. Your voices have been heard and on June 6, 2014 you will be given the greatest gift an employee can receive which is the right to vote for your union of choice and control the direction of your future.
>
> During this ongoing campaign you have been harassed, bullied, and most of all, lied to by your union (Local 237) in its attempt to intimidate you into not voting for the union of your choice. Your union has repeatedly showed its tactic of "lie to our members instead of protecting our members." In a letter dated May 8, 2014 sent to you Local 237 stated the following, "LEEBA is a Sham, nothing more than a paper organization." This is a **LIE**.
>
> What your union left out was that this "Sham" and "paper organization" was able to achieve something Local 237 has never accomplished nor attempted. On its first contract LEEBA achieved for its members (DEP), through arbitration, an award which granted its members uniform pattern raises, 10% night differential, 1000 clothing allowance, line of duty, longevity, increments raises within ranks and special assignment raises with immediate retro and a true law enforcement contract.
>
> While forgetting to inform you of this they continue to LIE to you: LEEBA has over 350 members not 88 (200 DEP and 155 Sands members); we have three office sites: Catskills and Briarcliff Manor and Stroudsburg, Pennsylvania. Therefore we have no present need for an office in NYC. However, by the time this election is over, LEEBA will have an New York City office to facilitate any needs our new members will have.

York City Office of Labor Relations Employee Benefits Program dated May 19, 2014, which demonstrates that LEEBA's "active and retiree welfare fund" agreements were not fully executed until that date. (*See* Ans., Exs. A, B)

Your union claims we have never represented NYC law enforcement officers but they forget to tell you that the NYC Department of Environmental Protection Police covers all five boroughs throughout NYC and all upstate counties within the NYC watershed area.

Your union tries to instill fear in you by stating that if you become a member of LEEBA you will lose your benefits. This is another LIE, every union in NYC receives a welfare fund, retiree welfare fund and an annuity fund with the same amount of contributions from the City of New York. All welfare funds receive $1640 dollars for each member it has and $87 dollars for its annuity fund. You will also not lose your medical benefits has stated by Local 237. For verification of this LIE please call NYCAPS at (212) 487-0500. And, yes LEEBA doesn't have to promise to buy you a drug coverage plan because it already has one and you won't have to spend $1500 before your coverage kicks in (your union must be mistaken it with theirs). When you become L.E.E.B.A. members you will receive the same plan with a $2500 dollar cap per individual compared to the $2000 offered by Loca1 237. However, what you will lose is your sub-standard dental plan with Local 237 because it will be replaced with one of the largest networks (AETNA), and accepted by every dentist in New York City and New York State with an unlimited cap per individual (DMO) and a $2500 limit for PPO which when you reach its limit you can switch over to DMO and continue to receive Aetna's unlimited benefits. Compared to Local 237's plan which you receive a $2500 cap per individual. Your union also forgets to mention that LEEBA gives a $50,000 dollar life insurance instead of the minuscule $10,000 policy Local 237 gives to you. Your union also fails to tell you that LEEBA offers a disability insurance underwritten by The Standard Insurance Company. Who underwrites Local 237's so called disability insurance? So, the question that needs to be answered is? -- why does LEEBA with 200 city employees receiving the same amount of welfare funds ($1640 per member) provide better benefits? Answer: we care about our members and spend most of our allocated funds ($1640) on our members. Local 237 would rather give you watered down benefits.

It is true that we gave ourselves our name, and yes, we have won the respect of law enforcement members. We are a main reason why you have been granted an election. Health and Hospital Police has submitted over 300 authorization cards and are awaiting decertification, CUNY has submitted over 350 authorization cards and are also awaiting decertification. Within three weeks the officers of School Safety Police will also join in to await its

> decertification and election. This will be close to 8000 present members of Local 237, who show their respect for L.E.E.B.A. and are willing to fight for what they deserve as LAW ENFORCEMENT OFFICERS.
>
> Your union talks about the great International Brotherhood of Teamsters, but have you seen the Brotherhood at any representational hearings, or any contract negotiations. No, the only thing the Brotherhood wants from you is its' share from your dues to be collected and sent to them.
>
> In closing, we hope this letter eases your mind and displaces the fear of losing your benefits. The reality is you will be receiving better benefits, and better representation. Let's be real, every member is tired of the abuse, LIES and treatment they receive at the hands of Local 237. Remember under L.E.E.B.A. we work for you not like under Local 237 where they think and believe you work for them. So when you receive your ballots on June 6, 2014 please vote L.E.E.B.A. for a new direction and future. No more LIES!, No more LIES!, No more LIES!

