DC 37, L. 376 v. City & DEP, 73 OCB 6 (BCB 2004) [Decision No. B-6-2004 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----------x

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, LOCAL 376,

Petitioner,

Decision No. B-6-2004

Docket No. BCB-2349-03

-and-

THE CITY OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

----------x

DECISION AND ORDER

On July 1, 2003, District Council 37, AFSCME, Local 376 ("DC 37," "Local 376" or "Union") filed a verified improper practice petition against the Department of Environmental Protection and the City of New York ("DEP" or "City"). The Union alleges that DEP violated § 12-306(a)(1), (2) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by refusing to deal with a Local 376 representative at a Step II hearing. The City argues that the petition must be dismissed because the facts fail to establish a violation of § 12-306(a)(1), (2) or (3). This Board finds that DEP violated NYCCBL § 12-306(a)(1) by attempting to discourage and inhibit the members of the Union from selecting the Local's Vice President as a representative. However, we dismiss the claimed violations of NYCCBL § 12-306(a)(2) and (3).

BACKGROUND

On June 3, 2003, Carol R. de Fritsch, the Director of Labor Relations at DEP, called Chandler Henderson, a union representative for DC 37, to schedule a Step II hearing for two grievants who were challenging disciplinary charges for the refusal of overtime and a recommendation for the penalty of forfeiting vacation time. De Fritsch requested that the hearing be scheduled on June 5, 2003, so that Loretta Townsend, the Assistant Disciplinary Counsel assigned to the case, could close the case before she left the agency, at the end of that week.

De Fritsch asked who would be accompanying Henderson to the hearing. Henderson told her that if the hearing was scheduled on a Monday or Wednesday, Gene DeMartino, the President of Local 376, would attend, and if the hearing were on Tuesday or Thursday, Thomas Kattou, the Vice-President of Local 376, would attend. According to Henderson, de Fritsch stated that Thomas Mollo, the Secretary/Treasurer for Local 376, was going to be released anyway for a health and safety meeting on the morning of June 5, and she wanted him to attend the hearing afterwards instead of Kattou.[1] According to de Fritsch, she "expressed dismay" and voiced concern about Kattou's "well-known behavior" by saying, "Oh God, not Tommy, is there anyway to avoid that?" (Tr. 90-91, 94.)[2] De Fritsch testified that she then asked if Mollo could also attend. Stating that Mollo either could not or would not attend, Henderson asserted that it was not de Fritsch's prerogative to decide who represents the Union's members at the hearing.

---

[1] Kattou was also scheduled to attend the health and safety meeting on the morning of June 5, 2003.

[2] Henderson, DeMartino, de Fritsch and Townsend testified at a hearing held at the Office of Collective Bargaining ("OCB") on January 22, January 29, and February 5, 2004. Numbers in parentheses refer to the hearing transcript, hereinafter abbreviated as "Tr."

On the same day, June 3, 2003, Mollo called DeMartino and said that de Fritsch had asked him to represent the grievants at the hearing. DeMartino informed Mollo, who had never represented members at a grievance hearing, that he was not a grievance representative and that Henderson and Kattou would be handling the hearing.

On the morning of June 5, 2003, de Fritsch spoke with Mollo at the health and safety meeting. According to de Fritsch, she asked him if it would be possible for him to attend the hearing to "keep everything calm." (Tr. 96.) Mollo responded that he did not know but that he would ask.

Shortly thereafter, DeMartino received a second call from Mollo. Mollo said de Fritsch had told him that he would be representing the grievants at the hearing because he was at the health and safety meeting. DeMartino responded that Mollo was not to represent the grievants, that Henderson and Kattou would be able to handle the hearing, and that DeMartino would straighten things out with de Fritsch.

