DC 37, L. 1505, 14 OCB2d 8 (BCB 2021)

(IP) (Docket No. BCB-4288-18)

Summary of Decision*:** The Union alleged that DPR violated NYCCBL §§ 12-306(a)(1), (2), (3), and (4) by interfering with the selection of its representatives, directing its staff to file complaints against a Union representative, modifying the location and scheduling of informal conferences and investigatory interviews, and denying certain representatives access to DPR facilities. The City argued that some of the actions did not occur as alleged and that it did not violate the NYCCBL. The Board found that DPR violated NYCCBL § 12-306(a)(1) by interfering with the Union's selection of representatives, violated NYCCBL § 12-306(a)(1) and (4) by modifying the procedure for scheduling investigatory interviews, and dismissed all other claims. Accordingly, 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 Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 1505, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On October 12, 2018, District Council 37, Local 1505, AFSCME, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Parks and Recreation ("DPR"). The Union alleges that DPR 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") by (i) interfering with the Union's selection of representatives at informal conferences and investigatory interviews; (ii) directing and/or encouraging its investigators to file complaints with another local against the Union's President; (iii) requiring informal conferences and investigatory interviews to be held in the office of the Parks Advocate; (iv) ceasing notification of the Union regarding scheduling of informal conferences or investigatory interviews; and (v) directing building security to deny the Union access to DPR facilities, preventing the Union from representing its members. Disputing that the facts occurred as alleged, the City argues that it did not violate the NYCCBL because it promptly rescinded an email banning a particular representative, did not encourage its staff to file complaints against that representative, acted within its authority in changing the location of conferences and interviews, did not exclude the Union from scheduling, and did not deny representatives access to the building. The Board finds that DPR violated NYCCBL § 12-306(a)(1) by interfering with the Union's selection of representatives at informal conferences, violated NYCCBL § 12-306(a)(1) and (4) by modifying the procedure for scheduling investigatory interviews, and dismisses all other claims. Accordingly, the petition is granted in part and denied in part.

BACKGROUND

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

DPR is a mayoral agency that is responsible for more than 30,000 acres of land and maintains the City's parks, public spaces, and recreational amenities. The Union is the certified collective bargaining representative for DPR's City Park Workers ("CPWs"). CPWs are

responsible for fulfilling maintenance and operations duties in the City's parks. The Union's President is Dilcy Benn, who has held the position for 12 years and has served in the title of CPW since 1998. Benn is on release time pursuant to the Mayor's Executive Order 75 ("EO 75"), which enables her to pursue her Union duties in a full-time capacity. The Union's Council Representative was Richard Kadlub, who served the Union from July 2017 through July 2019.[1] During all relevant periods, Benn and Kadlub represented CPWs in investigatory interviews, informal conferences, and other labor-management proceedings with the Advocate's Office.

Within DPR, the Advocate's Office is responsible for investigating and prosecuting allegations of employee misconduct and pursuing disciplinary action. The Advocate's Office consists of the Parks Advocate Pia Rivera, who oversees a unit that includes Deputy Advocate George Real, Chief Discipline Investigator Hanice Tavares, five Disciplinary Investigators ("Investigators"), and Agency Attorneys ("Attorneys") Joanna Drucker and Julie Stein. The Investigators are in the civil service title of "Investigator, Discipline," and are represented by DC 37, Local 1113. They conduct fact-finding interviews of alleged employee misconduct, in which they interview witnesses and provide employees an opportunity to share their version of events. There are two Investigators present for each investigatory interview, in addition to the employee and either his/her union representative or attorney of their choosing.[2] If the Deputy Advocate and the Chief Discipline Investigator decide to pursue disciplinary charges, the matter is assigned to an Attorney. The Attorney then sets up a disciplinary hearing, known as an informal conference,

[1] Kadlub remains employed by DC 37 and continues to represent locals in DC 37's Blue Collar Division.

[2] The Investigators review audio recordings of the investigatory interviews, their notes, and the case files prior to drafting and submitting a report to the Deputy Advocate and the Chief Discipline Investigator, who then collaborate and decide whether to pursue disciplinary charges.

in which she presents the disciplinary charges and supporting evidence to the employee and his/her union representative or attorney. During the informal conference, a hearing officer, known as the Informal Conference Leader ("ICL"), listens to the testimony, examines the evidence, and drafts a decision finding the employee guilty or not guilty. DPR employees who serve as ICLs on a rotating basis generally include "[C]hiefs of [O]perations, Parks [M]anagers, and those levels and above." (Tr. 325)

Investigatory interviews and informal conferences are held at the Advocate's Office, which is a linear series of rooms. A few steps outside the front entrance is the conference room, which has a small conference table and six chairs. Rivera's office is adjacent to the reception area. It is a large corner office with a conference table that seats eight people. Down the hallway is the Deputy Advocate's office, the Attorneys' seating area, and the Investigators' seating area in the back. The Advocate's Office is located on the second floor of an office building that houses several other DPR tenants.

June 7, 2018 – Verbal Altercation

The actions that the Union alleges violated the NYCCBL all occurred after an incident on June 7, 2018, while Benn and Kadlub were at the Advocate's Office to represent CPWs in investigatory interviews and informal conferences. After the first investigatory interview, the Union was scheduled for an informal conference. However, Drucker asked Benn and Kadlub to wait ten minutes until an informal conference with DC 37, Local 983, that was taking place in Rivera's office, concluded. Benn and Kadlub had other investigatory interviews to conduct, and they did not want to wait for the informal conference to end.

It is undisputed that Benn objected to Drucker's request to wait and that a verbal altercation between Benn and Drucker ensued. Benn testified that she and Drucker were "hollering" at each

other. (Tr. 118) Rivera, Deputy Advocate Real, Attorney Stein, and Investigators Javious Weather and Abigail Gordon, among others, overheard Benn yelling at Drucker.[3] No evidence was presented that Benn used vulgar or threatening language during this verbal altercation.

Ultimately, Benn and Kadlub left the Advocate's Office with the majority of the CPWs, and the investigatory interviews and informal conferences that did not take place that day were rescheduled.

June 13, 2018 – Email Regarding Union Representatives at Informal Conferences

Following the verbal altercation on June 7, 2018, Rivera testified that "a number of investigators and attorneys expressed that they were uncomfortable working with [Benn] and felt intimidated and threatened, and they wanted [Rivera] to do something about it." (Tr. 349) In response, she decided that the Advocate's Office would temporarily conduct informal conferences with only Kadlub until she had assurances from the Union that something like the altercation with Drucker would not happen again.