(Ans., Ex. E) (reproduced verbatim, emphasis in original)

On May 15, 2014, LEEBA filed the instant petition, asserting that Local 237's communications to its members were false and misleading "in derogation of LEEBA's right to conduct a fair and proper pre-election campaign[.]" (Amended Pet., p. 3)

POSITIONS OF THE PARTIES

LEEBA's Position

LEEBA asserts that Local 237 violated NYCCBL § 12-306(b)(1) when it distributed "false and misleading" campaign information to its members regarding LEEBA in order to gain an unfair advantage during the course of a union election.[4] LEEBA contends that such conduct

[4] NYCCBL § 12-306(b)(1) provides that: "It shall be an improper practice for a public employee organization or its agents . . . to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so[.]"

is likely to have a "chilling effect" upon employees' exercise of their rights under the NYCCBL. According to LEEBA, Local 237's communications went beyond objective, informational statements and were instead intended to be willful distortions of the truth. In particular, LEEBA contends that the letter from Local 237's President falsely stated that LEEBA has less than 88 members who work upstate and that LEEBA has never represented city law enforcement officers. LEEBA argues that, in reality, it was certified to represent EPOs in 2005 and there are approximately 200 EPOs who are called upon to work in the City on a regular basis. LEEBA also contends that the two-page benefits comparison published by Local 237 is almost entirely false and misleading. Furthermore, LEEBA states that Local 237 shop stewards have been encouraged to distribute the false and misleading material to members who will vote in the upcoming representation election. LEEBA contends that the dissemination of this campaign material "sought to frustrate the right of representation which in turn destroys the inherent free nature of that right." (Rep. ¶ 4)

LEEBA argues the viability of its improper practice claim is not governed by whether or not it had ample opportunity to rebut Local 237's statements. It contends that "the damaging effect of willfully false and misleading comments is complete upon dissemination and any subsequent rebuttal by [LEEBA] is irrelevant to the improper practice allegation." (Rep. ¶ 5) LEEBA argues that Local 237's distribution of false and misleading material has interfered with its right to conduct a fair and proper pre-election campaign. As relief, LEEBA requests that Local 237 be ordered to issue an apology and to refrain from making any further comment derogatory to LEEBA.[5]

[5] At a conference held on August 4, 2014, and confirmed in an e-mail dated August 5, 2014, LEEBA clarified the remedy it sought. It also confirmed that it was no longer seeking a cancelling of the vote, as initially requested in its amended petition. (*See also* Rep. ¶ 6)

Local 237's Position

Local 237 contends that LEEBA's allegations do not state a cognizable claim under the NYCCBL because the allegedly offending statements were non-coercive and truthful and did not constitute unlawful threats. It further argues that LEEBA does not, and cannot, allege that Local 237 acted "to interfere with, restrain or coerce public employees in choosing their collective bargaining representative" because the petition consists of allegations of mere falsity and does not allege that any statement made by Local 237 was coercively misleading to any employee. Further, Local 237 avers that its communications served to truthfully inform employees about the factual consequences of certifying LEEBA as their bargaining representative. Citing National Labor Relations Board ("NLRB") case law, Local 237 argues that such statements regarding the effect that certification of LEEBA will have on employees' terms and conditions of employment are lawful since Local 237 did not indicate that it had the power to bring about the predicted result.

Local 237 further contends that even if its statements could be found to be material misrepresentations, which it strongly denies, nevertheless LEEBA had ample opportunity to rebut these statements. In particular, LEEBA had 29 days before the scheduled date of election to rebut the statements, which it did in its May 19, 2014 reply letter.[6] According to the Public Employment Relations Board ("PERB"), where there has been sufficient time for rebuttal prior to the election, even misleading statements do not warrant a new election. Consequently, Local 237 argues that if LEEBA's allegations are insufficient to sustain an election objection, they are also insufficient to form the basis for a cognizable improper practice claim.

[6] Local 237 avers that LEEBA's letter contained material misrepresentations itself.