DeMartino then called de Fritsch. According to DeMartino, she confirmed Mollo's statements and explained that she wanted Mollo at the hearing but did not want Kattou. DeMartino stated that de Fritsch told him that if he insisted that Kattou would attend, she would call DC 37 and request that Kattou not appear. DeMartino told her that it was not DC 37's or DEP's responsibility to decide who represents members of Local 376. At this point, de Fritsch stated that Kattou had better behave.

De Fritsch, on the other hand, vehemently denied having threatened to call DC 37. She testified that she asked only if it would be possible for Mollo to come to the hearing. She told DeMartino that Mollo seeks the middle ground and has a calming effect and that she had some

concerns about Kattou. She said, "Here's hoping Tommy behaves." (Tr. 100.)

Later that day, June 5, 2003, de Fritsch held the Step II hearing. Townsend was DEP's counsel and Richard Prado, a Superintendent at DEP, was a witness. Henderson and Kattou represented the grievants.

According to Henderson, when they entered the hearing room with the grievants, de Fritsch said, "I told you I didn't want to see him here." (Tr. 12-13.) At the OCB hearing, neither de Fritsch nor Townsend testified as to any remarks upon the arrival of the Union delegates and members.

Henderson was the primary advocate on behalf of the grievants. While questioning Prado, Henderson asked Kattou if he had anything to add. Kattou challenged DEP's position that the grievants were required to work the overtime in question because of a policy that requires three-man crews in the evening. He noted that in a prior hearing, the Union had defended grievants who had refused to work overtime in two-man crews. In that case, DEP had rejected the Union's argument that three-man crews were required.

According to Henderson, although Townsend did not raise an objection, de Fritsch responded to Kattou by stating, "Here we go, you're bringing up comments that aren't relevant, this has nothing to do with this hearing." (Tr. 13.) With a laid back demeanor, Kattou continued to try to get his point across. De Fritsch "kept saying how it wasn't relevant, here we go again with your nonsense and a few other choice words."[3] (Tr. 16.)

---

[3] De Fritsch had also presided over a hearing for two other members who had received a forfeiture of five vacation days for the same offense as that charged against the grievants. The other members were represented by Henderson and DeMartino. According to Henderson, DeMartino had made a similar argument in the prior grievance proceeding and but de Fritsch had not responded in the same way she did with Kattou.

De Fritsch, on the other hand, testified that she asked Kattou to refrain from interrupting and he became agitated and angry. He pounded the table with a clenched fist. A few minutes later, when Townsend tried to speak, Kattou pointed his finger at her and said angrily, "You can't have it both ways."[4] (Tr. 102, 134-135.) De Fritsch again asked Kattou not to interrupt. He said he was not through. She replied, "You are through, I can't conduct a hearing like this." (Tr. 102.) She then asked Henderson to continue. He presented an argument for the health and safety exception to the "obey now, grieve later" rule. In his closing statement, Henderson argued that the proposed discipline should be reduced to a reprimand.

Townsend described the hearing as follows. At the outset, Kattou was pretty calm. Townsend objected to Kattou's argument and stated that it was not the point and was not part of the health and safety exception. Kattou continued to make his point and became more agitated and worked up. De Fritsch told him his argument was not relevant and he should not continue. Kattou continued and became upset and accusatory. He raised his voice and expressed more emotion. His face became red and he leaned forward over the table.

After the hearing, while the grievants were still in the room, de Fritsch asked Henderson if she could speak with him alone. According to de Fritsch, the matter she wanted to discuss with Henderson was unrelated to the hearing. Henderson asked if it the subject matter pertained to Local 376 and de Fritsch indicated that it did. When Henderson motioned to Kattou to sit down, de Fritsch said, "No, I just want to speak to you, I don't want to speak to him, he could leave with his members." (Tr. 17, 33.) Henderson said that any questions regarding Local 376

[4] Neither Henderson nor Townsend testified that Kattou banged the table or pointed his finger, although, as Kattou was seated immediately to Townsend's right, she did not see everything Kattou did.

construction laborers could be said in front Kattou and that Kattou had the right to be there. According to Henderson, de Fritsch then stated, "If that's the case, then there's no need for us to have a conversation." (Tr. 17.) De Fritsch, on the other hand, testified that Henderson refused to speak with her. She said she wanted to speak with him alone and Henderson said, "You can't." (Tr. 110.)

