IUPAT, L. 806, 7 OCB2d 25 (BCB 2014)

(IP) (Docket No. BCB-4014-13)

Summary of Decision: The Union filed an improper practice petition alleging that DOT violated NYCCBL § 12-306(a)(1), (2), (3), (4), and (5) by meeting with Union members to discuss ongoing negotiations concerning a possible reduction in force. DOT argues that the discussions at issue did not violate the NYCCBL, but rather were the result of a good faith informational meeting in which management employees answered Union members' questions to the best of their ability. The Board found that, while DOT did not engage in direct dealing, its conduct violated NYCCBL § 12-306(a)(1) by interfering with union activity. The Board did not find sufficient evidence to establish a violation of NYCCBL § 12-306(a)(2), (3), (4), or (5). Therefore, the petition is granted, in part, and denied, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 806,

Petitioners,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION AND ORDER

On November 14, 2013, the International Union of Painters and Allied Trades, Local 806 ("Union"), filed an improper practice petition against the City of New York ("City") and the Department of Transportation ("DOT") alleging that DOT violated § 12-306(a)(1), (2), (3), (4), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code,

Title 12, Chapter 3) ("NYCCBL") by meeting with Union members to discuss ongoing negotiations concerning a possible reduction in force. The City argues that the discussions at issue did not violate the NYCCBL, but rather were the result of a good faith informational meeting in which management employees answered Union members' questions to the best of their ability. The Board finds that, while DOT did not engage in direct dealing, its conduct violated NYCCBL § 12-306(a)(1) by interfering with union activity. The Board did not find sufficient evidence to establish a violation of NYCCBL § 12-306(a)(2), (3), (4), or (5). Therefore, the petition is granted, in part, and denied, in part.

BACKGROUND

The Trial Examiner held three days of hearing and found that the totality of the record, including the pleadings, exhibits, and post hearing briefs, established the relevant facts to be as follows:

DOT employs approximately 28 in-house Bridge Painters and seven Supervisor Bridge Painters (the "Supervisors") in its Department of Bridges. A Supervisor Bridge Painter plans each job, deploys Bridge Painters, orders equipment, and ensures that projects progress safely and efficiently. Three of the seven Supervisors, Robert Avellino, Reynaldo Grant, and Al Pappas, testified that they are provisionally appointed to their current title.[1] The record also indicates that David Yanolatos and Vincent Babajko are permanent Supervisors.[2] Babajko is

[1] A provisional appointment is temporary, as opposed to a permanent appointment. A provisional employee has not, for various reasons, been appointed from a certified civil service list after passing a civil service examination. Three Supervisors testified that they believed they could be removed from their current title at any time because of their provisional status. (*See* Tr. 17-18; 47; 71)

[2] Huey Flood and Ceasar Pazmino did not testify at the hearing.

also the "team leader." Babajko supervises the provisional Supervisors. All seven Supervisors, as well as the Bridge Painters, are Union members.

DOT first contemplated laying off the Bridge Painters and Supervisors in 2011. These actions were motivated by budgetary concerns. Management believed that these employees were underutilized during winter months and therefore the potential savings would have a limited impact on DOT's operations. The estimated savings were included in the budget for 2012, but the plan was not implemented because circumstances changed in light of Hurricane Sandy. Then, in October 2013, DOT resumed discussions of laying off Bridge Painters and Supervisors.

On October 24, 2013, the City's Office of Labor Relations ("OLR") met with the Union to discuss the possible layoffs. According to OLR Assistant Commissioner Steven Banks, the parties discussed the details surrounding the possible layoffs of Supervisors and Bridge Painters, including a seniority list and potentially affected employees. The parties also discussed alternatives to layoffs. One possible alternative, proposed by the City, was to seasonalize the title. The Assistant Commissioner explained that seasonalization is an arrangement in which employees work between nine and ten months a year, and are let go during the winter months. He also stated that seasonalization is essentially a furlough, but seasonalization agreements often provide employees with certain retention rights and, in some circumstances, the ability to carry over leave balances from year to year. According to the Assistant Commissioner, the Union stated that DOT had other options at its disposal to meet budgetary concerns and the Union did not seem interested in seasonalization at the meeting. The Union opposed the plans to lay off employees and plans to seasonalize the titles.

William Budge, a Bridge Painter and Union Shop Steward, attended the October 24 meeting. He testified that OLR implied that the laid off employees would be hired back in the

spring, but there were no specific details offered as to how employees would be hired back, or in what order. Leaving that meeting, Budge understood that most Bridge Painters and Supervisors would be laid off. Discussions regarding the layoffs continued into late December 2013, however, the layoffs were eventually avoided.

Earlene Powell, DOT's Deputy Director of In-house Painting, testified that she was approached on October 28, 2013, by several Supervisors, including Babajko, Avellino, Flood, and others, with questions and concerns about the possible layoffs.[3] She testified that these Supervisors were concerned about losing their jobs. She then approached her superiors, Ronald Rauch and George Klein.[4] According to Rauch, Powell asked Rauch and Klein to speak with the Supervisors about the layoffs because they were "confused, irate … and they were looking for answers." (Tr. 154) The three scheduled a meeting for October 29, 2013, and had Babajko notify the other Supervisors.