Thereafter, on June 13, 2018, Drucker emailed Kadlub regarding several informal conferences that were being scheduled at the Advocate's Office. (*See* TE Ex. 1A) In this email, Drucker explained, "[p]lease be advised, that until we are given any new information to the contrary, the informal conferences will be conducted with you [Kadlub], and not Dilcy [Benn]." (*Id.*)

However, "very shortly after [Drucker's] email was sent," Rivera received a call from Joseph Trimble, DPR's Director of Labor Relations, stating that Benn could not be kept from

[3] Weather and Gordon testified that another Investigator opened his/her office door to see what was going on. Written statements that Drucker, Real, and Stein made contemporaneous with the incident corroborate testimony that Benn was yelling at Drucker. (*See* City Ex. 1A, C, and D) Gordon testified that both Benn and Drucker were speaking loudly. However, Rivera and Weather testified that Drucker was not yelling at Benn.

informal conferences. (Tr. 351) Rivera testified that this call from Trimble came "almost on [the] same date" that Drucker's email was sent, on June 13, 2018. (*Id.* at 350) Rivera testified that she does not know exactly when the policy reversal was communicated to the Union by Trimble or otherwise, but it was sometime before June 19, 2018.[4]

On June 19, 2018, Kadlub responded to Drucker's initial email from June 13, 2018, confirming that the policy was reversed and that Benn would be permitted at informal conferences. (TE Ex. 1B) Specifically, he wrote, "[j]ust checking that we are all on the same page. [Benn] will be coming to the hearings." (*Id.*) Drucker responded, "[y]es, that is what I was told." (*Id.*) Both Kadlub and Rivera testified that no hearings, investigatory interviews, informal conferences, etc., took place without Benn.

DPR's Investigators' Complaints About Benn

Following the verbal altercation between Benn and Drucker on June 7, 2018, five Advocate's Office Investigators, including Weather, Tavares and Gordon, met with the Assistant Director of DC 37's White Collar Division, Madonna Knight, to complain about Benn.[5] Benn testified that following a hearing at the Advocate's Office, three Investigators told her that Rivera compelled them to make the complaints and apologized for "being forced to file a complaint against her when they [did not] want to do it." (Tr. 142) Of the three Investigators who allegedly

[4] In mid-June 2018, there was a meeting between the Union and DPR. However, the witnesses disagreed about the motivation for and content of the meeting. Benn and Kadlub testified that the meeting was called for in the wake of Drucker's email on June 13, 2018, and that Benn's exclusion from informal conferences was discussed. In contrast, Rivera testified that the purpose of the meeting was to address Benn's behavior on June 7, 2018, and that the decision to exclude Benn from informal conferences was not discussed.

[5] The record does not make clear exactly when the Investigators went to DC 37 to complain. Testimony from Gordon and Weather regarding when they submitted written statements to Tavares suggests that the meeting was held sometime in the middle of June 2018.

apologized, Benn would only name Weather. Weather testified that after the June 7, 2018 incident Tavares asked him to "write a statement." (*Id.* at 257) Weather submitted a statement to Tavares dated June 8, 2018, that indicated he heard, "Benn yelling, 'Who you talking to?'" (City Ex. 1F) This statement was written on a DPR Advocate's Office form entitled "Investigation Unit Statement by Employee" and was signed by Weather. (*Id.*)

Rivera testified that the collection of witness statements after an incident is common practice and acknowledged that Tavares collected statements from Investigators concerning the June 7, 2018 verbal altercation. However, Weather testified that he believed Tavares was asking him to write a statement against Benn and he did not want to. (Tr. 257) He testified that he did not refuse because he was worried about being retaliated against.[6]

Weather also testified that sometime after the June 7, 2018 altercation, Tavares asked him "to go down to the Local."[7] (Tr. 258) Again, Weather complied and accompanied Tavares to Local 1113's office. However, Weather stated that he complied because he thought, "go or don't be part of the team." (*Id.* at 259)

Rivera testified that she neither encouraged nor directed her staff to make complaints to DC 37 about Benn. She testified that she became aware that the Investigators went to DC 37 and made complaints because Gordon and Tavares told her after they went. Similarly, Gordon testified that neither Tavares nor Rivera pressured or directed her to make a complaint against Benn. Gordon testified that she went with the group of Investigators to DC 37 to "to get some guidance

[6] Specifically, he stated, "either you play with the team, or you're not part of the team. And if you're not a part of the team, then things may happen that you know won't be good. The energy in the office won't be great. It won't be conducive to everyone." (*Id.* at 258) Weather noted that he had not personally witnessed retaliation at the Advocate's Office but had "heard" about it. (Tr. 258)

[7] Tavares is a member of the same bargaining unit as the other Investigators.

and advice on how to handle the situation" that occurred with Benn on June 7, 2018. (Tr. 294) She explained that she was "pretty upset" and wanted to alert the union. (*Id.* at 297-98)

Location of Informal Conferences

On June 19, 2018, when Kadlub emailed Drucker to confirm that the policy excluding Benn from informal conferences was reversed, Drucker replied confirming the policy reversal, but also noted that upcoming informal conferences "must be held in [Rivera's] office." (TE Ex. 1B) As of the date of the improper practice hearing, it was undisputed that all informal conferences and some investigatory interviews were still being conducted in Rivera's office.

Kadlub forwarded Drucker's email to Benn. In response, on June 20, 2018, Benn sent an email to Trimble, DPR Commissioner David Starks, DC 37 Associate General Counsel Steven Sykes, Director of DC 37 Blue Collar Division David Catala, and DC 37 Executive Director Henry Garrido. (*See* TE Ex. 1C) In her email, she expressed frustration with this new policy, writing in relevant part:

> [T]here is a hearing room that all the other locals use for all hearings . . . I do not have a problem if [Rivera] wants to sit in on [a]ll hearings . . . but I will not be forced to hold hearings in her office and have my members treated any different than any other members.

(*Id.*)

The Union's informal conferences had never been held in Rivera's office prior to this directive. Rather, all informal conferences and investigatory interviews were held in the conference room.[8] Benn, Kadlub, and Weather testified that they did not know of any other DC 37 local that was restricted to holding informal conferences or investigatory interviews in Rivera's

[8] The Union does not dispute that other locals held informal conferences and investigatory interviews in Rivera's office when necessary. Both Benn and Kadlub acknowledged that on June 7, 2018, DC 37 Local 983 was conducting an informal conference in Rivera's office.

office. Benn stated that she has "never been in [Rivera's] office for anything" and that "everything has been done out of the conference room." (Tr. 131)

Rivera, Gordon, and Weather testified that investigatory interviews and informal conferences were normally held in the conference room. However, on a busy day or if a staff member requested it, Rivera and/or Real's offices were used for locals other than the Union.[9] Further, although Rivera did not normally attend investigatory interviews and informal conferences, on occasion she observed them for all locals. Benn acknowledged that generally she did not mind Rivera observing investigatory interviews and informal conferences in the conference room because she was engaged and paid attention. However, Benn testified that she has a problem with Rivera's observation in her office because she does not sit at the table with the parties and is in no way engaged with the proceedings. Kadlub testified that he did not have any issue with the location change, only that it was "different from the past practice." (Tr. 93)

Rivera testified that she decided to hold the Union's informal conferences in her office following the June 7, 2018 verbal altercation because Attorneys Drucker and Stein told her that they were uncomfortable holding them in the conference room with Benn. Additionally, Rivera testified that Gordon and Tavares told her that they were uncomfortable holding investigatory interviews with Benn in the conference room and wanted to have them in her office. Rivera also

[9] Rivera testified that from 2016 through June 7, 2018, investigatory interviews and informal conferences could not be held in her office because Benn refused to enter her office. Rivera stated that she accommodated Benn up until the events of June 7, 2018, after which she testified that the policy had to change. Rivera's testimony is consistent with a December 13, 2016 memorandum to "file," in which Real reported that the conference room was busy that day, Stein offered the Union use of Rivera's office for an informal conference and that Benn stated that she would not enter Rivera's office. (*See* City Ex. 3)

received a call and email from Knight at DC 37 requesting that she address Benn's behavior and asking that the Investigators not have to work with Benn.[10]

Scheduling Policy for Investigatory Interviews and Informal Conferences

Prior to June 2018, informal conferences and investigatory interviews with the Union were scheduled on Thursday afternoons. Four or five cases were assigned each day, and the Advocate Office's staff would coordinate when cases were scheduled with Kadlub.[11] Once a mutually agreeable date was determined, the Advocate's Office notified the employee.

