PBA, Gravius & Williamson v. City & NYPD, 73 OCB 13 (BCB 2004) [Decision No. B-13-2004 (IP)]

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

-between-

PATROLMEN'S BENEVOLENT ASSOCIATION, and POLICE OFFICERS DANIEL GRAVIUS and SCOTT WILLIAMSON,

Petitioners,

Decision No. B-13-2004
Docket No. BCB-2374-03

-and-

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

Respondents.
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INTERIM DECISION AND ORDER

On December 24, 2003, the Patrolmen's Benevolent Association ("PBA" or "Union"), filed a verified improper practice petition alleging that the City of New York and the Police Department of the City of New York ("City" or "NYPD") violated § 12-306(a)(1), (2), (3), and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union alleges that an NYPD Assistant Chief retaliated against two PBA Trustees, Police Officers Daniel Gravius and Scott Williamson, for publicly voicing their displeasure over the transfer of a precinct Delegate, undermined Union leadership, interfered with internal union affairs, inhibited free exercise of employee rights, and prevented Gravius and Williamson from adequately representing their membership. The City filed a motion to dismiss, contending that most of the petition was untimely and that the remaining

timely allegations failed to state a claim.[1] This Board finds that most of the Union's allegations, including those arising under NYCCBL § 12-306(a)(4), are untimely and that the Union failed to state a claim under NYCCBL § 12-306(a)(3), but that the remaining allegations under NYCCBL § 12-306(a)(1) and (2) are sufficient to state a claim. Therefore, we grant the motion to dismiss in part and deny it in part.

THE UNION'S ALLEGATIONS OF FACT

Petitioner Scott Williamson is a New York City Police Officer who has served as the Bronx A Trustee from 1996 to the present. He was reelected to a new four-year term in June 2003. Petitioner Daniel Gravius is a New York City Police Officer who has served as the Bronx Financial Secretary of the PBA from July 1999 to the present. He was also reelected to a new four-year term in June 2003.

The Union asserts that prior to March 2003 Gravius and Williamson enjoyed a cordial, open relationship with Chief Izzo, the Commanding Officer of Patrol Borough Bronx. In February 2003, Police Officer Joseph Anthony, a 50th Precinct Union Delegate, was transferred from the Bronx to Queens. On March 5, 2003, Gravius addressed a roll call at the 50th Precinct to inform the police officers that the Union was investigating a possible retaliation claim regarding Anthony's transfer. On March 10, the 50th Precinct Integrity Control Officer ("ICO") left a voice message for Gravius, informing Gravius that neither he nor Williamson could enter the 50th Precinct without permission.

[1] Pursuant to § 1-12(l) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1)("OCB Rules"), we have considered the moving papers, answering papers, and the reply for purposes of this decision.

On March 18, 2003, Williamson and Gravius attempted to enter the 50th Precinct to update officers on current Union events. NYPD threatened them with suspension for disobeying the ICO's mandate not to enter without permission. The Mayor's Office of Labor Relations intervened, preventing the Officers' suspension. Gravius and Williamson spoke with Deputy Commissioner Beirne, who expressed a desire to resolve the situation by scheduling a meeting. The meeting was canceled; subsequently, Petitioners made several inquiries about re-scheduling, but a new date was not set. According to the Union, Beirne's attempt to schedule a meeting induced them to refrain from filing charges at that time.

On April 8, 2003, Gravius attempted to say hello to Izzo but was snubbed because, according to the Union, Izzo was angry that Gravius and Williamson did not get suspended for disobeying the ICO's orders. The Union alleges that from that day forward, Gravius and Williamson attempted to speak to Izzo regarding various Union matters but were constantly rebuffed. Over the next few months, Izzo engaged in the following actions: he initially refused to speak or meet with the two Officers; he instituted a new requirement that Gravius and Williamson submit a written memorandum informing him of the topics to be discussed prior to any requested meeting with him; he did not take their phone calls; and he barred them from attending an NYPD luncheon at the Bronx Botanical Gardens. The Union asserts that although Izzo stonewalled Gravius and Williamson, he continued to communicate with the third Bronx Trustee, who had not publicly voiced his displeasure regarding Anthony's transfer. The Union also asserts that Izzo showed this favoritism during the course of Union elections, and the third Bronx Trustee was on an opposing slate from that of Gravius and Williamson.