At the time the meeting was scheduled, Klein, Rauch and Powell did not have a great deal of information about the possible layoffs. None of the managers contacted OLR or their supervisors to request permission to speak with the Supervisors, or obtain information concerning the possible layoffs in anticipation of the meeting. Moreover, none of them attended the Labor-Management meeting on October 24, 2013. Klein testified that while he was not present at the October 24 meeting, he was informed by his supervisor that the City met with the

[3] Powell testified that she had not heard anything about the possible layoffs before speaking with Babajko on Monday, October 28, 2013. However, Rauch testified that savings based on seasonalization were included in the budget as early as July or August 2013 and that he told Earlene Powell about the possible seasonalization of staff within a day of learning about the budget.

[4] Rauch is DOT's Director of Bridge Painting in charge of in-house bridge painting and maintenance and contracting out major painting projects. Klein is the Deputy Chief Engineer in charge of the Bureau of Maintenance, Inspection, and Operations for Bridges.

Union and advised it that the Bridge Painters would be laid off for three months during the winter.[5] Klein knew that the parties were bargaining over these issues and that the Union had not agreed to any plan or guarantee at the October 24 meeting. Klein also testified that he was fully aware of the contentious nature of the issue and that he knew that the Union threatened to file lawsuits concerning layoffs in 2012. Klein stated that he attended the October 29 meeting because he "was the most well-versed in knowing the particulars about the layoff. [He] didn't believe [Rauch or Powell] really knew much and [he] thought it would be a good idea that [he] attend." (Tr. 194)

Prior to October 29, 2013, Rauch knew that the City would have to deal with the Union on the issue of seasonalization. He had been told that the City and the Union discussed the possibility that the Bridge Painting titles would be seasonalized, and knew that the negotiations were ongoing when Powell approached him to meet with the Supervisors. However, he was also told that the initial discussion between the parties was not productive and he was unaware of the details being negotiated between the Union and DOT. When asked why he had an informational meeting with employees when he did not have any information to give them, Rauch responded that he was trying to put a human face on what seemed like a mechanized process.

Klein, Rauch, and Powell met with the seven Supervisors to discuss the possible layoffs on October 29, 2013, at approximately 9:30 a.m. in the Bridge Painters' locker room.[6] Klein spoke first and ran the meeting, which lasted for roughly one and one half hours. It is undisputed that management did not provide any information or handouts concerning the layoff procedure at

[5] Klein had also been involved in the discussion to layoff Bridge Painters in 2012.

[6] The record indicates that similar meetings between management and the Supervisors occurred a few times a year.

the meeting and did not explain "bumping rights" or otherwise discuss the manner in which the layoffs would occur. Other basic details concerning the meeting such as its location, who attended, and who spoke, are not in dispute. Nevertheless, the witnesses provided divergent accounts of what each person said at the meeting.

Klein testified that he advised the Supervisors that the City "was looking" to seasonalize the Supervisor and Bridge Painter titles and that "they were going to lay them off for the months of January, February and March and bring them back in April."[7] (Tr. 195, 205) He testified that the Supervisors wanted to know the details surrounding the layoffs, and some who were considering retirement might retire sooner rather than later, depending on the terms of the layoffs. He testified that he did not use the word "furlough." Klein testified that he did not suggest that the Supervisors take any kind of action.

Powell and Rauch's testimony generally corroborated Klein's testimony concerning his statements. Rauch supported Klein's claim that he did not tell the Supervisors that DOT wanted furloughs. Powell stated that the Supervisors asked Klein why they were being laid off, told him they hadn't received any information from their Union, and that they felt very frustrated. Rauch stated that Klein told the Supervisors to speak with their Union, because the Union would have more information than he did.

Four of the Supervisors present at the meeting testified at the hearing, and they provided a different account of Klein's statements. According to Avellino, Klein told the Supervisors that the City had offered to furlough the Bridge Painters instead of laying them off, but "the union flat out turned them down." (Tr. 52) He testified that Klein told them that "furloughs are what you want;" and that "it's much better than being laid off because you know you have a job to

[7] Klein testified that he thought seasonalization could be either a layoff or a furlough. (Tr. 199)

come back to." (Tr. 52) Pappas, Yanolatos, and Grant also testified that Klein told the Supervisors that the Union had rejected the furloughs offered by the City. Grant testified that Klein told the Supervisors that DOT was "fighting to keep [them]," but the Union didn't want to bargain with them. (Tr. 22) Pappas testified that Klein said that the layoffs were because of a $450,000 budget shortfall, and Pappas suggested assigning the Supervisors and Bridge Painters to work on projects for DEP as an alternative to layoffs. Klein responded that DOT could not retain them for the winter because of the budgetary concerns.

Rauch spoke after Klein. He testified that the Supervisors told him that the City was throwing them to the curb, and asked him for information. The employees had questions about healthcare and other benefits. Rauch told the Supervisors that the managers did not have much information to pass on. Rauch testified that he told them he would try to put them in contact with the "correct" people in personnel and labor relations who may be able to answer their questions. (Tr. 157) Rauch told the Supervisors that he was worried he might lose his job if they lost theirs – "without Bridge Painters there's no need for a bridge paint director" – but he claimed he was trying to make light of the situation.[8] (Tr. 158) Rauch testified that the Supervisors were worried that the layoffs would be permanent and he did not know if this was true. All he knew is that DOT wanted to seasonalize the titles.[9] Rauch did not recall if he said that furloughs were the best deal the Supervisors would get. Rauch testified that he told the Supervisors that he did not have the power to negotiate with them. He also stated that the

[8] In his affidavit, Rauch stated to the contrary: "I also never made a statement that I would lose my job if the staff were laid off, but not furloughed, this is not true. I did jokingly state that if the employees were laid off, it wouldn't leave me with anyone to supervise." At the hearing, he testified that his job would not have been affected.

