DC 37, L. 1087, 11 OCB2d 41 (BCB 2018)

(IP) (Docket No. BCB-4245-17)

Summary of Decision*:** The Union alleged that the NYPD violated NYCCBL § 12-306(a)(1) when a NYPD supervisor directed a unit member not to speak to his shop steward and attempted to physically prevent him from doing so, threatened to change a unit member's shift because he called the Union and stated that seeking the Union's assistance would be futile, and initially refused to permit a Union representative to meet with unit members. The City argued that the Union did not establish that the supervisor engaged in activity that was inherently destructive of employee rights under NYCCBL § 12-305. The Board found that the supervisor's conduct in two of the alleged incidents constituted violations of NYCCBL § 12-306(a)(1), but that the third incident did not rise to the level of inherently destructive conduct. Accordingly, the petition was 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 Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and LOCAL 1087,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On August 25, 2017, District Council 37, AFSCME, AFL-CIO and its affiliated Local 1087 (collectively, "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD"). Petitioners assert that the NYPD violated NYCCBL § 12-306(a)(1) when a NYPD supervisor directed a unit member not to speak

to his shop steward and attempted to physically prevent him from doing so, threatened to change a unit member's shift because he called the Union and stated that seeking the Union's assistance would be futile, and initially refused to permit a Union representative to meet with unit members. The City argues that the Union did not establish that the supervisor engaged in activity that was inherently destructive of employee rights under NYCCBL § 12-305. The Board finds that the supervisor's conduct in two of the alleged incidents constituted violations of NYCCBL § 12-306(a)(1), but that the third incident did not rise to the level of inherently destructive conduct. Accordingly, the petition is granted in part and denied in part.

BACKGROUND

The Trial Examiner held four days of hearing and found that the totality of the record, including the pleadings, exhibits, and briefs, established the relevant facts set forth below.

The Union represents NYPD employees in the title of Radio Repair Mechanic ("RRM"). RRMs are assigned to the Life Safety Systems Division-Electronics Section, also known as the Radio Shop, located in Queens, New York. The Radio Shop is responsible for the installation, repair, and maintenance of all NYPD electronic communication devices on boats, helicopters, and at field command posts. The Union's claims against the NYPD stem from a series of incidents that occurred in April 2017 at the Radio Shop involving Manager of Radio Repair Operations ("Manager") Pierre Barbee. Barbee has worked for the NYPD for 25 years and has served in the Manager title since 2016. As Manager, Barbee supervises 32 employees and is responsible for overseeing the daily operations of the Radio Shop, including the Portables, Mobiles, and Low Tension units.

The NYPD has a policy known as "vacation picking" whereby RRMs reserve future dates to use annual leave. Lieutenant Nicole Ruggiero serves as the Operations Coordinator for the Life Safety Systems Division, with responsibilities that include coordinating personnel, tracking overtime, and coordinating scheduling. On March 31, 2017, Lt. Ruggiero received an email from the Overhead Bureau reminding her that civilian personnel under her direction should start their vacation picks immediately for the new vacation year, which commenced on May 1, 2017. Shortly after receiving the email, Lt. Ruggiero provided Barbee with a vacation pick folder for each unit under his supervision with an Annual Civilian Leave Selection Form in each folder. She informed him that each unit must select vacation days according to the number of days or weeks listed next to the employee's name and then pass the folder along in seniority order.

According to Barbee, he received the vacation picks directive in early April 2017 from Lt. Ruggiero, who advised him that the Union was aware of the forms. Shortly thereafter, he met with the RRMs to let them know that the forms would be circulated and to explain what they were about. When he received the folders, he met with each unit separately and showed them the forms. The RRMs objected to the process because they had not previously been required to select their vacation dates for the entire year ahead of time but could simply request time when they needed it.[1] Prior to 2017, in order to reserve annual leave time, unit members would merely fill out a Leave of Absence Report and submit it to Barbee on an "as needed" basis; thus, everyone did not complete the form at the same time. (Tr. 162)

[1] Barbee recalled that the RRMs had done advance vacation picks only one time about 15 years prior to 2017. Other than that one instance, customarily the RRMs would inform Barbee of their vacation needs, and as long as there was coverage, the vacation requests were granted. If any vacation requests conflicted, the RRM with more seniority usually prevailed.

Barbee emphasized to the RRMs that the vacation picks were something they were required to do, but that the picks would not necessarily be used; rather, they were a "point of reference," and the RRMs could still submit their vacation requests as they always had. (Tr. 304) He then distributed the folders to the units and instructed them to have the form completed by April 28.