Later that day, June 5, 2003, Henderson called de Fritsch. Henderson expressed his displeasure with de Fritsch's request to speak with him alone and his hope that de Fritsch would not put him in that position again. He stated that he thought de Fritsch had crossed the line with her comments to Kattou. According to Henderson, de Fritsch said, "Well, you know, I think he hurt your grievants' case, I was probably going to give them a reprimand but because of his comments and his ranting and his raving, I don't know what decision I'm going to render." (Tr. 19, 35.) According to de Fritsch, she merely said it was regrettable that Kattou had exploded and complimented Henderson on the way he conducted the defense of the grievants. She denied that she discussed what her decision would be. Henderson asked her not to let her differences with Kattou interfere with her making a favorable ruling for the grievants. De Fritsch asked what Henderson thought they deserved, and he answered, a letter of reprimand. She responded, "You'll get my decision in the mail." (Tr. 111-112.)

On June 9, 2003, de Fritsch issued a Step II determination in which she reversed the Step I recommendation of the Informal Conference leader "[i]nasmuch as both grievants were able to state an approximation of the health and safety exception to the 'obey now, grieve later' principle, providing adequate grounds for their refusals to work." The determination stated, in part:

> Superintendent Richard Prado and both grievants gave unsworn testimony, with both [grievants] stating justifiable excuses for their refusal to work.
>
> It should be noted that the irrelevant, inappropriate and contentious statements, made with totally unwarranted anger by Local 376's Vice President, Thomas Kattou, could have seriously damaged grievants' case, had Mr. Chandler Henderson not been present. The membership of Local 376 would be wise to discourage and inhibit such imprudent conduct by its elected Vice President.
>
> The statements by [the grievants], in defense of their actions, were sincere, fully credible, and contained rational justification. Both expressed genuine regret for their acts of insubordination. Both men – one, because of his physical condition and the other, because of his distraught emotions – on that day represented discernible hazards to the safety of any crew to which they would have been assigned to work an extra shift.

De Fritsch recommended that the grievants receive a reprimand that would be expunged after six months if there is no further disciplinary action within that time. If further disciplinary action is warranted, she recommended forfeiture of one vacation day in addition to the punishment for the future infraction.

One of the grievants posted the decision in the locker room at the yard, accessible to all Local 376 members.

De Fritsch testified at the OCB hearing that she wrote the paragraph about Kattou "to try to convey the message to this union that in-your-face anger was not the way to accomplish things." (Tr. 118.) She stated:

> The last sentence of that [paragraph] I totally regret, I wish I had never written it. I never intended to hold Mr. Kattou to ridicule, to berate him, but I did . . . want to express to this union that sitting down and giving a cogent explanation without trying to pick a fight would accomplish so much more. And I regret that I included that paragraph in the decision, most especially the last sentence. It was clearly wrong.

(Tr. 119.)

The Union seeks a declaration that DEP's conduct violated the NYCCBL, a cease and

desist order, and the posting of appropriate notices at the City's facilities and work sites.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that DEP violated NYCCBL § 12-306(a)(1) by attempting to avoid dealing with an elected official, attempting to select the individuals with whom it would deal, and publicly voicing disdain for an elected official to the Union membership.[5] DEP's attempt to discourage Kattou from appearing and speaking at the Step II conference deprived the membership of representation by one of its elected leaders. Furthermore, the Union says, by disparaging Kattou in front of his members as well as the staff from DC 37 and DEP, and by noting the agency's opinion of Kattou's abilities in a Step II decision, DEP has gone directly to Union members for the purpose of undermining the Union and interfering with and restraining members in the exercise of their protected rights.