[9] Rauch testified that seasonalizing and furlough mean the same thing.

Supervisors mentioned an upcoming Union meeting and he told them that it was a good opportunity to ask questions, because Powell, Rauch, and Klein did not have the answers.

Avellino, Grant, Pappas, and Yanolatos all testified that Rauch encouraged the Supervisors not to accept layoffs and to tell their Union that they wanted furloughs. Pappas, recounting what Rauch said at the October 29 meeting, testified that in essence Rauch said "you're union members, you have every right to go to your Union and demand that they accept furloughs." (Tr. 76) According to the four Supervisors, Rauch also conveyed that accepting furloughs was in their best interest. Avellino testified that "[Rauch] might not have used the words 'the best deal you're going to get,' but that was the gist of it." (Tr. 52) Grant and Pappas also testified that Rauch said he would lose his job if the Supervisors lost their jobs.

Powell spoke last. She testified that she answered the Supervisors' questions concerning health insurance by informing them that, if laid off, they could purchase COBRA, and by offering to provide them with the NYCAPS phone number. Rauch corroborated this testimony; he testified that Powell told the Supervisors that it would be possible to purchase COBRA. Powell testified that she did not distribute handouts or COBRA notices. She specifically denied that she promised healthcare to employees in the event of a furlough. She knew she was not authorized to offer employees healthcare benefits or furloughs. Powell denied making any comments concerning the upcoming Union meeting.

In regard to Powell's testimony, the four Supervisors provided less consistent testimony and much less specific testimony as to what Powell said at the meeting. Yanolatos asserted that Powell stated that if they accepted furloughs, they would be able to keep their health coverage and he denied that Powell's statements concerned purchasing COBRA. He testified that Powell's statements concerning health insurance benefits were important to him because his

family has substantial medical expenses and "without health coverage [he would] be in a lot of trouble." (Tr. 228) Avellino testified that he understood Powell's comments to mean that "we would have benefits and we would have a job with the furlough." (Tr. 65) However, Avellino also testified that he knew that he would have to pay for COBRA. Pappas understood Powell to say that furloughs were a better option for employees because they would be able to maintain medical benefits while on furlough. He felt she was offering them a better way out if they convinced their Union to agree to furloughs. He testified that he came to learn that he would not keep his medical benefits if he was furloughed or laid off and he learned that he would have to pay for COBRA.[10] Pappas also testified that Powell stated that she was concerned that she would lose her job if the Supervisors and Bridge Painters were laid off.

All four Supervisors who testified at the hearing stated that management asked the Supervisors to report back to them with details from the upcoming Union meeting concerning the possible layoffs. However, their testimony varied slightly. Grant testified that Klein and Powell asked that the Supervisors "let [them] know what happened" at an upcoming Union meeting. (Tr. 27) Avellino testified "I wasn't asked personally but I heard [Rauch] and [Powell] asking a couple of the guys let us know how you make out, you know, with your union." (Tr. 54) Pappas stated that Klein, Rauch, and Powell each indicated that they wanted to hear about the upcoming Union meeting, what transpired, and what approach the Union would take in future negotiations. (Tr. 80) Pappas also testified that Rauch was "very interested" in what happened at the Union meeting the following day. (Tr. 77) Yanolatos testified that management asked some Supervisors to let them know how the union meeting went.

[10] Pappas testified that he felt misled by this information after the fact. However, Grant testified that Pappas allegedly disagreed with Powell during the meeting about the information she provided concerning COBRA.

Each Supervisor testified that the comments of Klein, Rauch, and Powell at the meeting gave them concerns that the Union was not representing their best interest. Grant testified that this information made him "really mad because I feel like the Union wasn't doing their job." (Tr. 23) He stated that he "even asked if we can disassociate ourself with the Union and find somebody who is going to really legally represent us because at that time I thought that the Union was not working in our favor." (Tr. 25) Avellino felt like the "Union might have been able to do more for me, and the way it was presented to me, my Union wasn't doing anything for me." (Tr. 52) Pappas testified that Klein's statement that the Union rejected furloughs offered by the City made him "a little frustrated and angry." (Tr. 76) He "was starting to doubt what the Union's goals were." (Tr. 76) Also, Rauch's comments led him to believe that the Union was "kind of throwing [the Supervisors] under the bus and just letting this layoff happen." (Tr. 77)

As a result of management's decision to limit the meeting to Supervisors, Shop Steward Budge was not permitted to attend the meeting.[11] In advance of the meeting, Babajko told Yanolatos, Budge's supervisor, that Budge was not required at the meeting. The record also indicates that the Supervisors asked for Budge to be brought into the meeting while it was occurring. Avellino and Grant testified that the Supervisors asked why Budge was not present but were told that he was not needed at the meeting. Also, according to Pappas, when Klein was talking about what happened at the October 24 meeting between the Union and OLR, Pappas

[11] Klein, Rauch, and Powell testified that they knew many of the employees at risk for being laid off, and who were also concerned about their job security, were not invited to the meeting. Bridge Painters were not included in the meeting, even though, according to Rauch, roughly 23 of the 28 Bridge Painters would be laid off if the plan was implemented, while some of the Supervisors in attendance would have been retained due to seniority and bumping procedures. However, management decided not to invite the Bridge Painters to the meeting, "because historically when we had full quorum meetings, the meetings would turn out to be chaotic, unruly, and everyone would speak over one another…. So we don't have those type of meetings at all if possible because it just becomes too chaotic." (Tr. 155)

asked Klein if Budge had been present when furloughs were offered to the Union and stated that he may be able to "shed some light" on the offer. (Tr. 73) Klein responded that Budge was not needed. Budge also testified that he had attended some, but not all meetings between management and the Supervisors in the past.