The forms had been in circulation for approximately three weeks when, on April 24, 2017, Lt. Ruggiero emailed Barbee that she needed the completed forms no later than April 26. On April 26, Barbee investigated where the form for the Portables unit was and what progress had been made on completing it.[2] He learned that RRM Steve Roth was the last one to have the form. Roth is number three on the seniority list, and the form had to be submitted to at least 12 more RRMs in the unit.

April 26, 2017 Encounter Between Barbee and Roth

Roth has worked as an RRM for over 30 years and estimated that Barbee has been his immediate supervisor for approximately 20 years. On the morning of April 26, 2017, Roth arrived at the Radio Shop about 15 or 20 minutes prior to the start of his 7:00 a.m. shift. About five minutes after he arrived, Roth left the room where his cubicle is located. According to Roth, he entered the hallway where he ran into Barbee, who held out the vacation picks form and said, "you've had enough damn time to think about it, fill it out now and give it back to me right away." (Tr. 164) Roth told Barbee that he needed more clarification and some documentation regarding the fact that the vacation picks were now going to be "engraved in stone." (Tr. 165)He also told Barbee that he needed to talk to his shop steward. According to Roth, Barbee responded that "this

[2] Portables was the only remaining unit over which Barbee had responsibility that had not completed the form by that time.

doesn't involve the shop steward or anybody from the union, this came down from the police department. Just get back in there and fill it out." (Tr. 165)

Roth testified that at this point he attempted to exit the hallway onto the shop floor to see the shop steward when Barbee "bellied up" to him, making physical contact, and would not let him pass. (Tr. 166) Roth testified that this contact was aggressive and was not inadvertent or accidental. While blocking Roth from passing, Barbee repeatedly stated, "don't disobey my order." (Tr. 166) Roth testified that the entire incident lasted four to five minutes. He stated that he was shocked by how Barbee raised his voice and would not let him pass to talk to the shop steward.[3]

RRMs John Koenderman, Michael Cohen, and Dong Son work at the Radio Shop. All three RRMs witnessed the incident between Roth and Barbee and corroborated the essential elements of Roth's testimony of his verbal exchange with Barbee. Those witnesses also stated that Barbee was speaking to Roth in a loud voice and/or was yelling at him to complete his vacation pick. They also corroborated that Barbee told Roth that he could not speak to his shop steward. Koenderman observed that Barbee and Roth were standing within a foot of each other. Cohen estimated that Barbee and Roth appeared to be about two to three feet apart. Son testified that the two were face-to-face and that Barbee was attempting to block Roth's way.

Shortly after the incident, Union shop steward Michael Beck came downstairs from his office in the comparator room and was told by other RRMs that there had been a dispute between Barbee and Roth over the vacation picks. Beck asked what happened and was told that someone

[3] Roth testified that he witnessed Barbee act in an aggressive manner toward RRMs on multiple occasions but had never seen him make physical contact with anyone or block their way.

who witnessed the incident made an audio recording of it. He asked to hear it and was sent a copy of the recording by email.[4] The audio recording was introduced in evidence and captures less than one minute of conversation between Barbee and Roth.[5] While the clarity of the recording is uneven, a man can be heard loudly making the following statements:

> I told you how it is. Pick the goddamn dates and get it over with. Of course, you've had the [unclear] for over a week now. Here, go back. There's nobody else to talk to. There's no, I don't care if you heard of it. I don't care if you heard of it. This isn't about what you heard of. This is what they gave me. You do it. That's it. There's no one else to talk to. There's no one else to talk to. There's no one else to talk to. There's no one else to talk to. This has got nothing to do with your shop steward. . . . This has, your vacation pick has nothing to do with the shop steward. This a policy of the Police Department. No, you can't talk to [unclear]. Don't disobey my orders. Obey my order, then go. Obey my order.

Union Ex. B.