In or around June 2018, Benn and Kadlub testified that a few Union members informed them about investigatory interviews or informal conferences that had been scheduled without the Union's participation. Kadlub testified that "two or three" members contacted him, but he could not recall their names. (Tr. 90) Benn testified that "about four" members contacted her, and she identified two of them by name. (*Id.* at 162) Kadlub did not specify whether he was referring to investigatory interviews and/or informal conferences that had been scheduled without his participation, and instead referred to "hearings" generally. (*Id.* at 69, 72) Benn's testified similarly, but she did recall that the two members who she was able to identify by name told her that "the Advocate's Office had scheduled them to come in for an investigation" and were "subjects of the

[10] Knight's June 27, 2018 email to Rivera did not name Benn specifically, but explained that DC 37 met with "several Investigators" from the Advocate's Office who expressed their concerns about "several incidents that occurred with one of [DPR's] employees while doing their work." (*See* City Ex. 4) Further, Knight wrote that the Investigators complained "several times to [DPR] to no avail." (*Id.*) Accordingly, Knight requested that Rivera "address all concerns and create an environment that is safe for them to do their jobs." (*Id.*) Similarly, on June 29, 2018, Tavares emailed Rivera explaining that the Investigators discussed their concerns with Knight, were "advised to cease any contact with [Benn]," and that the Investigators would "no longer conduct CPW interviews." (City Ex. 5) Irrespective of Tavares' email, it does not appear that Investigators ceased contact with Benn or refused to conduct interviews before or after that date.

[11] Benn is not involved with scheduling.

investigation." (*Id.* at 162-63) The Union was not directly notified of any changes in the Advocate Office's scheduling procedure. However, Weather testified that soon after the June 7, 2018 verbal altercation, the Investigators were instructed during an internal meeting to call the CPWs directly, provide them with dates, and tell them to contact the Union to see if the dates were agreeable.[12]

Kadlub could not recall how long this alleged change lasted, but noted that it was "a week, maybe." (Tr. 71-72) Weather testified that the change lasted maybe "a little over a month" and was discontinued because the CPWs failed to reach out to their Union representative, and that therefore cases were not being scheduled. (*Id.* at 270) There is limited evidence that any CPWs appeared for investigatory interviews or informal conferences without Union representation as a result of any scheduling change.[13]

Rivera denied implementing any change to the office's scheduling policy after June 7, 2018. She testified that following the events of June 7, 2018, the Union was notified about all scheduled investigatory interviews and informal conferences. Rivera also testified that no investigatory interviews were held for approximately one month following the June 7 incident. Emails that Drucker sent to Kadlub from June 13 and 19, 2018, indicate that the Advocate's Office

[12] Throughout Weather's testimony, he alleges that policy changes were discussed in internal meetings at the Advocate's Office soon after June 7, 2018 in response to the altercation between Benn and Drucker. Weather testified that these meetings were typically attended by the Investigators and supervisors. He did not mention the Attorneys when asked directly to identify who was present for these meetings. Weather explained that a supervisor directed the alleged policy changes, but he did not provide specifics regarding the dates of the meetings or which supervisor made the instructions. He testified that there were three supervisors: Rivera, Real, and Tavares.

[13] Benn testified that one member appeared for an investigatory interview or informal conference, signed a waiver, and proceeded without a Union representative. The member was not identified, and a copy of the waiver was not produced. Rivera, in contrast, testified that DPR and DC 37 discontinued using waivers five or six years prior, and that no investigatory interviews of informal conferences were held without a Union representative following June 7, 2018.

continued to discuss informal conferences directly with Kadlub in and around June 2018. (*See* TE Ex. 1A and B) Specifically, in Drucker's June 13, 2018 email, she wrote, "my [three] informal conferences are … all vehicle accidents. I also have [one] case … that is supposed to be on Thursday. [Stein] has [two] as well on August 2nd . . . I'll send you the notice and charges shortly." (TE Ex. 1A) (redacting names of employees) Drucker followed up in a June 19, 2018 email, writing that she would "send out the notice in early July for the [four] employees." (TE Ex. 1B)

June 28, 2018 – Entry to DPR's Office Building

On June 28, 2018, at around 1:00 p.m., Kadlub and Benn arrived at DPR's office building for scheduled investigatory interviews and informal conferences with the Advocate's Office. While they were waiting by the elevator, the building's security guard called Kadlub and Benn over to the security desk and told them that they were not allowed upstairs in the building.[14] Specifically, Benn testified that the security guard said that "[Rivera and Real] told me not to let you into this building." (Tr. 150) Kadlub testified that he "[did not] recall whether the security guard used any names" with respect to who provided the instruction. (*Id.* at 60) Further, Benn and Kadlub testified that the security guard did not ask them to wait or call up to the Advocate's Office to ask whether they could go upstairs.

After standing at the security desk for a few seconds, Benn and Kadlub saw Tavares and Real walking by, and the security guard attempted but failed to get their attention. However, they noted that Tavares and Real laughed and continued walking by without acknowledging the security guard. Benn testified that she and Kadlub left the building about three or four minutes after the

[14] Kadlub testified that he had never been stopped by security when entering the building with Benn or otherwise, except for "maybe once" when he first started working for DC 37 a little over two years prior to the hearing in this matter. (Tr. 86) Benn testified that in the approximately 30 years that she had used the building prior to this incident, she had never been stopped by security.

security guard called them over to the desk. Prior to leaving the building, Benn called the CPWs that were already upstairs waiting for the hearings and told them to go home.

Kadlub testified that ten minutes after they left the building, he received a call from Rivera asking them to come back. Benn and Kadlub were no longer together, so Kadlub told Rivera that he would have to ask Benn and get back to her. Ultimately, Benn told Kadlub that she would not go back to the building, and they did not return that day. The investigatory interviews and informal conferences were rescheduled. Soon after leaving DPR, Benn wrote an email to Trimble, Stark, Garrido, Sykes, Catala, and DC 37 General Counsel Robin Roach alleging that she and Kadlub were unlawfully denied access to the Advocate's Office.