In late August 2003, at a delegate's convention, Gravius spoke again with Deputy

Commissioner Beirne, who expressed a desire to resolve the issue concerning Izzo in a meeting. A meeting was not scheduled.

On September 14, 2003, Gravius responded to a police shooting involving four police officers. While present with the officers, an NYPD Captain approached Gravius and informed him that Izzo wanted to speak to the four officers privately outside of Gravius's presence. He did not specify why and then physically blocked Gravius from entering Izzo's office. The Union asserts that Izzo attempted to embarrass Gravius and diminish him in the eyes of his constituents by failing to articulate the purpose of the meeting and by excluding him.

On October 10, 2003, NYPD transferred Izzo, who was named Commanding Officer of the Narcotics Division.

As a remedy, the Union requests that the Board issue an order directing Respondents to cease and desist from retaliating against Union representatives, to ensure that PBA leadership may adequately represent its constituents, to recognize the duly elected representatives of the PBA, and to reinstate an open line of communication with Union officials regarding union matters.

POSITIONS OF THEPARTIES

City's Position

The City argues that of all the allegations in the petition only the events of September 14, 2003, when Gravius was barred from Izzo's office, are timely. Despite the Union's contention that Izzo's conduct constitutes a continuous violation, Petitioners have not established that the events outside the four month statute of limitations are significantly related to constitute a

continuing course of conduct. Rather, the incidents are discrete and unrelated allegations regarding separate conduct.

Although the Union claims that it was induced by Deputy Commissioner Beirne to refrain from filing an improper practice petition, NYPD's good faith conversations regarding labor-management issues could not reasonably be construed as an effort to restrain the Union's rights under the NYCCBL. The only situation in which the Union's reliance on management would be sufficient to toll the statute of limitations is if the City had made firm representations of a resolution upon which the Union may reasonably relied. Here, Petitioners provide no evidence of an assurance of an imminent resolution.

The Union's new claim in their opposition to the motion to dismiss – that NYPD instituted a new policy concerning Gravius's and Williamson's speaking with Beirne about labor issues in violation of NYCCBL § 12-306(a)(1) and (4) – must be dismissed in its entirety because it was not alleged in the petition and is untimely. Petitioners have also failed to show that any action taken by NYPD with respect to Gravius and Williamson constituted improper interference or discrimination in violation of NYCCBL § 12-306(a)(1) and (3). Finally, Petitioners have failed to allege any specific factual information as to how any action taken by NYPD has dominated or interfered with the administration of the Union, in violation of § 12-306(a)(2).[2] Any remaining claims should be dismissed as speculative.

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[2] NYCCBL § 12-306(a) provides, in relevant part:
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;
(2) to dominate or interfere with the formation or administration of any public employee
(continued...)

Union's Position

The Union argues that on a motion to dismiss, the moving party concedes the truth of the facts alleged and Petitioners are entitled to every favorable inference from those facts. Such a motion should be granted only if the Board concludes that evidence produced by the charging party, and all inferences therefrom, is plainly insufficient. Here, Petitioners have alleged ample facts evidencing a pattern of retaliatory conduct and interference.

The Union argues that Respondents should be estopped from raising the statute of limitations since NYPD induced Petitioners to refrain from filing an improper practice when, in March 2003, Deputy Commissioner Beirne assured them that in the interest of sound labor relations he would schedule an informal meeting with the relevant parties. Despite several inquiries over the next few months, the meeting never took place. Only after Izzo's October 2003 transfer did the Union realize that a meeting would not take place. Petitioners reasonably relied on Beirne's representations and refrained from filing a charge. Thus, equity dictates that the statute of limitations be tolled from the date of Beirne's assertions until it became apparent that the issues would not be informally resolved.

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[2](...continued)
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. . . .

NYCCBL § 12-305 provides, in relevant 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 . . . .

In the alternative, acts that occurred more than four months prior to the filing of the petition may be used as background information to show a continuing course of conduct. Thus, the events before August 24, 2003, demonstrate Izzo's retaliatory intent and provide the inference of improper motive for his actions on September 14, 2003, and for his continued refusal to acknowledge the representatives.