Generally, Barbee acknowledged that during the April 26, 2017 conversation, he told Roth to "[g]ive me the God damned form" and that he was very frustrated trying to get the form back from him. (Tr. 312) He stated that he was giving Roth an order to complete the form, that Roth did not comply, and that his goal at that point in time was simply to get the form back so it could be circulated to the other RRMs in the unit. He stated that he told Roth that "[t]here was no one to talk to at that moment because the form had to go out and be back" quickly. (Tr. 364) Initially, Barbee denied having raised his voice to Roth or having any physical contact with him. However, on cross-examination, Barbee confirmed that the recording captured part of his conversation with Roth and that it was him making the statements noted above. In particular, Barbee admitted on

[4] Beck testified that Barbee had been known to "fly off the handle" and, as a result, he had previously instructed unit members to keep a "running log" of incidents involving Barbee. (Tr. 35-36)

[5] The recording was admitted into evidence over the City's objection based on the Trial Examiner's determination that the recording was admissible because it was relevant, properly authenticated, and falls into an exception to the New York law that prohibits the recording of a conversation without the consent of at least one party to the conversation.

cross-examination that he told Roth: "There's no one else to talk to. . . . This has got nothing to do with your shop steward," and "Your vacation of yours has nothing to do with your shop steward. This is a policy of the Police Department. . . . It has nothing to do with your shop steward. Pick the days. Don't disobey your order. Obey my order," and "no, you can't talk to anyone." (Tr. 343-44) Barbee estimated that, during the entirety of his conversation with Roth, they were about nine feet apart and that the conversation lasted about ten minutes.

There is no dispute that after the incident with Barbee, Roth complied with Barbee's order he returned to his cubicle and filled out the vacation form. Barbee subsequently got the form back from everyone in the Portables unit and returned it to Lt. Ruggiero by the deadline.

Later in the morning of April 26, 2017, Beck contacted Union representative Chandler Henderson to tell him that he had received a recording of Barbee yelling at Roth. Henderson asked Beck to email him the recording, which he did. Henderson notified Beck that he would come to the Radio Shop on April 28 and that they could discuss the matter then.

April 28, 2017 Events

On April 28, 2017, Henderson contacted Lieutenant Patricia Feeley of NYPD Labor Relations to notify her that he was planning to go to the Radio Shop that day to speak to the RRMs on their lunch break about the vacation pick issue. The RRMs take lunch anytime between 11 a.m. and 2 p.m., and he planned to stay in the break room the entire time to meet with them. Lt. Feeley explained to Henderson that there was no requirement to select all five weeks of vacation; rather, the RRMs were only being asked to pick one week and that they had the ability, if their plans changed, to change the dates on a case-by-case basis. She also told him that she did not understand why his members would not want these picks because the process was to their benefit. Henderson informed Lt. Feeley that he thought the RRMs had been given incorrect information. Lt. Feeley

subsequently notified Lt. Ruggiero that Henderson was coming out to the Radio Shop to speak to the members about vacation picks and asked her to make arrangements for the meeting.

Henderson arrived at the Radio Shop shortly before 11:00 a.m. on April 28, 2017. Upon arriving, he called Beck and asked him to meet him on the shop floor. Beck came down, and Henderson told him that he wanted to let the other RRMs know he was there and where he would be when they started their lunch break. They then walked through the shop floor and stopped to talk to some of the RRMs, including Andy Paris and Ted Rabinowitz. Henderson said good morning and "let the guys know that I'm there to discuss the job issue and we'll be meeting in the break room."[6] (Tr. 86)

Paris was standing with RRM Sewnarine Durga when Henderson came around with Beck. According to Paris, Barbee approached them and started yelling "so you called the union on me. I'll put you on nights any time you [sic] want and you can have – you or the union will have nothing to do about it."[7] (Tr. 118) Both Henderson and Durga corroborated Paris' testimony that Barbee made this statement. Henderson testified that he had no idea what Barbee was referring to and that he responded to Barbee by saying, "what are you talking about, because I'm not here for that, I'm here to discuss the vacation pick issue." (Tr. 87) Henderson then told Barbee that he was just "saying hello to my men, you're not a member of this bargaining unit anymore, so I need you to step away." (Tr. 87)

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[6] The break room where RRMs eat lunch is on the second floor of the Radio Shop.