DISCUSSION

NYCCBL § 12-306(b)(1) provides that it is an improper practice for a public employee organization 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, or to cause, or attempt to cause, a public employer to do so."[7] This language is nearly identical to that of § 12-306(a)(1), which applies to public employers or their agents.[8] While this Board has not developed a body of cases interpreting NYCCBL § 12-306(b)(1), with respect to NYCCBL § 12-306(a)(1) we have 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." *DEA*, 4 OCB2d 35, at 9 (BCB 2011) (quoting *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010)).

In a previous case, the Board analyzed public comments about a union and its leadership made by then-Mayor Michael Bloomberg, which the union alleged violated § 12-306(a)(1). *See PBA*, 77 OCB 10, at 21 (2006). In *PBA*, the union alleged that certain comments made by the Mayor "violated the rights of members to choose its representatives free of coercive influence." *Id*. at 9. In particular, the union claimed that the Mayor's comments that the union leadership had rejected its offers during negotiations in order to win re-election and keep their "cushy jobs"

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[7] 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.

[8] NYCCBL § 12-306(a)(1) states: "It shall be 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[.]"

improperly encouraged members to favor candidates other than the current leadership and, therefore, subverted the members' organizational and representational rights. *Id*. It also argued that the Mayor's statement that the union did not inform its members of the City's offers during negotiations was blatantly false and fostered dissent and opposition within the membership. The Board found that these comments were similar to those found by PERB in other cases not to constitute interference, even where some statements were misstatements of fact, because the comments were not threatening or coercive. *Id*. at 20-21 (citing *Yonkers Board of Educ.*, 10 PERB ¶ 3057 (1977); *Town of Greenburgh*, 32 PERB ¶ 3025 (1999)). In particular, the Board noted that in *Town of Greenburgh*, PERB found that comments by the town's Chief of Police calling the union's president and attorney "sleazebags" and "shysters" at a labor-management meeting may have been "vitriolic" but did not constitute interference because the communications were opinions and were stated in a non-coercive manner. *PBA*, 77 OCB 10, at 21 (citing *Town of Greenburgh*, 32 PERB ¶3025, at 3053-3054).

The allegations in the instant case are similar to those at issue in *PBA*. Here, LEEBA essentially argues that Local 237's distribution of "false and misleading" information interfered with employees' right to choose their representative. However, under the particular circumstances of this case, we cannot find that Local 237's statements interfered with employee rights in violation of NYCCBL § 12-306(b)(1). As in *PBA*, we do not find the statements here were coercive, as they neither contained any threats of reprisal nor promised any benefits. *See PBA*, 77 OCB 10, at 14 (citations omitted). Although the May 8 letter did attempt to inform employees of the possible consequences of no longer being represented by Local 237, regardless of whether these consequences were accurate or not, the letter did not contain threats to take any action against employees who did not vote for Local 237. *See DC 37, Local 2507*, 2 OCB2d 28,

at 12 (BCB 2009) ("[A]n employer may give its opinion of possible adverse consequences of a Union's proposed action without committing an improper practice.") (*citing City of Albany*, 17 PERB ¶ 3068 (1984)).

We also cannot find that Local 237's statements constitute improper interference in violation of NYCCBL § 12-306(b)(1). PERB has previously analyzed statements made by unions that were alleged to constitute interference and has stated in that context that "[t]he mere act of issuing a statement which is not wholly accurate . . . does not give rise to a violation of § 209-a.2(a) of the Act, where . . . a reasonable member of the class could not have been misled."[9] *United Univ. Professions*, 20 PERB ¶ 3056, at 3123 (1987) (Union's inaccurate statement to employees that nonmembers' agency fee was the same amount as members' dues was not misleading where, "because of the statutory proviso and previous litigation affecting the [union's] agency fee procedure, a reasonable member of the class could not have been misled"). More specifically, in the context of a representation campaign PERB has found that a union's statements did not violate § 209-a.2(a) of the Taylor Law where they were "at worst, electioneering puffery, which could have been counteracted by the charging [union]." *Albany County*, 15 PERB ¶ 3102, at 3157 (1982) (internal quotation marks omitted). Similarly, the NLRB has repeatedly stated that it views employees as "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, at 132 (1982) (quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977)); *see also Durham Sch. Servs., LP*, 360 NLRB No. 108, No. 5-RC-096096, 2014 WL 1879433, at *1 (N.L.R.B. May 9, 2014) (quoting *Midland*, 263 NLRB 127, at 132).