After the meeting, some Supervisors approached Budge with questions as to why the Union rejected the City's furlough offer. Budge was confused by these questions because he did not believe the City had offered furloughs. Avellino and Pappas spoke separately with Angelo Serse, another Union official, after the meeting. Avellino asked Serse if a lawyer could attend the Union meeting, but Serse said he could not bring a lawyer and that Avellino needed to have faith in the Union. Pappas asked what was going on, and why the Union had refused furloughs. Serse said that the City had not offered furloughs, that the Union was negotiating for the Supervisors, and that he was interested in where Pappas received this information.

Grant testified that he received a phone call from Powell the night of October 29, 2014. The call occurred at 10:25 p.m. and lasted 11 minutes. (City Ex. 8) Both Grant and Powell testified that they spoke about a wake they had attended that night for a former coworker's son. Powell testified that she called Grant to talk about the sad occasion, and ask how the man had died. Powell stated that she and Grant knew some of the same people and occasionally attended the same events when DOT employees got together outside of work. Powell did not recall if they spoke about "anything related to work" and did not recall speaking about the Union meeting during the conversation. (Tr. 117-118) However, Grant testified that Powell asked him how the Union meeting went earlier that day. Grant replied that he was not allowed to discuss the Union meeting with her. She responded that she wasn't "the enemy," but Grant still did not tell her about the meeting. (Tr. 30) At that point, according to Grant, Powell said "I didn't make this

call." (Tr. 30) Grant testified that he notified other Union members of the phone call the following morning at work. Shop Steward Budge corroborated Grant's testimony. He testified that Grant reported to him that Powell called him and asked about the Union meeting the following morning.

The following day, October 30, 2013, Rauch left a voicemail for Avellino. The voicemail recording stated, in pertinent part:

> Hey Bobby, how you doing, it's Ron Rauch, [] just wanted to know [] how your meeting went yesterday [your Union meeting] … I mean I'm not looking for details, I just wanted to know if you guys [] had a productive meeting and [ ] if [] there was any kind of reassurances made or anything….

(Union Ex. A) Rauch confirmed that he left the voicemail and said his intention in asking about the Union meeting was to see if they had a productive meeting in light of the Supervisors' questions.[12] Avellino testified that this phone call made him feel "very leery because being a provisional, you really don't want to go against your bosses because they can bounce you out of your job, you know, the next day." (Tr. 60)

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DOT violated NYCCBL § 12-306(a)(1), (2), (3), (4), and (5).[13] DOT allegedly violated NYCCBL § 12-306(a)(1), (4), and (5) by directly dealing with Union

[12] Rauch asserted that he spoke with Avellino on the phone a few times a month.

[13] NYCCBL § 12-306(a) states that:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

members and circumventing the bargaining process with the Union.[14] The Union argues that the Board has previously found that direct dealing violates the NYCCBL in two circumstances: (1) where the employer makes a direct threat of reprisal or promise of a benefit and (2) where the employer intends to or actually impedes reaching agreements with employee organizations, or subverts the employees' right of organization and representation.[15]

Here, DOT intended to coerce the Supervisors into forcing the Union to change its bargaining position, and agree to DOT's proposal. The Union claims this is an "end run around the collective bargaining process." (Union Brief at 12) The Union asserts that DOT discredited the Union's leadership and decision regarding proposed layoffs at the October 29 meeting.

> (2) to dominate or interfere with the formation or administration of any public employee organization;
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;
>
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

[14] The Union asserts that a violation of NYCCBL § 12-306(a)(5) is established in this case because DOT engaged in direct dealing concerning a mandatory subject of bargaining while the collective bargaining agreement was in *status quo* and the parties to the agreement were engaged in negotiation.

[15] The Union asserts that if the Board were to require proof of actual authority to reach an agreement to establish a claim of direct dealing, it would create new criteria that would "devour the whole rule." (Union Brief at 13; Reply ¶ 15) In essence it asserts that in *UFOA*, 69 OCB 5 (BCB 2002), the Board found direct dealing by managers who did not have actual authority to reach an agreement. However, in that case, it was the FDNY Commissioner's communication directly to the union members that the Board found constituted direct dealing. Further, the Union asserts that the City's only support for such criteria comes from an NLRB case that merely asserts that the manager's authority may be a factor in the consideration.

DOT's intentional exclusion of Shop Steward Budge is additional evidence of DOT's subversion of the Supervisors' organizational and representational rights. Budge's presence would have inhibited DOT's effort to manipulate the Supervisors with misinformation. The Union also argues that DOT made promises of benefits to the Supervisors. It asserts that DOT offered the Supervisors furloughs, instead of layoffs, and claimed furloughs would provide certainty of a return to work. DOT also promised them uninterrupted health insurance coverage.

The Union disputes that the October 29 meeting was merely an informational meeting. It points out that no handouts were distributed, and no specific information was provided concerning the layoffs, possible benefits, or COBRA. Furthermore, the meeting did not include the bulk of employees at risk of being laid off. This meeting was held solely to circumvent and undermine the role of the Union in representing its members.

The Union argues that DOT's manipulation of the members is also inherently destructive of the Supervisors' rights under the NYCCBL. DOT's improper negotiations over uninterrupted health coverage and furloughs rise to the level of an unlawful deterrent of the Union's and its members' performance of and engagement in protected activity. It endangers the Union's ability to engage in meaningful bargaining and is inherently destructive conduct. Management made negative comments about the Union and held a meeting closed to Union representatives where management dealt directly with their employees on mandatory subjects to control Union participation. This damaged the Union's reputation and ability to properly represent its members.