[7] Paris has worked at the Radio Shop for approximately 11 of the 18 years he has been an RRM. He stated that this reaction was not uncommon for Barbee because "that's the way he deals with the men. He's overbearing, he yells a lot. He tends to get, you know, emotional. He wants things done his way." (Tr. 123) He described the workplace atmosphere as akin to "walking on eggshells" as a result of Barbee's behavior towards the RRMs under his supervision. (Tr. 130)

Barbee walked away, at which time Paris told Henderson that Barbee was trying to change his shift.[8] Henderson said they would talk about it in the break room. Barbee then returned and told Henderson that he could hold a meeting at the Shop but that "this is my floor and I want you off my floor, go meet in the break room." (Tr. 88) Henderson responded that he agreed and that was where they were heading.[9]

Barbee confirmed that he had a conversation with Henderson on the shop floor that day. He also conceded that he had previously discussed with Paris the prospect of putting him on the night shift but asserted that he never threatened to do so. Barbee recalled that Henderson congratulated him on his promotion and then he told Henderson that a room had been reserved for his meeting and that he couldn't meet with the members right there on the shop floor. However, that afternoon, Barbee sent Henderson an email stating:

> Please excuse me if I seemed brash with you, but people seem to want to make your visit a spectacle. I understood you'd be coming about the picks, but the situation with Mr. Paris was a recent development. I was waiting for you to speak to you if this is the matter you came for also. I'm no anti-union boogeyman. Please call me when you have the opportunity. We will speak confidentially I assure you. . . .

[8] A few days prior to the April 28, 2017 meeting, Paris was working on a vehicle when Barbee called him into his office and told him that he was not happy with his work. Paris recalled that he responded that he was doing his best and that Barbee could transfer him to another unit if he doesn't like his work. Barbee stated that he didn't have that option but that he could put him on nights again. In 2012 or 2013, Barbee had placed Paris on the night shift involuntarily for about two years. At that time, Paris had asked why a more junior RRM had not been selected, and Barbee responded that he had chosen Paris and that there was nothing Paris could do about it.

[9] Beck did not testify about this incident between Barbee, Paris and Henderson. Rabinowitz confirmed that Barbee told Henderson and the other employees present that the Union meeting needed to occur in the lunchroom. When questioned about whether he witnessed any other communications between Henderson and Barbee, Rabinowitz responded that he only heard greetings exchanged, which he described as "[s]omewhat friendly or cordial." He did not recall whether Barbee had engaged with anyone other than himself and Henderson. (Tr. 217)

(Pet., Ex. A) Barbee testified that what he meant by the statement "I'm no anti-union boogeyman" is that he has "no animus toward the union of any kind" and no reason to have any animus towards it. (Tr. 323) Barbee testified prior to his 2016 promotion, he had been a Union member for about 25 years and that he had no intention to discourage union activity. He explained that he referenced Paris in the email because he overheard Paris telling Henderson that Barbee was going to "put [him] on nights." (Tr. 353) Barbee further testified that it was only after his conversation with Henderson at the Radio Shop that he learned that Henderson was there to discuss the vacation picks issue.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that Respondents, through their agent Barbee, violated NYCCBL § 12-306(a)(1) on three separate occasions between April 26 and 28, 2017. It asserts that on all three occasions, Barbee engaged in actions that challenged the "efficacy of the Union" and attempted to chill union activity. (Union Br. at 2) The Union contends that the first incident was Barbee's confrontation with Roth on April 26, 2017, regarding the vacation pick form. It maintains that Barbee "bull[ied] and berate[d]" Roth, attempted to refuse him access to his shop steward, and made physical contact with him to prevent him from passing. (Union Br. at 29) In taking such actions, the Union argues that Barbee denied and demeaned the Union's role in addressing the vacation pick issue and "actively sought to penalize, and did deter, protected activity." (Union Br. at 30)

The Union asserts that Barbee's denials of many of the key details of Roth's testimony were not credible. For example, he testified that he was not screaming at Roth and that he and

Roth were never closer than about nine feet. The Union argues that this testimony was contradicted by Roth and other witnesses to the incident. It further argues that the "overwhelming weight" of the evidence supports Roth's contention that Barbee was "in his face, and attempting to intimidate hi[m] physically, including making contact, while berating him, demeaning the Union, and denying him access to his shop steward, a protected activity." (Union Br. at 31)

Further, the Union argues that the Trial Examiner properly admitted the April 26, 2017 audio recording of Barbee into evidence. It notes that the Barbee admitted that it was his voice on the audiotape. Therefore, it is in complete agreement with the grounds for the Trial Examiner's holding.

The Union contends that Respondents violated NYCCBL § 12-306(a)(1) again when Barbee threatened to place Paris on the "less desirable" night shift and proclaimed in front of Henderson that there was nothing the Union could do about it. The third violation occurred when Barbee told Henderson that this was "my floor," that he wanted Henderson off it, and that he should go meet his members in the break room.[10] (Union Br. at 33) The Union argues that the sole purpose of Barbee's "demonstration" was to "flex his assumed power" over the situation and make Henderson, and by extension the Union, appear weak and subordinate. (Union Br. at 34) The Union maintains that the only conclusion that can be drawn from these three incidents is that Barbee was actively seeking to deter protected activity, which is a violation of NYCCBL § 12-306(a)(1).