Rivera testified that she never instructed security to deny Benn access to the building nor does she have the authority to do so. Instead, Rivera stated that following the events of June 7, 2018, she instructed security to call her if Benn arrived at the building. She did this so that "[the Advocate's Office] could be aware . . . of when [Benn] was coming upstairs, so that [the Advocate's Office] could confirm that there was an actual appointment for that day." (Tr. 381) Additionally, Rivera confirmed that she gave the security guard a picture of Benn because she was not sure whether he knew Benn's name, and she wanted to be sure that he knew who she was referencing. Rivera testified that the standard procedure for entering the building is that visitors sign in, show identification to security, and then "the person who they are going to visit is notified by the security guard." (*Id.* at 371) In this case, Rivera asserted that she had to specifically instruct security about Benn because Benn had been inside the building "a lot" and would normally "just come in without [the Advocate's Office] being notified."[15] (*Id.* at 380)

[15] However, Rivera noted that visitors to the Advocate's Office needed to be "buzzed in." (Tr. 386) Similar to Rivera, Weather also testified that the building security guard would only stop

Rivera further testified that when she returned to the Advocate's Office after lunch on June 28, 2018, she noticed CPWs in the hallway. One of the CPWs told her that he was notified by Benn that she was not allowed into the building. As a result, Rivera went downstairs and asked the security guard why he did not call up to the Advocate's Office. Rivera stated that the security guard told her that Benn did not allow him the opportunity to call up. Once back upstairs, Rivera called Kadlub. Rivera explained that she asked him what happened, why he did not call her, and whether they could come back. Kadlub told her that they were denied access to the Advocate's Office and that Benn would not return to the building.

Weather testified that in an internal meeting at the Advocate's Office to discuss the events of June 7, 2018, the staff was told that Benn was not "currently allowed in the building" and that a photo of Benn was given to the building's security guard. (Tr. 264) Weather testified that the policy banning Benn from the building was in place for "probably a month or two."[16] (*Id.* at 271)

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that DPR's actions constitute violations of NYCCBL § 12-305 and NYCCBL §§ 12-306(a)(1), (2), (3), and (4).[17] The Union argues that DPR and Rivera violated

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someone and ask him/her to sign into the building if he/she was not there all the time and did not know them. Otherwise, he stated that "we all just walked in." (Tr. 287)

[16] Weather testified that he never witnessed Benn being excluded from the building.

[17] NYCCBL § 12-306(a) provides, in pertinent 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;

NYCCBL § 12-306(a)(1) and (3) by attempting to exclude Benn from representing Union members at informal conferences and investigatory interviews; directing and/or encouraging its Investigators to file complaints with Local 1113 against Benn; directing that all informal conferences and investigatory interviews must be held in Rivera's personal office and presence; ceasing to notify the Union when its members had scheduled informal conferences or investigatory interviews; and instructing security to deny Benn and Kadlub access to the Advocate's Office. The Union asserts that DPR was aware of Benn's position with the Union and argues that all the actions taken by DPR against Benn, Kadlub, and members of the Union are directly tied to Benn's union activity.

The Union argues that no matter how slight the adverse effects, DPR's actions would not have occurred but for Benn's role as Union President. According to the Union, Rivera's effort to coerce subordinates into raising complaints with Local 1113 against Benn is analogous to an agency pursuing disciplinary charges against a union representative for improper anti-union

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> (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 . . . .

NYCCBL § 12-305 provides, 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 . . . .

motives. In this case, the Union asserts that Rivera took action to interfere with the operation of the Union and prejudiced Benn in her role as President. Further, the Union notes that DPR's actions concerning the location and scheduling of investigatory interviews and informal conferences were not implemented for other locals.

Additionally, the Union argues that these acts were inherently destructive of protected rights and violated NYCCBL § 12-306(a)(1) independently. Specifically, the Union argues that it is well-established that efforts by a public employer to decide which union representative it chooses to deal with in contractual grievances is inimical to the rights of employees and the entire collective bargaining process. Moreover, the Union argues that the decision to exclude Benn was widely discussed and was the subject of the mid-June meeting between the parties. Further, the Union argues that DPR's decision to hold all hearings in Rivera's office was a "straightforward exertion of power, and one that was meant to anger [the Union] and make it appear weak." (Union Br. at 30) Moreover, the Union contends that forcing its members to appear in Rivera's personal office, in her presence, created an atmosphere of intimidation. Indeed, the Union asserts that all of DPR's actions were *per se* coercive and chilling.

The Union argues that DPR violated NYCCBL § 12-306(a)(2) by directing employees to file complaints with Local 1113 against Benn. Additionally, it asserts that DPR's actions in attempting to exclude Benn from informal conferences and changing the location and scheduling of investigatory interviews and informal conferences are were not applicable to other locals and disfavored the Union over other DC 37 locals in violation of NYCCBL § 12-306(a)(2).

The Union argues that DPR also made unilateral changes to mandatory subjects of bargaining, in violation of NYCCBL § 12-306(a)(4), when it stopped coordinating investigatory interviews and informal conference dates with the Union and directed that they must be held in

Rivera's office. The Union asserts that both are long-standing practices. Similarly, the Union argues that "the practice of using any available interview room at the [Advocate's Office], when there is a scheduled interview or hearing, is also of very long standing, and continues to this day for all other local unions besides [the Union]." (Union Br. at 52)

As a remedy, the Union seeks an order directing that DPR cease and desist from engaging in the specified improper practices, post notices of the improper practices, and any such other further relief as may be just and proper.

City's Position

The City argues that DPR did not discriminate or retaliate against Benn or the Union in violation of NYCCBL §§ 12-306(a)(1) and (3). The City asserts that although DPR had knowledge of Benn's union activity, it played no role in DPR's actions. Since Benn has worked with DPR on behalf of the Union for years, the City asserts that it is illogical that her union activity is now a motivating factor. Instead, it contends that DPR's actions were motivated by Benn's unprofessional and inappropriate behavior on June 7, 2018. Moreover, the City argues that Benn benefited from her role as Union President because "virtually any other DPR employee who spent their time berating staff would have been admonished and/or disciplined." (City Br. at 35) Moreover, the City asserts that Benn, the Union, and its members suffered no adverse action.

The City argues that the Union's allegation that Rivera retaliated against Benn by coercing staff to file complaints is not supported by credible evidence. The City asserts that the Union's witnesses gave conflicting testimony as to who was responsible for the alleged coercion, and Gordon denied that her complaint was directed or coerced. Similarly, the City contends that the Union has failed to establish that the alleged change in scheduling procedures even occurred. However, even assuming it did, the City asserts that disparate treatment of a local does not

constitute a violation of NYCCBL § 12-306(a)(3). Additionally, the City asserts that Rivera never banned Benn from the building. According to the City, this is evident by fact that Rivera called Kadlub immediately to ask whether Benn and Kadlub could return.