The Union argues that such egregious conduct is tantamount to domination and violates NYCCBL § 12-306(a)(2). Through its actions, DOT sought to "corruptly circumvent lawful collective bargaining mandates." (Union Brief at 15) DOT's direct dealing attempted to "poison

the well" such that the Union can no longer participate in arm's length bargaining. (Pet. ¶ 44) DOT also made improper promises of benefits in order to gain the Supervisors' compliance with DOT proposals and spoke critically of the Union to "manufacture outrage" at the Union. *Id.* Finally, the fact that Rauch and Powell contacted two Supervisors to gain information about the Union meeting shows their intention to continue to exert influence over the Supervisors and dominate the Union.

The Union also argues that DOT discriminated against the Supervisors in violation of NYCCBL § 12-306(a)(3). Klein, Rauch, and Powell knew that the Supervisors were active Union members, and that there was a Union meeting scheduled shortly after they engaged the members in direct dealing. Furthermore, management's anti-union animus is apparent where they criticized the Union and then pushed the DOT's bargaining position on the Supervisors. This adversely affected the Supervisors by manipulating them such that they relied on DOT's representations by pressuring the Union at the Union meeting, but would never receive the promised benefits of continued health care coverage. Furthermore, DOT retaliated against the Union, by interfering with its members, for rejecting DOT's bargaining offer at the Labor-Management meeting.

The Union questions the credibility of both Rauch and Powell. Rauch testified that he told Powell of the possible layoffs in July or August of 2013, but Powell testified that she did not learn of the possible layoffs until she was approached by Babajko in October 2013. Furthermore, while Rauch stated in his sworn affidavit that he did not tell the Supervisors that he would lose his own job if they were laid off, he admitted at the hearing that he did make a comment to that effect.

City's Position

The City argues that the Union failed to establish that DOT engaged in direct dealing with the Supervisors in violation of the NYCCBL. The City argues that, in considering whether certain interactions amounted to direct dealing, the Board applies the standards enumerated in the National Labor Relations Act ("NLRA") in evaluating the totality of the circumstances. The record developed in this case shows that DOT did not engage in direct dealing, but rather presented facts concerning the possible layoffs to the Supervisors and outlined what would happen to the employees if various possible events occurred. DOT merely conducted an informational meeting in response to employee inquiries and did not promise any benefit or threaten reprisal in exchange for the Supervisors agreeing, which is clearly permitted under the NYCCBL. The statements made at the meeting were factual, not coercive, and indicated the manner in which DOT intended to act in the future. Even assuming that, as some Supervisors testified, Klein stated that DOT offered furloughs and the Union turned that offer down, this is not direct dealing but the recitation of bargaining history. Additionally, a violation will not be found where the employer conveyed its bargaining position and its underlying reasons for that position, so the communications at issue would not constitute direct dealing even if Klein, Rauch, or Powell told the Supervisors that furloughs are what they want.

Furthermore, the City rejects the Supervisors' testimony that DOT told them to pressure the Union into accepting DOT's bargaining offer, or made promises of continued health care insurance. The City argues that Klein, Rauch, and Powell credibly denied making such statements and also would have nothing to gain from making such statements. Also, the City rejects the Supervisors' testimony that Klein, Rauch, and Powell sought information about the Union meeting. Their testimony concerning statements made at the meeting was inconsistent, and the following phone calls were not an attempt to obtain details regarding the Union meeting.

The transcript of the voicemail Rauch left for Avellino makes clear that he was concerned that the Supervisors were able to get answers to their questions, and did not seek details about the meeting. Additionally, the testimony concerning Powell's call to Grant the night of October 29 made clear that they spoke about a non-work issue.[16]

The City also argues that the Board must consider that Klein, Rauch, and Powell do not have authority to confer benefits, enforce reprisal, or subvert the Supervisors' organizational or representative rights. The City argues that previous cases in which the Board has found direct dealing involved higher level management who were, or could have been, involved in the decision-making process. Klein, Rauch, and Powell do not exert the sort of decision-making authority which would empower them to offer employees furloughs instead of layoffs, or uninterrupted healthcare coverage.

Additionally, DOT did not interfere with, restrain, or coerce any employee, as proscribed by NYCCBL § 12-306(a)(1). In determining if such a violation exists, the Board first considers whether the actions at issue were inherently destructive of important employee rights. The City argues that inherently destructive conduct must carry unavoidable consequences that the employer foresaw and intended. Furthermore, inherently destructive conduct has far reaching effects which interfere with future bargaining, or discriminated against employees purely because of union activity. Also, conduct which directly and unambiguously penalizes or deters protected activity also can be considered inherently destructive.

Here, the actions at issue cannot be considered inherently destructive. The actions at issue were not taken in an effort to interfere with the Union meeting that occurred later that day.

[16] The City argues that Grant's testimony is not credible, in part, because he initially testified that this call occurred after midnight, but Powell's phone bill showed that the call actually occurred at 10:25 p.m.

The informational meeting occurred at the request of the Supervisors, not DOT management, because the Union members had heard of potential layoffs. The City asserts that Shop Steward Budge's absence from the meeting is not relevant, as the employer is permitted to exclude union representation from staff meetings, no disciplinary action was taken at the meeting, and, in any event, Budge was only excluded because the meeting was for Supervisors only. DOT sought to keep the meeting small, so that it did not become chaotic. Arguing that cases cited by the Union are inapposite to this case, the City argued that the managers, who were not involved in the negotiation process, merely conveyed what information they had to worried staff members, and no suggestions were made to undercut the Union or to direct employees to try and convince their representatives to take a deal that they would have no authorization to make.

The City argues that the Union also failed to establish that the employer took any action in discrimination or retaliation for protected union activity. Even assuming the facts as alleged by the Union, a *prima facie* case of retaliation has not been established because there is no evidence that the DOT took an improper adverse action against the Union or its members as the result of protected activity. Rather, the Union merely reasserts its claim that DOT engaged in direct dealing, which is more appropriately considered under other subsections of the NYCCBL.

The City also argues that DOT did not violate NYCCBL § 12-306(a)(2). The City states that the Board has found domination where the employer interferes with a union's formation, coopts its administration such that it is no longer a separate bargaining representative, or where the employer preferences one union over another. For example, the Board found a violation where the employer treated incumbent union officers differently than challenging candidates during a union election. The Union has not alleged any action or disparate treatment which would amount to domination as required by prior Board decisions. There is no evidence that the

City treated certain individuals or other unions better than others, or that the alleged behavior inhibits the Union's ability to represent its employees.

Finally, the employer's actions were taken for legitimate business reasons and were the exercise of management rights pursuant to NYCCBL § 12-307(b). The City argues that it is within an employer's management right to conduct staff meetings and obtain information directly from employees. In this case, DOT attempted to inform employees of possible layoffs and the fact that the information was new to employees because the Union had not communicated with them about the status of their jobs does not constitute a violation of the NYCCBL.

DISCUSSION

NYCCBL § 12-306(a)(1) states that it is an improper practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter."[17] Considering the facts before us, this Board finds that the communications of Klein, Rauch, and Powell during the October 29 meeting, in conjunction with the subsequent phone calls between Rauch and Avellino and between Powell and Grant, interfered with the Supervisors' exercise of their rights under NYCCBL § 12-305 and had a chilling effect on future union activity. However, we also find that this conduct does not

[17] 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…. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

constitute direct dealing. Furthermore, the record before the Board does not establish a violation of NYCCBL § 12-306(a)(2), (3), (4) or (5). Therefore the Union's petition is granted, in part, and denied, in part.

The Board has previously found that an employer violates NYCCBL § 12-306(a)(1) when communication with employees, regardless of the employer's motive, contains an element of coercion because of its potentially chilling effect on union activity that is inherently destructive of rights protected by the NYCCBL. *See OSA*, 6 OCB2d 26 (BCB 2013) (finding certain statements by an assistant commissioner "deterred employees from engaging in protected activity and diminished the Union's capacity to effectively represent its members") (citing *DEA*, 4 OCB2d 35 (BCB 2011)); *see also CSTG, L. 375*, 3 OCB2d 14 (BCB 2012) (finding a union member's reasonable perception that a statement by a superior was an implicit threat and demand to drop a grievance was inherently destructive regardless of the superior's motive).

There is no dispute that, at the October 29 meeting, Klein, Rauch, Powell met with the Supervisors and discussed a possible reduction in force that could affect the Supervisors. With regard to specific statements made at the meeting, the City's witnesses and the Union's witnesses provided diverging testimony. In general, unless noted below, we credit the Supervisors' testimony as it was more consistent, and thus more reliable. We find that Klein and Rauch attempted to persuade the Supervisors to pressure the Union to accept DOT's offer to seasonalize the titles. Despite their stated intention to merely provide the Supervisors with answers to their questions, the record indicates that Klein and Rauch's statements made at that meeting were coercive. Klein was not at the October 24 labor-management meeting and he admitted that he knew that the parties were still bargaining over these issues. Nevertheless, he told the Supervisors that DOT offered furloughs because DOT was fighting to keep them, but the "union

flat out turned them down" and refused to bargain. (Tr. 52, 207) According to the Supervisors, Klein also told them that furloughs are better "because you know you have a job to come back to." (Tr. 52) Rauch said he would lose his job if the Supervisors lost theirs. He also encouraged the Supervisors to demand that the Union accept furloughs because it would be in their best interest and told the Supervisors not to accept layoffs; he said furloughs were the best deal they were going to get.

Furthermore, at the end of the meeting, Klein, Rauch, and Powell asked the Supervisors to report back to them what took place at the Union meeting. While Klein, Rauch, and Powell denied making such a request, we credit the consistent testimony of the Supervisors in conjunction with the fact that after the Union meeting both Rauch and Powell asked the Supervisors what had occurred. Rauch called Avellino after the Union meeting to find out what happened and if the Union had made any "reassurances." (Union Ex. A) Further, we credit Grant's recollection of his conversation with Powell on the night of October 29, that Powell asked him about what transpired at the Union meeting. Grant's testimony was clear and was also bolstered by Shop Steward Budge, who testified that Grant informed him of the conversation with Powell concerning Union business the following day. Powell, on the other hand, did not recall if they spoke about work, and did not recall asking Grant about the Union meeting.

While the DOT may have selected which employees to address based on a legitimate need to maintain order while discussing a sensitive subject, the result was to single out employees, three of whom were provisionally appointed to their current title, who were concerned about the security of their jobs. In fact, Avellino testified that the phone call from Rauch made him feel "very leery because being a provisional, you really don't want to go against your bosses because they can bounce you out of your job, you know, the next day." (Tr.