The Union asserts that, as a matter of law, whether Barbee's attempts to force the RRMs to make vacation picks was justified bears no relevance. Citing Board precedent, the Union argues

[10] The Union maintains that Barbee's subsequent email to Henderson, in which he explained that he mistakenly thought Henderson had come to the Radio Shop to address Paris' concerns, is recognition that he had overstepped his authority.

that "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights," the Board can find an unfair labor practice occurred even if the employer offers evidence that the conduct was motivated by business considerations. (Union Br. at 39) According to the Union, the RRMs' wish to seek clarification from the Union about the vacation picks was legitimate, and their efforts to seek out the Union for answers was protected activity.

Finally, the Union argues that, while Barbee's actions on April 26 and 28, 2017 were *prima facie* violations of NYCCBL § 12-306(a)(1), the Board should consider Barbee's prior behavior towards his subordinates in assessing the ways in which his actions on those dates were received by the Union members. It contends that such behavior provides further circumstantial evidence of how Barbee's actions were understood by his subordinates and, therefore, how they served to penalize or deter protected activity.

City's Position

The City argues that Petitioner has failed to establish an independent violation of NYCCBL § 12-306(a)(1). It argues that no facts were presented to demonstrate that the NYPD engaged in conduct that rose to the level of inherently destructive. It also contends that Barbee had legitimate business justifications for his conduct and that he was not motivated by anti-union animus.[11]

Regarding Barbee's April 26, 2017 encounter with Roth, the City asserts that Barbee's goal was to meet the deadline imposed by Lt. Ruggiero and that he was merely seeking Roth's compliance with his lawful and reasonable order to return the form. The City contends that the chronology of events supports a conclusion that Roth had ample opportunity to consult with the

[11] The City argues that the Union did not establish that a violation of NYCCBL § 12-306(a)(3) occurred. However, the Union does not assert an allegation of discrimination or retaliation in violation of NYCCBL § 12-306(a)(3). Consequently, we do not address this argument.

shop steward after the form was handed out in early April. It claims that Barbee provided credible testimony that he was frustrated with Roth's conduct in refusing to complete or return the form. Moreover, given the physical layout of the office area, the City maintains that Roth's claim that Barbee physically blocked him is highly questionable. Roth did not have to go past Barbee; rather, as reflected in photos in evidence, he had multiple points of ingress and egress to choose from. Further, had Barbee "bellied up" to Roth and made the alleged physical contact, there "should have been some outcry or immediate response," including but not limited to filing an official report. (City Br. at 36)

Moreover, the City argues that the Trial Examiner erred by admitting the April 26, 2017 audio recording into evidence because a proper foundation was not established. It asserts that the recording was "largely unintelligible and not sufficiently audible" and that it is "only a portion of the conversation with no date or time stamp." (City Br. at 25) According to the City, the audio recording was inadmissible because the person who recorded the conversation did not authenticate it and a chain of custody was not established.[12]

As to the incident with Paris, the City maintains that the record reflects inconsistent testimony. Paris testified that Barbee screamed "you called the Union on me" and "I will put you on nights anytime I want and there is nothing the Union can do." (City Br. at 32 (citing Tr. 217)) The City argues that Barbee denied screaming at Paris and threatening to put him on nights and that Barbee's version of events was confirmed by Rabinowitz and Beck. However, even if the

[12] The City also notes that Patrol Guide 203-06, which is applicable to RRMs, prohibits the use of any personal electronics/digital devices to record video and/or audio. It maintains that the recording at issue was in direct violation of the NYPD regulations.

sequence of events occurred as Paris alleged, the City asserts that Paris knew, based on a prior conversation, that Barbee had an issue with his work performance, not his union activity.

The City asserts that the testimony reflected significant personal animus against Barbee by Union members. It maintains that such animus was "exceptional" and "colored the biased testimony of the Union's witnesses." (City Br. at 34) Such animus, the City argues, calls the credibility of these witnesses into question. Citing case law, it further asserts that any personality conflicts that Barbee had with Roth, Paris, or others does not constitute improper motivation under the NYCCBL. Instead, the City maintains that the incidents cited by the Union have more to do with insubordination and poor performance than anti-union animus.