Assuming *arguendo* that the Union is able to establish a *prima facie* case of retaliation on any of its NYCCBL § 12-306(a)(3) claims, the City argues that its actions were the result of legitimate business reasons. Following June 7, 2018, staff at the Advocate's Office and even one of DC 37's own representatives reached out to Rivera and demanded that she take action to protect the office from Benn's behavior. As a result, the City contends that Rivera took "very minimal and legitimate steps to address her staff's well-being," all of which "had no impact on [Benn's] rights as a Union representative to represent her members and perform any other union-related function." (City Br. at 38)

Further, the City argues that DPR did not engage in actions that were inherently destructive of important rights in violation of NYCCBL § 12-306(a)(1). None of the alleged acts, taken together or alone, are visible and continuing obstacles to future exercise of employee rights, nor do they directly or unambiguously deter or penalize protected activity. Specifically, the City argues that the email banning Benn from informal conferences was quickly reversed. The City asserts that the Investigators were motivated to file the complaints on their own. Informal conferences took place in Rivera's office to address staff concerns, and there is no evidence that the decision had any impact on the rights of Union members. There was no functional process change with respect to the scheduling of investigatory interviews and informal conferences, regardless of whom the Advocate's Office contacted first, the Union or the member. No investigatory interviews or informal conferences were conducted without Union representation. Similarly, no protected

employee rights were affected when Benn and Kadlub could not access the building because all investigatory interviews and informal conferences were rescheduled and conducted on a later date.

The City also argues that DPR's actions did not dominate or interfere with the formation or administration of the Union in violation of NYCCBL § 12-306(a)(2). The revoked email excluding Benn from informal conferences had no effect on the Union's internal structures or its ability to represent its members as Benn was never excluded from any hearing. Directing that all the Union's conferences be held in Rivera's office was comparable with the other unions who also use her office. In addition, any complaints against Benn have no impact on her ability to represent her members or on the administration of the Union.

Finally, the City argues that DPR did not violate NYCCBL § 12-306(a)(4) because no investigatory interviews or informal conferences went forward without Union representation. Further, the location of hearings is not a mandatory subject of bargaining, and the decision to use Rivera's office or the conference room goes to the methods and means by which government operations are conducted and DPR's discretion over its organization. Alternatively, any alleged change is *de minimis* because the conference room and Rivera's office are steps away from each other and have an equal capacity to hold hearings.[18] Accordingly, the City asks that the improper practice be dismissed.

DISCUSSION

For clarity, we analyze the claims here by incident and alleged violations of the law. However, although the Union alleges that each incident violated NYCCBL § 12-306(a)(3), none of the incidents involved an adverse employment action by the City. Thus, we do not address these

[18] To the extent that Rivera sits in on hearings that occur in her office, the City asserts that she has the right to do so whether they occur in her office, the conference room, or otherwise.

allegations individually. Indeed, because the Union has failed to allege or show an adverse employment action suffered by Benn or the CPWs related to any of its claims, we dismiss the Union's NYCCBL § 12-306(a)(3) claims. *See DC 37, L. 983*, 6 OCB2d 10, at 31 (BCB 2013); *CSTG, Local 375*, 3 OCB2d 14, at 16 (BCB 2010); *Andreani*, 2 OCB2d 40, at 28 (2009) ("crucial determination in [NYCCBL § 12-306(a)(3)] claims [is] whether a petitioner has alleged an adverse employment action taken by an employer"); *Moriates*, 1 OCB2d 34, at 13 (BCB 2008), *aff'd*, *Matter of Moriates v. NYC OCB*, Ind. No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.) (failure to allege adverse employment action fatal to NYCCBL § 12-306(a)(3) claim); *OSA*, 13 OCB2d 2, at 30-31 (BCB 2020) (finding that a termination is an adverse employment action); *DC 37, L. 2507*, 11 OCB2d 18, at 22 (BCB 2018) (finding that the removal of a desirable assignment is an adverse employment action); *OSA*, 7 OCB2d 20, at 27 (BCB 2014) (finding that an undesirable transfer is an adverse employment action).[19]

Communication Excluding Benn from Informal Conferences

The Union alleges that Drucker's June 13, 2018 email to Kadlub excluding Benn from informal conferences violated NYCCBL §§ 12-306(a)(1) and (2). NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents "to interfere with, restrain

[19] We are mindful that the labor relations process "must tolerate robust debate of employment issues, even if occasionally intemperate." *Local 376, DC 37*, 4 OCB2d 58, at 13 (BCB 2011) (quoting *Village of Scotia*, 29 PERB ¶ 3071 (1996)) (other citations omitted). However, we have also found that statements made by employee representatives while engaging in concerted activities can lose protection of the NYCCBL. *See Local 376, DC 37*, 4 OCB2d 58, at 15-16 (finding that personal and disparaging attacks did not "further the collective welfare of the [u]nion's employees" or "relate to the collective bargaining process," and therefore lost protection of the NYCCBL). In this case, we find that Benn's statements were protected by the NYCCBL. Her statements were made during the course of, and in relation to, protected union activities, and were not so "egregious and inappropriate" as to render them unprotected. *See DC 37, L. 2507*, 11 OCB2d 18, at 19-21 (BCB 2018) (finding that a shop steward's statements were made "in furtherance of the collective welfare of his fellow [u]nion members," and were "not so flagrant and egregious" as to lose protection of the NYCCBL).

or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter[.]" The Board has previously held that "conduct that contain[s] an innate element of coercion, irrespective of motive, [can] constitute conduct which, because of its potentially chilling effect . . . is inherently destructive of important rights guaranteed under the NYCCBL." *DEA*, 4 OCB2d 35, at 9 (BCB 2011) (quoting *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010)). Moreover, we have found that "an attempt by an employer to decide which union representative it chooses to deal with in connection with contractual grievances [is] inimical to the rights of employees and to the entire collective bargaining process." *Lehman*, 29 OCB 23, at 11 (BCB 1982); *see also Malverne Police Benevolent Association,* 43 PERB ¶ 4602 (2010) (explaining that a union's choice of representative is protected from employer interference by the Taylor Law and that an employer's interference with such matters has a chilling effect on the free exercise of employees' protected rights). Accordingly, we have held that such attempts violate NYCCBL § 12-306(a)(1). *See DC 37, L. 376*, 73 OCB 6, at 10-11 (BCB 2004); *Local 420, DC 37*, 69 OCB 11, at 5 (BCB 2002); *Lehman*, 29 OCB 23, at 11.

For instance, in *DC 37, L. 376*, 73 OCB 6, at 2-7 (BCB 2004), the agency's director of labor relations, *inter alia*, attempted to stop a union vice president from representing employees at a disciplinary hearing. The director voiced concerns about the vice president's "well-known" behavior and asked another union representative if there was any way to avoid the vice president's attendance. *Id.* at 2. Ultimately, the Board found that the director's "attempt to avoid dealing with [the vice president]" was part of a course of conduct that discouraged and inhibited employees from choosing the vice president as their representative in violation of NYCCBL § 12-306(a)(1). *Id.* at 11.

In this case, Drucker's June 13, 2018 email to Kadlub excluding Benn from informal conferences was undoubtedly "an attempt" by DPR "to decide which union representative it chooses to deal with," in violation of NYCCBL § 12-306(a)(1). *Lehman*, 29 OCB 23, at 11. Like in *DC 37, L. 376*, 73 OCB 6, DPR never followed through on its effort to exclude Benn, and Benn was never denied an opportunity to represent employees. Nevertheless, we find that the email itself was inherently destructive of important rights guaranteed by the NYCCBL because it was an attempt to determine which Union representative would represent employees and thus was inimical to employee rights. Accordingly, we find that DPR violated NYCCBL § 12-306(a)(1).[20]

On the other hand, we find that Drucker's June 13, 2018 email did not violate NYCCBL § 12-306(a)(2) as alleged by the Union. NYCCBL § 12-306(a)(2) provides that it is an improper practice for an employer to "dominate or interfere with the formation or administration of any public employee organization." We have held that an employer violates NYCCBL § 12-306(a)(2):

> [if it] has interfered with [a union's] formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges, or recognizing a favored union when another union has raised a real representation claim concerning the employees involved.