60) Considering the totality of the circumstances, the statements made by Klein and Rauch disparaging the Union's conduct at the bargaining table and urging the Supervisors to take a specific stance at the Union meeting, in conjunction with the subsequent phone calls in which Rauch and Powell applied further pressure on the Supervisors to report on what happened at the Union meeting, was coercive in nature and interfered with the employees' exercise of their rights under the NYCCBL. We therefore find that these actions violated NYCCBL § 12-306(a)(1).

Consistent with the Taylor Law and the NLRA, the Board has interpreted NYCCBL § 12-306(a)(1) to also prohibit an employer from engaging in direct dealing with Union members. *See UFT*, 4 OCB2d 4 (BCB 2011); *UFOA*, 69 OCB 5 (BCB 2002).[18] However, the law does not prevent employers from communicating with employees, and therefore direct communication with Union members during negotiations is not a *per se* violation of the NYCCBL. In fact, the Board has incorporated NLRA §8(c) into its analysis of direct dealing allegations. *See PBA*, 77 OCB 10, at 14 (BCB 2006); *CIR*, 49 OCB 22 (BCB 1992). Section 8(c) states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

NLRA, 29 U.S.C. § 158(c) (2014). Specifically, the Board has acknowledged that an employer may distribute memoranda, send informational emails, or hold informational meetings with

[18] In finding a violation of NYCCBL § 12-306(a)(1) in this case, we highlight a difference between improper direct dealing and other conduct which interferes with employees' rights under the NYCCBL. Employer conduct constituting direct dealing – attempting to directly negotiate terms and conditions of employment with employees and thus circumventing the employees' designated bargaining agent – is distinguishable from communication that interferes with, or potentially chills the exercise of, employees' rights under the NYCCBL through disparaging or coercive comments, but does not attempt to create an agreement circumventing the Union.

employees "about, for example, the status of negotiations, the proposals made, its positions and opinions, and its reasons for those" without violating the NYCCBL. *PBA*, 77 OCB 10, at 13 (BCB 2006). *See also CEU, L. 237*, 6 OCB2d 34 (BCB 2013) (finding no violation where an employer sent a series of three emails which concerned the need for cost savings and discussed possible layoffs, acknowledged the union's necessary role in the process, did not include a promise or threat, and did not attempt to engage employees in direct negotiation); *DC 37*, 5 OCB2d 1, at 15 (BCB 2012) (finding that memoranda distributed to employees, and informational meetings, did not contain a promise of benefit or threat of reprisal and the employer did not demonstrate any effort to engage employees in negotiation).

However, the Board has found that an employer interferes with employees' rights under the NYCCBL "when in its communications with employees, it obtains or endeavors to obtain the employee's agreement to some matter affecting a term or condition of employment, whether by making either a threat of reprisal or promise of benefit, or otherwise subverting the members' organizational and representational rights." *DC 37*, 6 OCB2d 3, at 13 (BCB 2013) (internal quotations omitted); *see also PBA*, 77 OCB 10, at 14 (BCB 2006) (quoting *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, at 134 (2d Cir. 1986)); *CIR*, 49 OCB 22 (BCB 1992).

In essence, direct dealing is "characterized by actions that attempt to mislead employees or to persuade them to believe that they will best achieve their objectives directly through the employer rather than through the union; in other words, the employer, by what it says or does, attempts to establish a negotiating relationship with unit employees to the exclusion of the employees' bargaining agent." *PBA*, 77 OCB 10, at 14 (BCB 2006) (citing *Americare Pine Lodge Nursing and Rehabilitation Center v. NLRB*, 164 F.3d 867 (4th Cir. 1999)).

Therefore, to find direct dealing in this case, the Union needed to establish that DOT impermissibly bypassed the Union for the purpose of negotiating or attempting to negotiate directly with the Supervisors to reach an agreement on the layoffs or seasonalization. *See DC 37, L. 2507*, 2 OCB2d 28, at 10 (BCB 2009) (quoting *Dutchess Comm. College*, 41 PERB ¶ 3029, 3129 (2008) (other citations omitted)) (finding that the employer did not make a bargaining offer to the employees but, rather, stated its interpretation of an agreement the parties previously memorialized). On the record before us, this Board finds that the Union failed to prove that the DOT engaged in direct dealing.

Considering the totality of the circumstances, we find that Klein, Rauch, and Powell did not attempt to engage the Supervisors in direct negotiation. Indeed, Klein, Rauch, and Powell attempted to persuade the Supervisors that furloughs, or the seasonalization of the title, were in their best interest. However, none of these managers were in a position to change or adjust the manner in which any staff reduction would occur or how it would impact the Supervisors, even if they successfully persuaded the Supervisors that furloughs were preferable to layoffs. Further, it is clear that Klein, Rauch, and Powell instructed the Supervisors to discuss these issues with the Union and did not try to directly secure an agreement with these bargaining unit members.[19] *Compare UFT*, 4 OCB2d 4, at 22 (BCB 2011) (Board found direct dealing where a letter issued by employer agencies "invited [employees] to propose possible alternate divisions of their working hours if they were not satisfied with [the proposal] prescribed in the letter" and managers and employees discussed and arranged alternative schedules); *UFOA*, 69 OCB 5 (BCB

[19] Additionally, it is clear that the parties did not enter into an extra-union agreement because no benefit was actually conferred upon the Supervisors as a result of the communications at issue. *See Patrolmen's Benevolent Assn. v. NYC Off. of Collective Barg.*, 2012 NY Slip Op. 50997(U), at 6 (Sup. Court NY Co. May 29, 2012) (finding direct dealing where direct communication with employees led employees to enter into an "extra-union agreement concerning the [promised] benefits").