The City argues that even assuming the Union has established a *prima facie* claim that Barbee engaged in inherently destructive conduct, the record reflects that Barbee's conduct was in furtherance of a legitimate business reason. It contends that the record is devoid of any evidence that the NYPD took any retaliatory action or was motivated by anti-union animus. Rather, the record establishes that Barbee was a supervisor focused on "getting the important work of the unit done" and ensuring efficient operations at the Radio Shop and that his actions were intended to obtain compliance with NYPD policies and procedures. (City Br. at 35) The evidence established that Barbee was motivated solely by a desire to promote efficient operations, maintain workplace order, and meet the applicable deadline for submission of the selection form.

Accordingly, the City requests that the Board dismiss the petition in its entirety and grant such other and further relief as it deems proper.

DISCUSSION

In this matter, the Board must determine whether certain statements and actions taken by Barbee, an agent of the NYPD, were inherently destructive and discouraged the exercise of rights

of employee rights under the NYCCBL. NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter . . . ."[13] We have long recognized that conduct that contains "an innate element of coercion, irrespective of motive, [can] constitute conduct which, because of its potentially chilling effect . . . is inherently destructive of important rights guaranteed under the NYCCBL." *UFA*, 8 OCB2d 3, at 26 (BCB 2015); *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010) (quoting *ADWA*, 55 OCB 19, at 40 (BCB 1995). Further, a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions. *See L. 1180, CWA*, 71 OCB 28, at 9-10 (BCB 2003) ("Actions which are inherently destructive of important employee rights may constitute unlawful interference even in the absence of proof of improper motive.") (citations omitted).

We have previously found that speech that has the potential to chill or discourage an employee from participating in union activities is a violation of NYCCBL § 12-306(a)(1). For example, in *OSA*, 6 OCB2d 26 (BCB 2013), a Union representative sent an email to a group of employees who had expressed concern about their agency's policy regarding absences. An assistant commissioner responded to this email by telling the employees to "disregard" the advice from their Union and that it was "inappropriate" for their Union representative to directly email Union members and provide instructions in "contradiction to the email" he had issued. *Id.* at 9. The Board held that such actions violated NYCCBL § 12-306(a)(1) because they "deterred employees from engaging in protected activity and diminished the Union's capacity to effectively

[13] NYCCBL § 12-305 provides, in pertinent part, that public employees "shall have the right to self-organization, to form, join or assist pubic employee organizations, to bargain collectively through certified employee organizations of their choosing and shall have the right to refrain from any or all of such activities."

represent its members." *Id.* at 11. *See also IUPAT, L. 806*, 7 OCB2d 25 (statements by senior agency officials disparaging the union's conduct at the bargaining table, in conjunction with other actions such as pressuring supervisors to report on what occurred at a union meeting, were coercive in nature and interfered with employees' exercise of their NYCCBL rights); *CSTG, L. 375*, 3 OCB2d 14 (BCB 2012) (finding a union's 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).

In the instant matter, the Union alleges three instances in which Barbee's conduct was inherently destructive of the employee rights protected under NYCCBL § 12-305. The first was the April 26, 2017 incident between Barbee and Roth. Based on the record, we find that Barbee asked Roth to complete the vacation pick immediately. When Roth told him that he needed to speak to his Union representative first, Barbee became angry and loud, and ordered Roth to complete the pick. However, in doing so, Barbee also told Roth that, "There's no one else to talk to," "This has got nothing to do with your shop steward," "your vacation pick has nothing to do with the shop steward," and "No, you can't talk to the union." (Tr. 343-44) However, in the audio recording it is clear that Barbee also said, "Obey my order, then go."[14] (Union Ex. B)

Further, we find that during this verbal exchange Barbee stood close to Roth and between him and the exit to the hallway to physically prevent Roth from exiting his work area to speak to the shop steward. These factual conclusions are based on the credible and consistent testimony of

[14] We concur with the Trial Examiner's admission of the audio recording into evidence. The recording is relevant, probative, and was sufficiently authenticated. In light of the other evidence presented, the fact that the audio recording did not fully capture the entire exchange between Barbee and Roth does not make it inadmissible but limits its probative value.