The Union contends that DEP violated NYCCBL § 12-306(a)(2) by diminishing the Union's ability to represent its members. According to the Union, DEP attempted to interfere in

---

[5]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 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. . . .

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. . . .

the manner in which the Union operates and represents its members when a DEP agent sought to handpick the Union representative with whom DEP would deal and repeatedly attempted to contact other staff and officials at Local 376 and DC 37. By treating an "unfavored" Union advocate with disparaging comments and hostile and intimidating behavior, DEP has conveyed to the members that their work life will suffer if they are represented by an unfavored individual.

Lastly, the Union alleges that DEP violated NYCCBL § 12-306(a)(3) by discriminating against Kattou and the members he sought to represent for the purpose of discouraging his participation in Union activities as a bargaining representative. According to the Union, Kattou's advocacy was the motivating factor in the agency's decision.

City's Position

The City argues that the petition must be dismissed because the Union has failed to establish that DEP violated § 12-306(a)(1), (2) or (3). There was no § 12-306(a)(1) violation because de Fritsch scheduled the hearing for a Thursday, knowing that Kattou would attend on that day of the week, and merely inquired whether Mollo would be attending the hearing in addition to Kattou. Furthermore, at the hearing, she simply advised Kattou that his arguments were irrelevant and his behavior inappropriate. As the decision maker in a Step II hearing, she was required to conduct orderly hearings and determine the relevancy of arguments.

Section 12-306(a)(2) was not violated because the facts do not establish domination of the Union, interference with the formation or administration of the Union, or support of the Union or any other union.

Finally, the Union failed to establish a violation of § 12-306(a)(3) because, even assuming *arguendo* that a Step II hearing is union activity, the Union has not established that

DEP's conduct was improper. Kattou argued a point that had nothing to do with the issue at the hearing. After de Fritsch advised him that his argument was not relevant, he continued to argue the issue, banged the table, and pointed his finger at the agency's counsel. De Fritsch was merely conducting an orderly hearing and determining relevancy. The Union has not established the second element of the *Salamanca* test.

DISCUSSION

"An attempt by an employer to decide which union representative it chooses to deal with in connection with contractual grievances would be inimical to the rights of employees and to the entire collective bargaining process." *Lehman*, Decision No. B-23-82, at 11; *see also Local 420, District Council 37*, Decision No. B-11-2002, at 5 n.3.

In *Lehman*, the employer denied a non-employee grievance representative access to a work location for the purpose of handling employees' grievances but did not deny access to other representatives. The Board clarified that it was the rights of the employees, not the rights of the union representative, which were at interest. *Id.* at 10. We denied a motion to dismiss because the denial of access for the purpose of restraining or preventing employees from utilizing the representative's services in processing grievances constitutes "a *prima facie* interference with employees' rights in violation of [§ 12-306(a)(1)] of the NYCCBL." *Id.* at 11. The Board was not influenced by the employer's permitting free access to other representatives and noted that "it is not within [the employer's] power to decree that it will allow other Union representatives to handle employees' grievances, but not the [Union's designated representative]." *Id.* at 11-12. Although discrimination against a non-employee representative for the purpose of interfering

with employees' rights may be a violation of § 12-306(a)(1), the Board found the petitioner's § 12-306(a)(3) claim to be "without merit." *Id.* at 13 (noting that the petitioner, the union representative, had failed to allege that any employee had been discriminated against).

In *Local 420*, Decision No. B-11-2002, the hearing officer at an informal conference refused to allow more than one union representative to speak on behalf of an employee without having established "ground rules" prior to the start of the proceeding. Given the particular circumstances of the case, the Board found that the employer interfered with the *employee's* rights under § 12-306(a)(1). *Id.* at 4. The Board did not find a violation of § 12-306(a)(3) because the hearing officer, in allowing only one representative to speak, was not motivated by a desire to punish the employee for exercising his rights under § 12-305. *Id.* at 6-7.