[20] We note that although the policy excluding Benn from informal conferences as described in the June 13, 2018 email was in effect for at most six days, its rescission does not moot the issue under the NYCCBL. *See Local 333, UMD*, 6 OCB2d 25, at 16 (BCB 2013) (finding that the rescission of an email that altered employee rights with respect to the use of sick leave did not nullify the union's allegation). Indeed, "it has long been established that an 'improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remain open for consideration.'" *COBA*, 11 OCB2d 9, at 14 (BCB 2018) (citing *DC 37, L. 1457*, 1 OCB2d 32, at 22 (BCB 2008)); *see also Plainedge Union Free School Dist.*, 31 PERB ¶ 3063 (1998).

Feder, 5 OCB2d 14, at 30 (BCB 2012) (quoting *Moriates*, 1 OCB2d 34, at 11 (BCB 2008), *affd., Matter of Moriates v. NYC OCB,* Ind. No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010)) (Sherwood, J.) (citation and quotation marks omitted). However, we have also held that the "disfavoring of a union delegate by management will not constitute a violation of this provision, provided that management's actions cannot be construed as domination and does not rise to the level of interference with the actual administration of the union's internal structures." *DC 37*, 1 OCB2d 5, at 52 (BCB 2008) (quoting *SBA*, 75 OCB 22, at 21 (BCB 2005)); *see also DC 37, L. 376*, 73 OCB 6, at 12.

In this case, the Union has failed to provide any evidence that Drucker's email affected the Union's formation or administration or that it interfered with the Union's operation to the extent necessary to demonstrate domination under the NYCCBL. Therefore, we dismiss the Union's claim under NYCCBL § 12-306(a)(2).

Investigators' Complaints

We find that there is insufficient evidence to conclude that Rivera directed the Investigators to complain to Local 1113 about Benn. It is undisputed that sometime shortly after the June 7, 2018 incident, several Investigators including Gordon, Weather, and Tavares spoke with a Local 1113 representative and complained about Benn. The City's witnesses testified consistently that neither Tavares nor Rivera encouraged or directed the Investigators to file complaints against Benn. Gordon testified that neither Tavares nor Rivera pressured her to meet with Local 1113 or make a complaint against Benn. To the contrary, she stated that she wanted to alert the union because she was personally upset about the June 7, 2018 incident. Moreover, Rivera testified that she neither encouraged nor directed her staff to make complaints to Local 1113 against Benn and

that she first became aware that the Investigators complained because Gordon and Tavares informed her after the Investigators met with Local 1113.

Weather's testimony that Tavares asked him to go to Local 1113 with other Advocate's Office staff was unrebutted. While the Union did not specifically allege that Tavares was acting on Rivera's behalf, Tavares was Weather's supervisor. Under certain circumstances, it may be inherently coercive for a supervisor to request that an employee file a complaint with his union. However, it is not clear that elements of coercion were innate in Tavares' request. It is undisputed that Tavares is a member of the same bargaining unit as the other Investigators and also complained to Local 1113. As Weather described Tavares' request, there was nothing explicitly coercive in asking him "to go down to the Local." (Tr. 258) As a result, we examine Weather's overall testimony and other evidence to determine if Tavares' request could be reasonably considered coercive.

Weather testified that he believed he had to comply with Tavares' request because of feared retaliation and the need to be "part of the team." (Tr. 259) Nevertheless, he gave no indication that Tavares sought anything other than Weather's participation in the visit to Local 1113. Further, the record does not support a finding that the Investigators as a group felt coerced by Tavares' invitation to go to Local 1113. To the contrary, Gordon testified that she was neither forced nor pressured or directed to go to DC 37 by Tavares but that she was "pretty upset" by Benn's conduct and wanted to alert the union. (*Id.* at 297-98) Under these circumstances, we do not find sufficient evidence to establish that Tavares' request could be reasonably considered coercive or that it otherwise interfered with his rights under NYCCBL § 12-305. Therefore, we find that the Union has failed to satisfy its burden of demonstrating that Rivera directed the Investigators to file

complaints with Local 1113 against Benn. In consideration of the foregoing, we dismiss the Union's claims under NYCCBL §§ 12-306(a)(1) and (2) with respect to this allegation.

Location of Investigatory Interviews and Informal Conferences

The Union alleges that DPR's decision to change the location of the Union's investigatory interviews and informal conferences from the conference room to Rivera's office violated NYCCBL §§ 12-306(a)(1), (2), and (4).

First, we find that DPR's decision to conduct investigatory interviews and conferences in Rivera's office did not violate NYCCBL § 12-306(a)(1). There is no dispute that on June 19, 2018, Drucker informed Kadlub via email that informal conferences must be held in Rivera's office, and that, since then, informal conferences and some investigatory interviews with the Union have been held there. However, the Union has failed to provide evidence that changing location from the conference room to Rivera's office interfered with, restrained, or coerced Benn or the CPWs in the exercise of their rights guaranteed by the NYCCBL. The Union argues that use of that office and Rivera's mere presence in the meetings is inherently threatening or coercive. However, like the Union, the City has the right to determine who attends these meetings and their role. *See* NYCCBL § 12-307(b). It is undisputed that Rivera had previously attended investigatory interviews and informal conferences in the conference room, albeit less frequently.[21] Moreover, the new location posed no logistical burden on the Union or bargaining unit members. Without more, we do not find that the location change and/or Rivera's presence during informal conferences and investigative interviews negatively impacted employee participation, or otherwise interfered with or impeded union activity. Therefore, we find that DPR's decision to conduct

[21] Inasmuch as Rivera is the Parks Advocate and responsible for the operation of that office, her participation in or observation of these meetings is not inherently threatening or coercive.

investigatory interviews and informal conferences in Rivera's office did not violate NYCCBL § 12-306(a)(1), and we dismiss this claim.

Second, we find that the location change did not violate NYCCBL § 12-306(a)(2). The Union asserts that this decision was an action which "actively sought to disfavor [the Union] over other DC 37 locals."[22] (Union Br. 49) NYCCBL § 12-306(a)(2) prohibits domination or interference in the formation or administration of a union. We have found favoritism of one union over another to violate the law only when done to influence employees' selection of their union representative. *See Feder,* 5 OCB2d 14, at 30-31 (BCB 2012) (finding no violation of NYCCBL § 12-306(a)(2) when the petitioner failed to allege that the disparate application of policy sought to influence employees' selection of their union representative or was otherwise based on union affiliation). Moreover, the Union has provided no evidence that the location change otherwise represented domination by management or interference with the Union's internal administration. Therefore, we dismiss the Union's claim under NYCCBL § 12-306(a)(2).