Roth in addition to three other witnesses, Koenderman, Cohen, and Son. In pertinent part, the testimony of the four Union witnesses confirmed the statements Barbee made to Roth on the audio recording. In addition, three of the four Union witnesses testified that Barbee was standing in very close proximity to Roth and/or was blocking Roth's exit.[15] In reaching these conclusions, we do not credit Barbee's denial that he was yelling or blocking Roth's egress. These assertions are contrary to the testimony of several other witnesses and/or the audio recording.[16] In addition, Barbee admitted that his comments went beyond ordering Roth to complete the form when he acknowledged that he said, "There's no one else to talk to," and "This has got nothing to do with your shop steward." (Tr. 343-44)

Based on these facts, we find that Barbee's statements violated NYCCBL § 12-306(a)(1) because they were coercive and interfered with, restrained, and discouraged union activity; thus, his conduct had a potentially chilling effect on the RRMs' right to engage in union activity. *See OSA*, 6 OCB2d 26, at 9. In this instance, Barbee's statements had the effect of discouraging Roth and potentially others who overheard the exchange from seeking advice from the Union and engaging with the Union about workplace issues of concern to them. While part of Barbee's statements may have merely been a legitimate directive to obey his order now and seek the Union's counsel later, his comments clearly went further than that instruction. He advised Roth and those RRMs listening that the vacation pick process was not a topic to be discussed with the Union. At a minimum, his statements regarding conferring with the Union conveyed that it would be futile

[15] The testimony of Cohen, the fourth witness, was that they were standing two to three feet apart.

[16] We reject the City's assertion that the Union witnesses' consistent testimony that Barbee was prone to loud and/or aggressive behavior in the workplace makes them biased or incredible. At most, it shows that they were accustomed to him behaving in a loud and aggressive manner but does not undermine the veracity of their testimony.

to seek the Union's assistance. Therefore, we find these statements to have interfered with and discouraged union activity. *See id.* ("Public employees have a fundamental right to seek advice from their Union . . .") In the context of Barbee's statements, we also find that his physical obstruction of Roth's egress further discouraged his exercise of Union activity, in violation of NYCCBL § 12-306(a)(1).

The second alleged improper act was the incident between Barbee and Paris on April 28, 2017. Based on the record, we find that Barbee came out of the mobile repair shop and started yelling that Paris had called the Union on him and threatened that he could put Paris on the night shift whenever he wanted and that the Union could do nothing about it. Paris, Henderson, and Durga all testified consistently regarding this statement. The City argues that Barbee's version of events was confirmed by Rabinowitz and Beck. However, we find that Rabinowitz and Beck did not testify about the conversation between Barbee and Paris.[17] Therefore, contrary to the City's assertion, we do not find that their testimony confirmed Barbee's version of the events or was inconsistent with the testimony of other Union witnesses. In addition, Barbee acknowledged in his email to Henderson that same day that his conduct was "brash" and that he was not anti-union. As a result, even Barbee understood that his comments were reasonably perceived to interfere with union activity.

Accordingly, we find that the Barbee accused Paris of calling the Union, threatened to change his shift as a result, and stated that seeking the Union's assistance would be futile. These statements violate NYCCBL § 12-306(a)(1), inasmuch as they were threats to interfere with and

[17] While Rabinowitz confirmed that Barbee told Henderson and the other employees present that the Union meeting needed to occur in the lunchroom, his recollection of this incident was limited. When specifically asked whether Barbee engaged with anyone other than himself and Henderson, he replied, "I don't recall." (Tr. 217)

discourage union activity. We find that Barbee's statements to Paris had a potentially chilling effect on employees' rights to engage in union activity. *See SSEU, L. 371*, 3 OCB2d 22, at 15-16 (finding that a supervisor's comment, in the context of a discussion about an employee's termination, that "nobody could threaten him with the Union," was a veiled threat and could lead an employee to conclude that any union involvement would be detrimental to their working relationship with this supervisor and, thus, was an NYCCBL § 12-306(a)(1) violation). Similarly, here, such statements conveyed to the RRMs that seeking the Union's assistance would have employment ramifications and/or be futile.

The Union's remaining interference claim concerns Barbee's instruction to Henderson to meet with employees in the breakroom. The Union argues that Barbee's actions rebuked Henderson in front of employees on the shop floor by ordering Henderson off "my floor" to demonstrate his power and make Henderson, and by extension the Union, appear weak. (Tr. 88) In this instance, we find that Barbee's action did not violate NYCCBL § 12-306(a)(1). According to Henderson, Barbee did not refuse to permit him to meet with employees. Rather, he told him, "This is my floor and I want you off my floor. Go meet in the break room." (Tr. 88) Henderson acknowledged that Barbee's instruction to meet with employees in the break room and not on the shop floor was appropriate. Therefore, we find no evidence in the record to support the conclusion that this action had a threatening, discouraging, or coercive effect.[18] *See UFA*, 8 OCB2d 3, at 26. Instead, we view Barbee's action was an effort, albeit coarsely executed, to maintain order on the shop floor and ensure that Henderson understood that Union activity could not take place there.