Acknowledging wrongdoing and making a sincere apology, de Fritsch was a credible witness. However, even assuming the facts to be as de Fritsch recounted them, her course of conduct, culminating in her writing that "[t]he membership of Local 376 would be wise to discourage and inhibit such imprudent conduct by its elected Vice President," amounted to a violation of § 12-306(a)(1) of the NYCCBL. She not only repeatedly juxtaposed disapproval of Kattou with praise for other representatives but also attempted to avoid dealing with Kattou. In addition, she appealed directly to the Union's members in order to influence the selection of their representative. Regardless of what de Fritsch's intentions may have been, the effect of her actions was to "discourage and inhibit" the members of Local 376 from choosing Kattou as a representative. *See Monticello Cent. Sch. Dist.*, 22 PERB ¶ 3002, at 3006 (1989) (a violation of § 209-a.1(a) of the Taylor Law, N.Y. Civil Service Law, Article 14 ("CSL"), when an assistant superintendent's "statements and conduct undermined [a particular union representative's] status

as a union representative").

While de Fritsch's conduct violated § 12-306(a)(1), it did not constitute a violation of NYCCBL § 12-306(a)(2). Domination or interference within the meaning of § 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 looked at as the employer's creation. *See Local 237, IBT*, Decision No. B-12-2001 at 9-10 (violation found since manager repeatedly met with groups of employees to discuss internal union matters, such as elections, union by-laws, and collective bargaining agreements); *District Council 37*, Decision No. B-36-93 at 18. Such domination is not found here. *See Local 420*, Decision No. B-11-2002 at 5 (no violation of § 12-306(a)(2) since a hearing officer's conduct, ordering the grievant to leave the informal conference, did not "interfer[e] with the *Union's* ability to represent its client adequately") (emphasis in the original); *see also Triborough Bridge and Tunnel Auth.*, 26 PERB ¶ 4611, at 4861 (1993) (no violation of CSL § 209-a.1(b) since the interference did not "undercut the independence of the organization").

Similarly, DEP has not violated § 12-306(a)(3) of the NYCCBL. While DEP was clearly aware of union activity by Kattou and the grievants, we find no discrimination or retaliation against any Union member. *See City of Salamanca*, 18 PERB ¶ 3012 (1985) (setting forth the two-part test used to determine whether § 12-306(a)(3) has been violated); *Bowman*, Decision No. B-51-87 (adopting the *Salamanca* test). Kattou did not experience any adverse employment action as a consequence of his representation. *See Local 1182, Communication Workers of America*, Decision No. B-26-96, at 21 (violation of § 12-306(a)(3) found when union

representative's license was checked as a result of his representation). Kattou was permitted to speak and did, in fact, present his argument at the Step II hearing. Furthermore, the grievants received a favorable outcome in the ensuing decision. Their punishment was reduced to a reprimand, to be expunged after six months of good behavior.

For the reasons set forth herein, the improper practice petition is granted as to the claim that DEP violated NYCCBL § 12-306(a)(1). The petition is dismissed with respect to the NYCCBL § 12-306(a)(2) and (3) claims.

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, BCB-2349-03, filed by District Counsel 37, Local 376, be, and the same hereby is, granted to the extent that the Department of Environmental Protection has violated NYCCBL§ 12-306(a)(1), and dismissed in all other respects; and it is

ORDERED, that the Department of Environmental Protection cease and desist from attempting to select the union representative with whom the agency would deal; and it is further

ORDERED, that the Department of Environmental Protection post the attached Notice to Employees for no less than thirty days at all locations used by the Department of Environmental Protection for written communications with bargaining unit employees.

Dated: March 19, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
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 New York City Department of Environmental Protection **committed an improper practice when it attempted to influence the selection of the District Council 37, Local 376, representative with whom the agency would deal.**

It is hereby:

ORDERED, that the New York City Department of Environmental Protection cease and desist from attempting to influence the selection of District Council 37, Local 376, representatives.

New York City Department of Environmental Protection
(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.