[9] Article 14, Civil Service Law ("Taylor Law"), § 209-a.2(a) is analogous to NYCCBL § 12-306(b)(1). It states: "It shall be an improper practice for an employee organization or its agents deliberately [ ] to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so."

Here, it is significant that the statements were made during the course of an election campaign. Regardless of whether the statements are true or false, we do not consider them to be improper interference because an average employee would surely be able to recognize the statements as campaign propaganda which, by its very nature, is intended to persuade employees to take a certain action. Furthermore, to the extent that LEEBA viewed the statements as false or misleading, it had ample time to address the employees and correct any misrepresentations. The two publications that are the subject of LEEBA's petition were distributed on or around March 14 and May 8, 2014. Therefore, LEEBA had at least four weeks prior to the beginning of the election to issue a rebuttal. It did so in a detailed and thorough two-page letter from its President, dated May 19, 2014. Consequently, LEEBA had ample opportunity to address any misrepresentations well before employees cast their ballots.

We note that issues of pre-election campaign misrepresentations have generally been addressed by PERB and the NLRB in the context of objections seeking to set aside election results. The Board of Certification, which has jurisdiction over such objections, has not yet adopted a standard regarding conduct that will constitute grounds for setting aside an election. PERB and the NLRB currently apply slightly differing standards in this regard.

In 1969, PERB adopted a standard derived from the standard that was applied at that time by the NLRB, known as the *Hollywood Ceramics* standard. *See N.Y. State Thruway Auth.*, 2 PERB ¶ 4007, at 4173 (1969), *affd.*, 2 PERB ¶ 3060 (1969) (citing *Hollywood Ceramics*, 140 NLRB 221 (1962)). Under PERB's version of the standard, an election should be set aside only when there has been: "a) a material misrepresentation, b) made at a time so shortly before the scheduled date of the election so as to preclude an effective reply, and c) the employees could not reasonably be expected to themselves evaluate the truth or falsity of the statements." *Id.*

Over the years the NLRB revised its position on campaign misrepresentations several times, eventually overruling *Hollywood Ceramics* and adopting a standard in 1982 that it has since adhered to consistently. This is known as the *Midland* standard, and under it the NLRB "will not probe into the truth or falsity of the parties' campaign statements and will not set aside an election on the basis of misleading statements unless 'a party has used forged documents which render the voters unable to recognize propaganda for what it is.'" *Durham Sch. Servs., LP*, 360 NLRB No. 108, No. 5-RC-096096, 2014 WL 1879433, at *1 (quoting *Midland Nat'l Life Ins. Co.*, [263 NLRB 127], at 133).

In the years since the NLRB adopted the *Midland* standard, PERB has not addressed the question as to whether it would revise its standard. In 1993, PERB's Director of Representation specifically declined to address the issue, instead finding no cause to set aside an election where a union had sufficient time to reply to alleged material misrepresentations. *See County of Schenectady*, 26 PERB ¶ 4018, at 4031 (1993) (declining to analyze whether the incumbent union's statements in a newsletter mailed to employees two days before the election were misrepresentations where the rival union was able to respond the following day by handing out a written response at the employees' worksite) (citing *City of Yonkers*, 12 PERB ¶ 4054 (1979) (misleading statements made by an incumbent union regarding the employer's supposed intent to discontinue contractual benefits in the event the rival union won the election did not require the election to be set aside where the rival union had sufficient opportunity to respond and in fact did so one day prior to the election)); *see also County of Chautauqua*, 46 PERB ¶ 4002 (2013) (adhering to the *N.Y. State Thruway* standard and finding that even if statements at issue were material misrepresentations, employees "could reasonably be expected to evaluate on their own the truth or falsity of the statement").

Under either PERB's or the NLRB's standard for evaluating alleged misrepresentations, the statements at issue here would not be likely to constitute cause to set aside the election. While the NLRB generally declines to examine the truth or falsity of such statements, PERB's case law is clear that where there is a sufficient opportunity for a union to rebut alleged misrepresentations, election results will not be set aside. As discussed above, LEEBA had ample time to respond to Local 237's statements and in fact did so.

In light of all the above, we do not find that Local 237 violated NYCCBL § 12-306(b)(1), and we dismiss the petition in its entirety.

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-4044-14, filed by the Law Enforcement Employees Benevolent Association against the City Employees Union, Local 237, International Brotherhood of Teamsters, hereby is dismissed in its entirety.

Dated: September 9, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
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PETER PEPPER
MEMBER