Even if the Board finds most of the allegations untimely, the remaining allegations provide a sufficient basis for a claim. For example, regarding the September 14, 2003, incident, under *National Labor Relations Board vs. Weingarten*, 420 U.S. 251 (1975), police officers are entitled to representation in any interview that may lead to discipline. The Union also contends that traditionally, and in accordance with statutory rights and rights afforded in the collective bargaining agreement, police officials permit union representation when they interview bargaining unit employees following a police-involved shooting. Additionally, Izzo's decision to prevent Gravius from accompanying the officers into the meeting, coupled with evidence of a pattern of retaliatory conduct, creates an inference of improper motive and establishes a violation of the NYCCBL.

Furthermore, Izzo's refusal to acknowledge Gravius and Williamson made it impossible for the two representatives to represent their membership properly. Moreover, Izzo favored a rival Bronx Trustee during the course of Union elections. By isolating two of the three duly elected Bronx Trustees and refusing to communicate with them regarding Union matters, Respondents created obstacles to the exercise of employee rights under NYCCBL § 12-305, in violation of NYCCBL § 12-306 (a)(1), (2), and (3).

Finally, NYPD violated NYCCBL § 12-306(a)(1) and (4) when Izzo refused to confer

with Gravius and Williamson and when, in April 2003, Izzo unilaterally implemented a new policy that they submit written memoranda before any meeting would take place. This policy affects terms and conditions of employment and is a mandatory subject of bargaining.

DISCUSSION

As a preliminary matter, we will determine whether the petition is timely.

NYCCBL § 12-306(e) provides in relevant part that:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

See also Section 1-07(b)(4), formerly § 1-07(d), of the OCB Rules.

A majority of the events described in the Union's petition occurred more than four months before it was filed on December 24, 2003, but the Union argues that the statute of limitations should be tolled as a matter of equitable estoppel and, in the alternative, that the NYPD's violations were in the nature of a continuing violation.

PERB has held that an employer is estopped from asserting the affirmative defense of timeliness when the Union's belief that the matter would be resolved is reasonably attributable to statements and/or actions by the employer. *Great Neck Water Pollution Control Dist.*, 27 PERB ¶ 3057 (1994) at 3134; *see also County of Onondaga*, 12 PERB ¶ 3035 (1979), *conf'd*, 77A.D.2d 783, 13 PERB ¶ 7011(4th Dep't 1980). When determining whether a union's belief in a particular case that a matter would be resolved was reasonable, PERB has examined whether the

employer had expressly requested the Union to refrain from filing charges or whether the Union believed that actions correcting the alleged violation had been taken.

In the instant matter, the Union's purported belief, based upon Beirne's statement that he would like to resolve the matter, was not reasonable. Even the most favorable interpretation of events following Beirne's statements reveals that Gravius and Williamson were aware that the initial meeting, discussed in March 2003, had been canceled and that their requests for a new meeting over the ensuing months were not heeded. The Union recognizes that the parties had not purported to resolve anything. Beirne had simply mentioned the desire to meet to attempt a resolution, but the Union waited until December 24, 2003, more than nine months without a meeting being scheduled, to file the petition. Accordingly, we will not toll the statute of limitations under the doctrine of equitable estoppel. Therefore, we dismiss as untimely the claims that arose prior to August 24, 2003. The untimely claims include the allegations that Izzo retaliated against Gravius and Williamson and failed to bargain by refusing to meet with them between March and August 2003, failed to bargain by implementing a new requirement that Gravius and Williamson submit written memoranda before seeking to meet with Izzo, and interfered with the Union by favoring one candidate over another during a Union election, in violation of NYCCBL § 12-306(a)(1), (2), (3) and (4).

When a petition, as here, alleges a continuing violation of the NYCCBL, evidence of wrongful acts which are determined to be untimely may be admissible for purposes of background information when offered to establish an ongoing and continuous course of violative conduct. *Robinson*, Decision No. B-29-2001 at 5; *Local 1549, District Council 37*, Decision No. B-25-89 at 20. Therefore, the events alleged to have occurred between March and August

24, 2003, are admissible as background information. While testimony concerning Izzo's actions prior to August 24, 2003, is not actionable, it may have bearing upon the NYPD's motivation for subsequent acts occurring within the statute of limitations and included within the scope of the petition.

Next, we will consider whether those allegations that are timely are sufficient to state claims of improper practice under the NYCCBL. Specifically, we will consider whether the allegations that, subsequent to August 24, 2003, Izzo had Gravius physically barred from the September 14, 2003, interview of four officers; that he continued to ignore requests by Gravius and Williamson to meet with him concerning Union business; and that he continued to generally favor the third Bronx Trustee over Gravius and Williamson, state claims under NYCCBL § 12-306(a)(1), (2), and (3).