[18] Our finding is bolstered by the fact that none of the RRMs who were present on the shop floor at the time testified about Barbee's order to Henderson to get off his floor; thus, there is no evidence that anyone other than Henderson heard the statement.

Moreover, in reaching these conclusions we do not find persuasive the City's assertion that Barbee was not motivated by anti-union animus on any of the three occasions discussed or that Barbee engaged in his conduct in furtherance of legitimate business goals, including the timely return of the vacation forms to NYPD officials. We have long held that "[a]ctions which are inherently destructive of important employee rights may constitute unlawful interference even in the absence of proof of improper motive." *L. 1180, CWA*, 71 OCB 28, at 9 (citations omitted); *see CSTG, L. 375*, 3 OCB2d 14. This Board has also held, in the context of independent NYCCBL § 12-306(a)(1) violations, that "a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions." *L. 1180, CWA, 71 OCB 28*, at 10. Accordingly, Barbee's subjective intent or motivation is immaterial and does not negate the inherently destructive effect of his conduct on employees.

In sum, we find that the City violated NYCCBL § 12-306(a)(1) when the NYPD, through its agent, directed a unit member not to speak to his shop steward, attempted to physically prevent him from doing so, threatened to change the shift of another unit member because he contacted the Union, and stated that it would be futile to seek the Union's assistance. We do not find that the City's agent refused to permit a Union representative from meeting with bargaining unit members. Accordingly, the improper practice is granted in part and denied in part.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, docketed as BCB-4245-17, filed by District Council 37, AFSCME, AFL-CIO and its affiliated Local 1087, is hereby granted as to the claims that the City violated NYCCBL § 12-306(a)(1) when the New York City Police Department, through its agent, directed a unit member not to speak to his shop steward, attempted to physically prevent him from doing so, threatened to change the shift of another unit member because he contacted the Union, and told employees that it would be futile to seek the Union's assistance; and it is further

ORDERED, that the improper practice petition is hereby denied as to the claim that the City violated NYCCBL § 12-306(a)(1) by initially refusing to permit a Union representative to meet with members; and it is hereby

ORDERED, that the New York City Police Department shall cease and desist from all efforts to interfere with, restrain, or coerce public employees in the exercise of their rights under the New York City Collective Bargaining Law, and it is further

ORDERED, that the New York City Police Department post the attached notice for no less than 30 days at all locations it uses for written communications, including electronic communications, with unit members.

Dated: December 12, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER

OFFICE OF COLLECTIVE BARGAINING

OFFICE ADDRESS
100 Gold Street
Suite 4800
New York, New York 10038

MAILING ADDRESS
Peck Slip Station
PO Box 1018
New York, New York

212.306.7160
www.ocb-nyc.org

NOTICE
TO
ALL EMPLOYEES
PURSUANTO
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 11 OCB2d 41 (BCB 2018), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO and its affiliated Local 1087, and the City of New York and the New York City Police Department.

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby:

ORDERED, that the improper practice petition, docketed as BCB-4245-17, filed by District Council 37, AFSCME, AFL-CIO and its affiliated Local 1087, is hereby granted as to the claims that the City violated NYCCBL § 12-306(a)(1) when the New York City Police Department, through its agent, directed a unit member not to speak to his shop steward, attempted to physically prevent him from doing so, threatened to change the shift of another unit member because he contacted the Union, and told employees that it would be futile to seek the Union's assistance; and it is further

ORDERED, that the improper practice petition is hereby denied as to the claim that the City violated NYCCBL § 12-306(a)(1) by initially refusing to permit a Union representative to meet with members; and it is hereby

ORDERED, that the New York City Police Department shall cease and desist from all efforts to interfere with, restrain, or coerce public employees in the exercise of their rights under the New York City Collective Bargaining Law, and it is further

ORDERED, that the New York City Police Department post this notice for no less than 30 days at all locations that it uses for written communications, including electronic communications, with unit members.

New York City Police Department
(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.