2002) (FDNY Commissioner's written communication directly to employees concerning a current bargaining proposal was found to be coercive and contain a promise of benefits if the employees accepted the Commissioner's bargaining offer).

Moreover, Klein, Rauch, and Powell did not make a promise of benefit in exchange for the Supervisors agreement to any bargaining proposal regarding possible layoffs. In this regard, we do not find that Powell promised the Supervisors additional health insurance coverage if they agreed to furloughs. Powell specifically denied promising healthcare to employees in the event of a furlough. We also credit her testimony that she answered the Supervisors' questions concerning health insurance, informed them of the possibility of purchasing COBRA, and offered to provide them with the NYCAPS phone number for them to seek out additional information, but did not promise healthcare to employees in the event of a furlough. Her testimony was corroborated by Rauch and, in part, by Grant when he acknowledged that Powell and Pappas discussed COBRA at the meeting. Unlike their testimony concerning Klein and Rauch's statements, the Supervisors' testimony regarding Powell's statements was not consistent. Avellino testified to his perception of what Powell meant, but did not testify to any direct statements made by Powell at the meeting. He thought Powell's comments meant that "we would have benefits and we would have a job with the furlough." (Tr. 65) Similarly, Yanolatos and Pappas denied that Powell mentioned purchasing COBRA and asserted that Powell stated that if they accepted furloughs, they would be able to keep their health coverage. However, Grant recalled that Pappas challenged information Powell provided about COBRA during the meeting. Thus, we credit Powell's testimony and find that she did not promise healthcare to the Supervisors if they agreed to furloughs.

The Union also alleges that the DOT violated NYCCBL § 12-306(a)(2) because its actions during, and after, the October 29 meeting were egregious and equivalent to domination.[20] The Board has found violations of NYCCBL § 12-306(a)(2) in instances where "the record shows preferential treatment of one union over another, interference with the formation or administration of the union, or assistance to the union to such an extent that it must be deemed the employer's creation." *DC 37, L. 2507*, 2 OCB2d 28, at 13 (BCB 2009) (quoting *SBA*, 75 OCB 22, at 20 (BCB 2005)). Here, while the October 29 meeting and subsequent phone calls interfered with the Supervisors' protected rights, they did not dominate the Union or interfere with its formation or administration. Therefore, this portion of the Union's petition is dismissed.

With respect to the Union's allegation that DOT violated NYCCBL § 12-306(a)(3), the Board finds that the Union failed to establish a *prima facie* case of discrimination or retaliation based on union activity. To establish a *prima facie* case, a petitioner must demonstrate that:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19. *See Colella*, 7 OCB2d 13 (BCB 2014); *CSTG, L. 375*, 7 OCB2d 9 (BCB 2014). Moreover, a petitioner may not rely on merely "speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22 (BCB 2005). Rather, "allegations of improper motivation must be based on statements of probative facts." *Ottey*, 67 OCB 19, at 8 (BCB 2001); *see also Kaplin*, 3 OCB2d 28 (BCB 2010).

On the record before us, the Union did not prove sufficient facts to establish a *prima facie* case of retaliation or discrimination. To the extent that the Union argues that DOT's actions

[20] NYCCBL § 12-306(a)(2) states that it is an improper practice for an employer to "to dominate or interfere with the formation or administration of any public employee organization."

violated NYCCBL § 12-306(a)(3), nothing in the record indicates that the Supervisors suffered an adverse employment action. See DC 37, L. 983, 6 OCB2d 10, at 31-32 (BCB 2013) (quoting *CSTG, L. 375*, 3 OCB2d 14, at 16 (BCB 2010). The Union appears to argue that, because the Union rejected DOT's bargaining proposal at the October 24 Labor-Management meeting, the Supervisors were subjected to the October 29 meeting and the subsequent phone calls questioning Grant and Avellino about the Union meeting. While we find these actions were coercive and interfered with the Supervisors' exercise of their NYCCBL § 12-305 rights, we do not construe them to have had a negative impact on the Supervisors' employment. Accordingly, the Board dismisses the Union's allegations as they relate to NYCCBL § 12-306(a)(3).

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 filed herein be, and the same hereby is, granted in relation to the alleged violations of §12-306(a)(1) of the NYCCBL; and it is further

ORDERED, that the improper practice petition filed herein be, and the same hereby is, denied in relation to the alleged violations of § 12-306(a)(2), (3), (4), and (5) of the NYCCBL; and it is therefore

ORDERED, that the Respondents shall cease and desist from all efforts to interfere with, restrain or coerce public employees in the exercise of their rights under the NYCCBL.

ORDERED, that the New York City Department of Transportation post appropriate notices of this decision for no less than thirty (30) days in locations throughout the New York City Department of Transportation.

Dated: November 10, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
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 7 OCB2d 25 (BCB 2014), determining an improper practice petition between the International Union of Painters and Allied Trades, Local 806 and the New York City Department of Transportation and the City of New York.

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 filed herein be, and the same hereby is, granted in relation to the alleged violations of §12-306(a)(1) of the NYCCBL; and it is further

ORDERED, that the improper practice petition filed herein be, and the same hereby is, denied in relation to the alleged violations of § 12-306(a)(2), (3), (4), and (5) of the NYCCBL; and it is therefore

ORDERED, that the Respondents shall cease and desist from all efforts to interfere with, restrain or coerce public employees in the exercise of their rights under the NYCCBL.

ORDERED, that the New York City Department of Transportation post appropriate notices of this decision for no less than thirty (30) days in locations throughout the New York City Department of Transportation.

The New York City Department of Transportation
(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.