Lastly, we find that the location change did not violate NYCCBL § 12-306(a)(4). NYCCBL § 12-306(a)(4) makes it an improper practice for a public employer or its agents "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 § 12-306(c) requires that public employers and employee organizations "bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *CEU, L. 237, IBT,* 2 OCB2d 37, at 11 (BCB 2009).

[22] We note that other DC 37 locals use Rivera's office for investigatory interviews and informal conferences. Indeed, Benn and Kadlub both acknowledged that they saw Local 983 holding an informal conference in Rivera's office on June 7, 2018, and Weather, Gordon, and Rivera all testified that investigatory interviews and informal conferences for other locals were sometimes held in Rivera's office.

The Board has long held that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012). "In order to establish that a unilateral change constitutes an improper practice, the petitioner must demonstrate the existence of such a change from the existing policy or practice and establish that the change as to which it seeks to negotiate is or relates to a mandatory subject of bargaining." *Doctors Council, L. 10MD, SEIU*, 9 OCB2d 2, at 10 (BCB 2016) (quoting *Local 1182, CWA*, 7 OCB2d 5, at 11 (BCB 2014)) (quotation and internal editing marks omitted).

However, in determining whether a unilateral change took place, "we have distinguished between a material change and one which is *de minimis*—that is, a change in form only, which does not require increased participation on the part of the employee or alter the substance of the benefit to the employee . . . ." *PBA*, 6 OCB2d 36, at 21 (BCB 2013) (quoting *DC 37*, 4 OCB2d 43, at 9-10 (BCB 2011)) (internal quotation marks omitted). Unlike a material change, a *de minimis* change does not suffice to establish an improper practice. *See DEA*, 2 OCB2d 11, at 16 (BCB 2009) (requiring completion of a form that elicited the same information as was previously required deemed *de minimis* change); *DC 37*, 77 OCB 34, at 17 (BCB 2006) (requiring employee to submit a physician's certificate during a protracted illness on a different day of the month deemed *de minimis* change); *PBA*, 73 OCB 12, at 16-17 (BCB 2004), *affd., Matter of Patrolmen's Benev. Assn. v. NYC Board of Collective Bargaining*, No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *affd.*, 38 A.D.3d 482 (1st Dept. 2007) (change in a performance monitoring policy's language regarding employees' participation in interviews deemed *de minimis*).

We find that, on this record, the change in investigatory interview and informal conference locations is a *de minimis* change that is not sufficient to establish an improper practice. The Union

did not present evidence from which we can conclude that the change in location from the conference room to Rivera's office materially altered the investigatory interview, informal conference, or employee participation. *See PBA*, 6 OCB2d 36, at 21; *DC 37*, 4 OCB2d 43, at 9-10.[23] The only asserted difference between the conference room and Rivera's office, is Rivera's more frequent attendance. However, the Union did not establish that her presence materially altered the interview or informal conference process. In fact, both Benn and Kadlub testified that they had no issue with Rivera participating in the interviews and conferences. Therefore, we dismiss the Union's claim under NYCCBL § 12-306(a)(4) with respect to the change in location.[24]

Scheduling Procedure for Investigatory Interviews and Informal Conferences

We find evidence that the procedure followed by the Advocate's Office to schedule investigatory interviews was changed sometime after June 7, 2018. Kadlub and Benn testified that sometime after June 7, 2018, they learned that several bargaining unit members had been notified about investigatory interviews that the Advocate's Office had not scheduled directly with the Union.[25] Also, Weather testified that sometime after June 7, 2018, he was told at an internal meeting with the other Investigators to coordinate dates with the employees and not the Union. Weather further testified that the new procedure was discontinued after approximately one month because it did not prove workable and resulted in interviews being canceled. Rivera also testified

[23] In as much as we find that the location change was *de minimis*, *Greenburgh #11 Union Free Sch. Dist.*, 33 PERB ¶ 3018 (2000), upon which the Union relies, is distinguishable from this case.

[24] Having found that the change in investigatory interview and informal conference location does not constitute a material change to a term or condition of employment, we do not address whether it relates to a mandatory subject of bargaining. *See, e.g.*, *UFADBA*, 12 OCB2d 30, at 20 n.12 (BCB 2019) (declining to address whether the alleged change related to a mandatory subject of bargaining when the petitioner had not met its burden of establishing a change in past practice).

[25] Based on the testimony of Benn and Kadlub, they received calls from between two and seven employees who reported they had been contacted directly by the AO to schedule their interviews.

that due to cancellations, investigatory interviews were not held for approximately one month. We note that we do not find sufficient evidence to conclude that Rivera directed any change in scheduling procedures or that the Advocate's Office failed to provide the Union with notice of informal conferences.[26] Regarding investigatory interviews, although we find that there were changes made to the notice and scheduling process, there was insufficient evidence presented to support the assertion that Rivera directed the changes, and Rivera expressly denied this assertion.

Accordingly, the testimony establishes that sometime after the June 7 incident and for a period of approximately one month there was an instruction to the Investigators to schedule dates for investigatory interviews with employees and to direct the employees to confirm dates with the Union. This new procedure deviated from the prior practice of contacting Kadlub first to schedule and having Kadlub coordinate the interview dates with the employees. Moreover, the record demonstrates that this unilaterally-imposed procedure affected the method of scheduling and notification of an investigatory interview that weighed disciplinary action. This Board has held that procedures relating to disciplinary investigations are mandatory subjects of bargaining. *See UFA*, 43 OCB 4 (BCB 1989) (finding that contract provisions "apply[ing] exclusively to investigations that are being conducted for disciplinary violations … are mandatory[,] and they

[26] Regarding informal conferences, we find that the Union has failed to establish that any instruction was issued by the Advocate's Office directly to employees or that the Advocate's Office made any other change to the informal conference scheduling process. The testimony of both Benn and Weather referred specifically to investigations while Kadlub's testimony regarding his contact with members did not specify whether he was referring to investigatory interviews and/or informal conferences. Benn identified two individuals that contacted her, both of whom referred to upcoming investigations. Regarding Weather's testimony, it is undisputed that Investigators do not schedule informal conferences, and Weather testified that the meeting at which the alleged instruction was given was only with Investigators. Overall, the witness testimony fails to allege with any particularity that the Union was omitted from the informal conference scheduling process. In fact, the June 13 and 19, 2018 emails between Drucker and Kadlub show that during the same period in which the change was alleged to be in effect, multiple dates for informal conferences were being coordinated directly with the Union.

may not be unilaterally deleted"); *City of Utica*, 53 PERB ¶ 4539 (2020) (procedures relating to disciplinary investigations, including advance notification to the union, are a mandatory subject of bargaining); *Town of Ulster v. New York State Public Employment Relations Bd.*, 2016 WL 3346019 (Sup. Ct. Albany Co. Mar. 24, 2016) (affirming PERB's conclusion that disciplinary investigation procedures are a mandatory subject of bargaining).[27] Therefore, we find that DPR made a unilateral change to a mandatory subject of bargaining, in violation of NYCCBL §§ 12-306(a)(1) and (4), by changing the procedure for scheduling investigatory interviews.[28]

Alleged Denial of Building Access

The Union alleges that Rivera directed building security to deny Benn and Kadlub access to DPR's office building on June 28, 2018, in violation of NYCCBL §§ 12-306(a)(1). It is undisputed that Benn's and Kadlub's access to the building was impeded by the security guard on June 28, 2018. They were stopped on their way into the building and were asked to wait at the security desk. It is also undisputed that despite formal rules regarding visitor entry, individuals like Benn and Kadlub, who frequent the building and are familiar to the security staff, are not stopped when entering the lobby. It is further undisputed that following the events of June 7, 2018, Rivera gave the security guard a picture of Benn and provided instructions to the guard regarding

[27] We note that we have previously rejected attempts to distinguish pre-discipline investigatory interviews from the disciplinary process. *See SBA*, 61 OCB 22, at 22 (BCB 1998) (explaining that [t]he [u]nions' attempt to distinguish the subject of pre-discipline interrogations from the disciplinary process is not supported by the caselaw . . . [and that] [t]he PERB cases that have considered demands relating to procedures for investigations or interrogations have dealt with them in the context of disciplinary procedures").

[28] We do not address the Union's independent NYCCBL § 12-306(a)(1) claim because when an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See* DC 37, 8 OCB2d 11, at 23 (BCB 2015); *Local 621, SEIU*, 2 OCB2d 27, at 14 (BCB 2009); *USCA*, 67 OCB 32, at 8 (BCB 2001). We also do not find that the change to scheduling of disciplinary investigation interviews is a violation of NYCCBL § 12-306(a)(2). Here, the change did not interfere with Union's administration or rise to the level of domination as required by the NYCCBL. *See DC 37*, 1 OCB2d 5, at 52; *SBA*, 75 OCB 22, at 21.

Benn's access. We credit Rivera's denial that she instructed security to deny Benn access and her testimony that she instructed the security guard to call her when Benn arrives at the building. Rivera testified that she wanted to be notified so she could confirm that Benn had an appointment, not that she intended to deny her access. Although this instruction suggests that Benn would not be permitted entry if she did not have an appointment, there is no dispute that Benn and Kadlub had an appointment on June 28, 2018. It is also undisputed that within minutes of Benn and Kadlub leaving the building, Rivera called Kadlub and asked them to return, and their access was unimpeded prior to and after this incident. Only one week earlier and in response to Trimble's instruction, Rivera allowed Benn to continue to attend informal conferences and interviews. Having agreed to permit Benn's continued participation, it does not seem plausible that a few days later Rivera would ban Benn from the building. Therefore, under the circumstances, the evidence suggests that by instructing the security guard to call her when Benn arrived, Rivera did not intend that building entry to conduct union business be denied.

In reaching this conclusion, we note that both Benn and Kadlub testified that the security guard said he had been instructed to not let Benn in the building.[29] In addition, Weather testified that at an unspecified internal meeting at the Advocate's Office following June 7, 2018, he was told that Benn was not "currently allowed in the building." (Tr. 264) While these statements may be true, in the absence of direct evidence, they do not establish that Rivera's instruction to the guard was to prohibit Benn's entry. Therefore, we credit Rivera's denial and conclude that Rivera instructed the security guard to call the Advocate's Office upon Benn's arrival.[30] This instruction

[29] Benn testified that the guard indicated that Rivera and Real had given him this instruction but Kadlub did not recall if the security guard used any names.

[30] We also note that Rivera testified that she does not have the authority to deny Benn access to the building as Parks Advocate.

resulted in the security guard stopping Benn and Kadlub from entering the building on June 28, 2018, and asking them to wait at the security desk. Accordingly, we dismiss the Union's claim that Rivera directed building security to deny Benn and Kadlub access to DPR's office building on June 28, 2018, in violation of NYCCBL §§ 12-306(a)(1).

In this case, the record suggests that Benn and Kadlub were subjected to different treatment than other union representatives when they were stopped by security on June 28, 2018. Therefore, we also review whether that conduct violated the NYCCBL. NYCCBL § 12-306(a)(1) prohibits an employer from interfering, restraining, or coercing employees in the exercise of their right to engage in union activity. However, there is no evidence that the security guard's conduct "create[d] visible and continuing obstacles to the future exercise of employee rights" or "unambiguously penalize[d] or deter[ed] protected activity," and therefore it did not interfere with the exercise of union activity. *See OSA*, 6 OCB2d 26, at 7 (BCB 2013) (internal quotation marks and citations omitted) (describing the two broad categories of conduct that have been held to be inherently destructive of important employee rights). Also, it has not been alleged or shown that the security guard's conduct reached the level of an impermissible threat. *See DC 37, L. 1087*, 11 OCB2d 41, at 16-18 (BCB 2018) (finding an independent NYCCBL § 12-306(a)(1) violation when a supervisor told a subordinate that he could not speak with his union steward about vacation picks and made physical contact with the employee to prevent him from exiting the hallway to speak with the union steward); *see also CSTG, Local 375*, 3 OCB2d 14, at 14-15 (BCB 2010) (finding an independent NYCCBL § 12-306(a)(1) violation when a supervisor confronted a subordinate in a heated manner about a pending grievance and told him he should "let it go"). Therefore, without more, we cannot find that the events of June 28, 2018 constituted an independent violation of NYCCBL § 12-306(a)(1).

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 by District Council 37, Local 1505, AFSCME, AFL-CIO, against the City of New York and New York City Department of Parks and Recreation, docketed as BCB-4288-18, is granted as to the claim that the City of New York and New York City Department of Parks and Recreation violated NYCCBL § 12-306(a)(1) by interfering with the Union's selection of representatives to represent members at informal conferences and violated NYCCBL § 12-306(a)(1) and (4) by modifying the procedure for scheduling investigatory interviews; and it is further

ORDERED, that the improper practice petition is denied as to all other claims that the City of New York and New York City Department of Parks and Recreation violated NYCCBL §§ 12-306(a)(1), (2), (3), and (4); and it is further

ORDERED, that the City of New York and New York City Department of Parks and Recreation cease and desist from interfering with the Union's selection of representatives to represent members at informal conferences and unilaterally modifying the procedure for scheduling investigatory interviews; and it is further

ORDERED, that the New York City Department of Parks and Recreation post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain for a minimum of thirty days.

Dated: April 1, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
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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 14 OCB2d 8 (BCB 2021), determining an improper practice petition between District Council 37, Local 1505, AFSCME, AFL-CIO, and the City of New York and New York City Department of Parks and Recreation.

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-4288-18, filed by District Council 37, Local 1505, AFSCME, AFL-CIO, against the City of New York and New York City Department of Parks and Recreation be, and the same hereby is, granted in-part; and it is further

DETERMINED, that the City of New York and New York City Department of Parks and Recreation has violated NYCCBL § 12-306(a)(1) by interfering with the Union's selection of representatives to represent members at informal conferences and violated NYCCBL § 12-306(a)(1) and (4) by unilaterally modifying the procedure for scheduling investigatory interviews; and it is further

ORDERED, that the New York City Department of Parks and Recreation post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain for a minimum of thirty days.

The New York City Department of Parks and Recreation
(Department)

Dated: _____

Posted By: _____
(Title)