On a motion to dismiss, the facts alleged by the petitioner must be deemed to be true, and the only question presented for adjudication is whether a cause of action has been stated. *McAllan*, Decision No. B-12-84 at 6; *Hanan*, Decision No. B-25-81 at 7. At this juncture, it is not the function of this Board to resolve questions of credibility and weight; those questions are properly determined after an evidentiary hearing. *Hanan,* Decision No. B-25-81 at 7. If a finding is made that the petition, on its face, does state a cause of action, then the respondent has an opportunity to submit an answer. *McAllan*, Decision No. B-12-84 at 6.

We find that Petitioners have stated a claim of interference under NYCCBL § 12-306(a)(1). An employer violates this section when it attempts to decide which union representative it chooses to deal with in connection with employees' NYCCBL § 12-305 rights. *Local 376, District Council 37*, Decision No. B-6-2004. In *Lehman*, Decision No. B-23-82, we

denied a motion to dismiss on a NYCCBL § 12-306(a)(1) claim. We held that an employer's denying its employees a union representative's services in assisting with rights arising under NYCCBL § 12-305 constitutes a *prima facie* interference with those rights. *Id.* at 11. This interference was not ameliorated by the employer's permitting free access to other representatives.

In the instant matter, the Union has alleged that Izzo continually and intentionally ignored Gravius and Williamson in favor of the third Bronx Trustee, and barred them from representing employees on September 14, 2003. Since it is alleged that the employer attempted to choose which union representative it would deal with in connection with employees asserting rights arising under NYCCBL § 12-305, we find that the Union has stated a claim under NYCCBL § 12-306(a)(1).[3]

The Union has also stated a claim under NYCCBL 12-306(a)(2). Domination or interference within the meaning of NYCCBL § 12-306(a)(2) has been found in situations in which there is 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 the union must be deemed the employer's creation. *Local 376, District Council 37*, Decision No. B-6-2004 at 12; *Local 237, IBT*, Decision No. B-12-2001 at 9-10. Moreover, we have held that favoring one faction or candidate for union office over another is violative of NYCCBL § 12-306(a)(2).

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[3] The petition refers to *Weingarten* rights (adopted by this Board in *Assistant Deputy Wardens*, Decision No. B-9-2003). Since the Union has not alleged that the officers involved in the September 14, 2003, incident asked for representation or that they were denied that representation, a *Weingarten* right has not been properly asserted. The right to union representation under *Weingarten* belongs to and may only be invoked by the employees who are summoned to an interview, not the Union. *See Assistant Deputy Wardens*, Decision No. B-9-2003 at 13.

Seabrook, Decision No. B-7-95 at 10. Here, although any claim regarding interference with the PBA election, held in June 2003, is untimely, the Union alleges that after the election and until his transfer in October 2003, Izzo continued to favor a delegate on a rival slate over Gravius and Williamson, and applied an access policy pertaining only to them, thereby interfering with the administration of the Union under NYCCBL § 12-306(a)(2).

We find, however, that the allegations of the petition fail to state a claim under NYCCBL § 12-306(a)(3). While NYPD was aware of Union activity by Gravius and Williamson, we find no allegations of discrimination against a public employee within the meaning of the law. *See City of Salamanca*, 18 PERB ¶ 3012 (1985) (setting forth the two-part test used to determine whether NYCCBL § 12-306(a)(3) has been violated); *Bowman*, Decision No. B-51-87 (adopting the *Salamanca* test). Neither Gravius nor Williamson experienced any adverse employment action as a consequence of their representation. *See Local 376, District Council 37*, Decision No. B-6-2004 at 13; *Cf. Local 1182, Communication Workers of America*, Decision No. B-26-96 at 21 (violation of NYCCBL § 12-306(a)(3) found when union representative's license was checked as a result of his representation). Any adverse effect upon their representational ability is covered by their claim under NYCCBL § 12-306(a)(1) and does not constitute a separate claim under 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 motion to dismiss, filed by the City of New York, in the matter of BCB-2374-03 is granted in relation to the claims stemming from NYCCBL § 12-306(a)(3) and (4), and denied in relation to those timely claims stemming from NYCCBL § 12-306 (a)(1) and (2), as determined herein.

Dated: July 29, 2004
New York, New York,

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER