COBA, 14 OCB2d 25 (BCB 2021)

(IP) (Docket No. BCB-4328-19)

Summary of Decision*:** The Union claimed that the City and the DOC violated NYCCBL § 12-306(a)(1) and (3) by admonishing a union delegate for emailing the warden, requiring him to submit a written report explaining why he had done so, telling him he had to follow the chain of command to address complaints, threatening him with an administrative transfer, and removing him from a roll call. The City denied that the union delegate had been threatened with an administrative transfer and argued that his removal from roll call and statements ordering him to follow the chain of command were motivated by legitimate business reasons. The Board found that the City and the DOC violated NYCCBL § 12-306(a)(1) by requiring the union delegate to submit a written report about why he had emailed the warden and threatening him with administrative transfer, and it dismissed all other claims. 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-

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Petitioner,

- and-

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

Respondents.

DECISION AND ORDER

On April 25, 2019, the Correction Officers Benevolent Association ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City

Department of Correction ("DOC").[1] The Union alleges that the DOC admonished a Union delegate for emailing the warden, required him to submit a written report explaining why he had done so, told him he had to follow the chain of command to address complaints, threatened him with an administrative transfer, and removed him from a roll call in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City denies that the Union delegate was threatened with an administrative transfer and argues that his removal from roll call and statements ordering him to follow the chain of command were not due to his union activity and were motivated by legitimate business reasons. The Board finds that the City and the DOC violated NYCCBL § 12-306(a)(1) by requiring him to submit a written report about why he had emailed the Warden regarding a labor-management issue and threatening him with administrative transfer, and it dismisses all other claims. Accordingly, the petition is granted in part and denied in part.

BACKGROUND

The Trial Examiner held a two-day hearing and found that the totality of the record, including the pleadings, exhibits, transcript, and briefs, established the relevant facts set forth below.

[1] The petition named Union delegate Edward McCauley as an additional petitioner and Warden Michelle Hallett and Assistant Deputy Warden Cheryl Booker as additional respondents. We have amended the caption *nunc pro tunc* because, based upon the record before this Board, the Union is acting on behalf of McCauley. *See COBA*, 2 OCB2d 7, at 2 n.1 (BCB 2009) (citing *SBA*, 75 OCB 22, at 1-2 (BCB 2005)) (where counsel for the union represented both the union and the union member, the Board considered the petition to be filed by the union on behalf of its member). In articulating jurisdiction to remedy improper practices, the NYCCBL provides that a public employer may be held responsible for the acts of its agents, and it does not extend application of the law to individuals. Therefore, the individual respondents are removed from the caption. *See* NYCCBL §§ 12-304 and 12-306; *Proctor*, 3 OCB2d 30, at 11 (BCB 2010); *Morgan*, 71 OCB 10, at 4 (BCB 2003); *Hassay*, 71 OCB 2, at 2 (BCB 2003).

Edward McCauley ("McCauley") is a Correction Officer ("CO") assigned to the DOC's North Infirmary Command ("NIC"), which is located on Riker's Island, and he is the Union's delegate for that facility. At the time of the events in issue, Michelle Hallett ("Hallett" or "Warden") was the Warden for NIC, and Cheryl Booker ("Booker" or "ADW") was the Assistant Deputy Warden.[2] NIC houses inmates who require infirmary care or have disabilities that require housing that is compliant with the Americans with Disabilities Act, as well as general population inmates and inmates with high-profile cases who require protective custody. McCauley is a Property Cashier at NIC. His duties including retrieving property bags containing the inmate's civilian attire on the morning of his or her court hearing, making sure the clothing is distributed to the inmate, and later placing it back into storage.

McCauley's shift runs from 6 a.m. to 2 p.m. There is no roll call at the start of his shift. If his NIC duties permit, McCauley attends the roll call held at the start of the 7 a.m. shift, but his attendance is not required.

On an unspecified date in March 2019, McCauley was called away from the roll-call area to speak to someone about a personnel issue shortly before 7 a.m. roll call was to commence. He testified that he does not recall who called him aside or what the personnel issue was. Upon resolving the issue, he returned to roll call sometime after it had commenced. McCauley testified that the ADW, who was conducting roll call, said "Who does he think he is?" and then directed a Captain to remove him from roll call. (Tr. 29, 70) The ADW testified that she told McCauley to "step out" of roll call, which he did, and denied making the statement, "Who does he think he is?" (Tr. 222) McCauley was not counseled or disciplined regarding the incident.

[2] Hallett has since retired.

The Warden and the ADW testified that it is a violation of 3.10.040 of the DOC Rules and Regulations to walk into a roll call after it has already commenced. The regulation they cited states as follows:

> MEMBERS OF THE UNIFORMED FORCE, ASSIGNED TO A TOUR OF DUTY FOR WHICH A ROLL CALL IS HELD, SHALL BE IN UNIFORM READY FOR ROLL CALL AT THE COMMENCEMENT OF THAT TOUR. FAILURE OF A MEMBER OF THE UNIFORMED FORCE TO TIMELY APPEAR AT THE APPROPRIATE ROLL CALL SHALL NOT BE CONSTRUED AS LATE ARRIVAL TO THE PARTICULAR FACILITY/COMMAND, BUT RATHER SHALL BE CONSTRUED AS A FAILURE TO COMPLY WITH THIS RULE. SUCH FAILURE TO COMPLY MAY RESULT IN A COMMAND DISCIPLINE ACTION PURSUANT TO DEPARTMENTAL POLICY. LATE ARRIVAL TO THE FACILITY/COMMAND SHALL BE DETERMINED PURSUANT TO RULES 3.10.010 AND 3.10.060.

(City Ex. 5)

McCauley testified that he had previously complained to the Warden at approximately three of their monthly labor-management meetings that the ADW was "crossing the line" by speaking to COs in a disrespectful manner. (Tr. 30) These monthly labor-management meetings are required by Operations Order 13/15 in order to "[p]rovide opportunities to share Departmental and Institutional policies, . . . [a]llow staff, through delegates, to bring concerns to the attention of the Commanding Officer, and . . . [e]ncourage suggestions and recommendations for improving the efficiency and quality of work-life at the command." (City Ex. 4) The meetings were regularly attended by the Warden, COBA Executive Board member Angel Castro, and NIC delegates. McCauley testified that although the meeting agendas did not specifically mention the ADW, her actions were discussed under the agenda item "Old Business," which states, "Professionalism must be presented in all ranks and supervisors need to support the officers." (Union Ex 1-A)

The Warden confirmed that McCauley had complained to her about the ADW. She testified that McCauley had told her he did not like the way the ADW spoke to him but had not provided any other details. She subsequently told the ADW to be mindful when speaking with staff. The Warden did not recall telling the ADW that McCauley had made complaints. According to the ADW, she did not know that McCauley had made complaints about her.

On April 12, 2019, McCauley received a call from the Union delegate at the West Facility ("West Facility Delegate"), which is a quarter mile away from NIC, requesting assistance. The West Facility Delegate told McCauley that an issue had arisen and that he was coming to NIC to speak to him. The West Facility Delegate, accompanied by another CO, drove to NIC and spoke to McCauley at the front gate. The West Facility Delegate told McCauley that the CO had received a phone call informing him that a member of his family had committed suicide and that they needed to get him released for the day. McCauley led them to the control room at NIC to speak to a Captain. Because there was no one in the control room, McCauley went to speak to the ADW, who was the Tour Commander, in her office.

McCauley told the ADW what had happened to the CO and asked what he should do to get him released for the day. According to McCauley, the ADW replied, "How long do you have on the job? You should know about a chain of command." (Tr. 35) McCauley testified that he then closed the door and repeated that he was asking for guidance as to how to get the CO released immediately. He stated he was uncertain what the procedure was given the reorganization of the West Facility.[3] McCauley testified that, when the ADW kept yelling at him, he walked away and said, "Forget it. I will take care of it." (Tr. 93)

[3] After a reorganization, the Warden had recently been made Warden of the West Facility in addition to NIC.

The ADW testified that McCauley had told her a CO needed to be relieved, so she had directed him to follow the chain of command and speak to the CO's control room supervisor. She did not recall that the CO was from the West Facility. According to the ADW and the Warden, the proper procedure to follow if a CO needs to leave work early is to speak to the CO's Captain so they can make staffing arrangements. Therefore, in this case, the CO or his delegate should have contacted the Captain at the West Facility, who was located at the control room in the West Facility. The Warden testified that, although she was the Warden of the West Facility, it still had its own supervisory and personnel structure, including its own control room and Captains, and that it was not appropriate for the CO and West Facility Delegate to leave their posts and go to the NIC instead of contacting the West Facility Captain on duty.

McCauley testified that he discussed the April 12th incident with the Warden at their next labor-management meeting on April 16, 2019. He believes he also mentioned the March roll call incident at the same meeting. Though neither the agenda nor the minutes of the meeting reference a discussion about the ADW specifically, McCauley stated that, as at prior meetings, her actions were discussed during an agenda item on professionalism. According to McCauley, the Warden told him that she would speak to the ADW.

On the morning of April 18, 2019, McCauley emailed the Warden regarding a "splashing" incident that day at NIC.[4] The email stated as follows:

> GM Warden,
> Officer [last name redacted] was splashed this morning by inmate [name and identifying number redacted].
> Are we in compliance with Operation Order 19/17 regarding the protocol regarding this Splashing Incident?

[4] "Splashing" refers to inmates intentionally throwing liquids such as bodily fluids, urine, water, or milk on COs.

> We appreciate your attention to this matter as we can't accept any [Member of Service] being subjected to this behavior as just the norm.
> Respectfully submitted,
> McCauley

(Union Ex. 1-B)

McCauley and the Warden had discussed the prevalence of such incidents at their labor-management meeting earlier that week, as well as the Union's belief that the DOC was not complying with the provisions of the Operations Order setting forth procedures to follow in response to splashing incidents. McCauley testified that he believed emailing the Warden directly was appropriate because he had been dealing with her about the ongoing problem of splashing and because the Warden had emphasized that she had an open-door policy for communicating with Union delegates. For example, the minutes of the labor-management meeting held on April 16, 2019, state that the Warden "stressed her open-door policy [and that] any issues can be brought to the Warden's office for resolution." (City Ex. 1)

The Warden was not at the facility that morning. She replied to McCauley by email stating that the Tour Commander should be handling the incident and copied the ADW on her message. The Warden testified that she believed it was inappropriate for McCauley to contact her directly regarding this splashing incident instead of contacting managers on duty that day at NIC. According to the Warden, the on-duty Tour Commander and Deputy Warden of Security at a facility are responsible for managing the response to splashing incidents. She stated, "when I have managers who are in the facility managing the incident . . . you have to give them [the] opportunity to do their job." (Tr. 190)

Shortly after the Warden emailed McCauley, he was contacted on his work radio and told to phone the ADW. McCauley testified that, when he phoned the ADW, she screamed at him for

contacting the Warden regarding the splashing incident and not following the chain of command. McCauley testified that the ADW said he had "no right" to do this and asked him who he thought he was. (Tr. 51) McCauley testified that he replied, "Ma'am, in all due respect, I am labor, she is management. We share concerns. And quite honestly, I think you are overstepping your boundaries with this." *Id.* The ADW then ordered him to write a report about why he had contacted the Warden about the splashing incident.

The ADW testified that, as the Tour Commander at NIC on April 18, 2019, she was managing the handling of the splashing incident that occurred that morning, and McCauley should have contacted either her or the Captain with any questions instead of going straight to the Warden. She therefore asked him to submit a memo explaining "why he hadn't followed the chain of command and had directly reached out to the warden regarding the incident." (Tr. 232) According to the ADW, when she asked McCauley to write this report, he said he would not do it and then hung up the phone on her. She said she generated a Command Discipline ("CD") against McCauley for disrespecting a supervisor when he hung up the phone on her, but that she did not know if it was ever served on him.[5]

The report prepared and submitted by McCauley on April 18, 2019, at the ADW's request, states as follows:

> On April 18, 2019 at approximately 1030 hours this writer was ordered by ADW [] Booker to submit a report as to why a proper chain of command was not followed regarding my inquiry of a splashing earlier in the day. I explained to her that the inquiry was made to the Warden on behalf of the Correction Officers Benevolent Association as a follow up to Tuesday's (4/16/19) Labor Management monthly meeting. As I believe ADW [] Booker should be aware, as a representative of the Officers of the North Infirmary Command I have every right to discuss any and all concerns directly

[5] There is no allegation in the petition concerning the CD. It was not introduced into evidence, and neither McCauley nor the Warden testified about it.

> with the Commanding Officer. By ADW [] Booker adamantly insisting I had no right to inquire if we were in compliance [with the] Operations Order regarding "Splashing" is a clear violation of our labor relations policy. Furthermore any attempt to intimidate or interfere with an investigation towards an elected Correction Officer Benevolent Association [delegate] will not be tolerated and will also be considered an improper practice on behalf of the New York City Department of Corrections.
>
> To conclude, the Correction Officers Benevolent Association will not succumb to acts of intimidation while trying to maintain the safety and well[-]being for our Officers.

(Union Ex. 1-C)

McCauley testified that on the following morning, April 19, 2019, the Warden saw him at roll call and told him she would like to speak with him afterwards. According to McCauley, when roll call finished the two of them went to the Warden's office. McCauley testified that the Warden told him that he had to follow the chain of command and that if he did not work things out with the ADW she would have them both administratively transferred. The Warden testified that she did not remember meeting with McCauley on April 19, and she denied having ever threatened to transfer him.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the City and the DOC violated NYCCBL § 12-306(a)(1) and (3) when the ADW verbally attacked McCauley and removed him from roll call; admonished McCauley for not following the chain of command when he requested the release of an employee from work; screamed at McCauley for contacting the Warden about a splashing incident and ordered him to explain why he had done so in a memorandum; and when the Warden instructed McCauley to follow the chain of command to address Union issues and threatened that if he could

not "work it out" with the ADW, McCauley would be administratively transferred.[6] The Union argues that there is no chain of command for delegates to address unit members' issues, and therefore McCauley had the right to go straight to the Warden or the ADW. It also argues that it was reasonable for McCauley to email the Warden inquiring whether the Operations Order concerning splashing was being followed because they had discussed this issue at their recent labor-management meeting. The Union asserts that the ADW and Warden's comments and actions interfered with, restrained, or coerced unit members from exercising their union rights and put McCauley on notice that future adverse employment actions would occur if he continued to engage in union activity.

The Union asserts that the Warden and the ADW were aware of McCauley's union activity and that their actions against him were motivated by that union activity. The Warden knew that McCauley had regularly challenged the DOC concerning, among other things, the health of COs jeopardized by inmates in NIC who splash officers with unknown fluids. In addition, McCauley had informed the Warden that the ADW had been disrespectful to him and other COs. According to the Union, her instruction to "work it out" with the ADW or be transferred was clearly a reaction to his union activity. It asserts that the ADW was likewise aware of and acted against McCauley

[6] NYCCBL § 12-306(a)(1) and (3) provide, in pertinent part, as follows:

> 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 [§] 12-305 of this chapter;
>
> * * * *
>
> (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.

because of his union activity, as evidenced by her lecturing him regarding the chain of command when he approached her about getting a CO released from work, saying, "Who does he think he is?" and having him removed from roll call after he had been summoned to address a personnel issue. *See* Union's Closing Br. at 4, 6. According to the Union, the DOC had no legitimate business reason to remove McCauley from roll call when he had just arrived from attending to union business.

The Union argues that the Warden's instruction to follow the chain of command to address complaints and her statement that if he could not "work it out" he would be administratively transferred are chilling and coercive and the ADW's refusal to discuss a member's employment issue with McCauley and his removal from roll call are discriminatory. The ADW's order that McCauley submit a written report explaining why he had communicated with the Warden was an additional threat that McCauley could be disciplined for this activity. Furthermore, according to the Union, the threat to transfer McCauley was inherently destructive to employee rights and therefore constitutes an independent violation of NYCCBL § 12-306(a)(l).

City's Position

The City argues that Petitioner's claims alleging that NYCCBL § 12-306(a)(l) and (a)(3) have been violated must be dismissed because Petitioner has failed to allege facts sufficient to state a *prima facie* case of retaliation. According to the City, McCauley was never disciplined despite appearing late at roll call and hanging up the phone on the ADW. In fact, the record demonstrates that there was no adverse employment action, retaliation, or discrimination against McCauley.

The City argues that there is no evidence that any of the Warden and the ADW's actions towards McCauley were motivated by anti-union animus. Regarding the removal of McCauley from roll call, the City points out that there was no testimony establishing that the ADW knew McCauley had complained about her to the Warden. It asserts that the evidence established he

was removed for interrupting roll call by arriving late in violation of DOC Rule and Regulation 3.10.040. Any comments the ADW made were likewise addressed solely to proper roll call procedures and not to McCauley's union activity.

The City argues that the Warden and the ADW's comments to McCauley regarding the chain of command were not motivated by his union activity. It asserts that the importance of following the chain of command within a paramilitary organization like the DOC is demonstrated by what occurred when McCauley and the West Facility Union Delegate tried to get a member released for the day: their disregard of the chain of command resulted in a delegate and another CO leaving their posts, driving to a different facility, getting McCauley to also leave his post, and then unnecessarily involving the tour commander at the wrong facility. According to the City, these problems could have been avoided if the employees involved had simply followed the chain of command and contacted the West Facility captain so that the CO post could be appropriately filled. Similarly, the City argues that it was inappropriate for McCauley to email the Warden, who was not even at NIC at the time, about the splashing incident instead of contacting the tour commander on duty.

Assuming *arguendo* that Petitioner has set forth a *prima facie* case of retaliation, the City argues that its actions were motivated by legitimate business reasons. The Warden's and the ADW's actions were aimed at promoting order, ensuring compliance with DOC regulations, and increasing efficiency. The City asserts that McCauley was "appropriately chastised" for having violated DOC Rule and Regulation 3.10.040 by appearing late at roll call. *See* City's Closing Br. at 3, 12. Roll call is a vital component of DOC procedures that is closely regulated, and COs are expected to timely appear to receive appropriate notifications and daily instructions.

The City argues that the Warden never made the alleged statements regarding a possible transfer. However, even if she did, according to the City these statements did not interfere with, restrain, or coerce COBA members from exercising their union rights. The City says the record is clear that the Warden was only trying to promote positive relations between the ADW and McCauley. Furthermore, no action was ever taken with respect to transferring either McCauley or the ADW.

DISCUSSION

The Union claims that the DOC retaliated against McCauley in violation of NYCCBL § 12-306(a)(1) and (3). To determine whether an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, 39 OCB 51 (BCB 1987). This test states that, to establish a *prima facie* claim of retaliation, a petitioner must demonstrate the following:

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

Bowman, 39 OCB 51, at 18-19; *see also Feder*, 4 OCB2d 46, at 42 (BCB 2011).

In order to establish discrimination or retaliation in violation of NYCCBL § 12-306(a)(3), as an initial matter it must be shown that an adverse employment action was taken against the employee at issue. *See Local 376, DC 37*, 14 OCB2d 13, at 6 (BCB 2021). Examples of such adverse employment action include termination, removal of a desirable assignment, or an undesirable transfer. *Id.* (citing *OSA*, 13 OCB2d 2, at 30-31 (BCB 2020) (termination); *DC 37*, L. 2507, 11 OCB2d 18, at 22 (BCB 2018) (removal of a desirable assignment); *OSA*, 7 OCB2d 20, at 27 (BCB 2014) (undesirable transfer)). Actions and statements that do not affect an employee's

terms and conditions of employment do not constitute an adverse employment action. *See id.* at 6-7 (citing *CSTG, L. 375*, 3 OCB2d 14, at 16-17 (BCB 2010); *Moriates*, 1 OCB2d 34, at 13 (BCB 2008)).

The majority of Petitioner's allegations relate to actions and statements that, though they may arguably interfere with McCauley's union activity, do not affect his terms and conditions of employment and therefore cannot constitute violations of NYCCBL § 12-306(a)(3). The sole allegation that potentially involves an adverse employment action is the March 2019 removal of McCauley from roll call.[7] Assuming *arguendo* that this removal from roll call constituted an adverse employment action, we find that Petitioner has not met its burden of establishing that McCauley's union activity was a motivating factor behind this action. We find the ADW was aware that McCauley was the Union's delegate at NIC. However, no evidence was presented that the ADW was aware that McCauley had complained about her to the Warden or that his lateness to roll call was due to his union activity. *See Local 30, IOUE*, 8 OCB2d 5, at 21 (BCB 2015) (claims of improper motivation "must be based on statements of probative facts, rather than speculative or conclusory allegations") (citations omitted). While the Union asserts that the statement "Who does he think he is?" was a reference to McCauley's status as a delegate, we find that this ambiguous statement cannot be construed to show union animus under the circumstances. The evidence instead suggests that the ADW's motivation for having McCauley removed from roll call was her belief that entering roll call after it had commenced was disruptive and violative of proper roll call procedure. Accordingly, we do not find sufficient evidence to conclude that

[7] McCauley testified that the ADW directed a Captain to remove him from roll call, whereas the ADW testified that she asked McCauley to step out of roll call. We need not resolve this factual dispute because how McCauley was removed from roll call is not material for purposes of our analysis.

McCauley's union activity was a motivating factor in removing him from roll call. We therefore deny the allegations in the petition that the City and DOC violated NYCCBL § 12-306(a)(3).[8]

We next consider whether any of the statements and actions alleged in the petition constitute independent violations of NYCCBL § 12-306(a)(1). 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[.]" "Unlike derivative violations, independent violations of § 12-306(a)(1) are usually acts that do not result in an adverse employment action, but consist of statements, promises, or threats which interfere with, restrain or coerce employees that engage in or refrain from engaging in union activity." *DC 37, L. 3621*, 11 OCB2d 35, at 33 (BCB 2018) (citing *UFA*, 8 OCB2d 3, at 28 (BCB 2015); *SSEU, L.371*, 3 OCB2d 22, at 15-16 (BCB 2010); *CSTG, Local 375*, 3 OCB2d 14, at 14-15 (BCB 2010)). "[C]onduct 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." *DC 37, L. 3621*, 11 OCB2d 35, at 34 (citations and internal quotations omitted).

We have previously described two categories of conduct that violate NYCCBL § 12-306(a)(1) because they are "inherently destructive" of employee rights. *CIR*, 51 OCB 26, at 41 (BCB 1993). The first is conduct that "creates visible and continuing obstacles to the future exercise of employee rights and jeopardizes the position of the union as bargaining agent or diminishes the union's capacity effectively to represent the employees in the bargaining unit." *Id.* at 41-42 (internal quotation marks and citations omitted). The second is conduct that "directly and

[8] Having reached this conclusion, we need not address the City's argument that it had a legitimate business reason for removing McCauley from roll call because he allegedly violated 3.10.040 of the DOC Rules and Regulations.

unambiguously penalizes or deters protected activity." *Id.* at 42 (internal quotation marks and citations omitted).

Assuming *arguendo* that the ADW said "Who does he think he is?" when she ordered McCauley to leave roll call, we find that, in context, the statement was not inherently destructive of rights under the NYCCBL. As noted earlier, no evidence was presented that the ADW was aware that McCauley was handling a union issue at the time he was absent from roll call, and the evidence suggests her motivation was her belief that McCauley's appearance at roll call after it had started was disruptive and violated proper roll call procedure. We conclude that, under the circumstances, the alleged statement neither diminished the union's capacity to represent members nor directly penalized or deterred union activity. Therefore, it did not violate NYCCBL § 12-306(a)(1).

We next consider the ADW's statements to McCauley when he sought her assistance in getting leave for a CO from the West Facility. The testimony that the ADW told McCauley, "How long do you have on the job? You should know about a chain of command," was unrebutted. (Tr. 35) The City offered testimony that the chain of command to follow if a CO needs to leave work early is to speak to the CO's Captain so that he or she can arrange staffing for the absent CO. McCauley did not dispute that this was the proper procedure to follow. Instead, he asserted that he was unsure who to contact due to a reorganization at the West Facility. While the ADW's tone and her questioning of McCauley's knowledge and experience may have been rude, she did not disparage or denigrate the union or unambiguously penalize or deter McCauley's union activity. Instead, she told him to go to the CO's Captain to obtain time off. We find that her comments were not inherently destructive of rights under the NYCCBL. *See CIR*, 51 OCB 26, at 41-42. We accordingly dismiss this claim.

The remaining allegations concern the ADW's and the Warden's actions on April 18 and 19, 2019, following McCauley's email to the Warden regarding a splashing incident. As she did in the earlier incident regarding the request for time off for the West Facility CO, the ADW again told McCauley that he needed to follow the "chain of command." In this case, she said that McCauley should have contacted her first before emailing the Warden. In addition, she ordered McCauley to submit a written report about why he had contacted the Warden. While in both instances the ADW referred to the "chain of command," the circumstances lead us to a different conclusion regarding this second incident.

The Union offered unrebutted testimony that McCauley had prior conversations with the Warden at various labor-management meetings expressing the Union's concerns regarding numerous splashing incidents. McCauley's email to the Warden inquiring whether the DOC was compliant with the relevant Operations Order for splashing incidents expressly sought the Warden's opinion on whether the protocols had been followed in this instance. While the Warden and the ADW may have preferred that he instead contact the ADW, McCauley was clearly acting in his capacity as a delegate following up on a persistent issue affecting employees when he emailed the Warden. He was also acting in accordance with his understanding of the Warden's open-door policy, which the Warden had stressed at labor-management meetings. In this context, emailing the Warden regarding the splashing incident constituted protected union activity.

It is undisputed that in response to his email, the ADW ordered McCauley to submit a written report about why he had contacted the Warden. We also credit McCauley's testimony that the ADW told him he had "no right" to email the Warden. (Tr. 51) His credible testimony regarding this conversation is supported by his description of the conversation in the written report he submitted that same day. We find that the ADW's requiring McCauley to submit a written

report about his union activity "directly and unambiguously penalizes or deters protected activity" in violation of NYCCBL § 12-306(a)(1). *CIR*, 51 OCB 26, at 42. Having found that the ADW's actions were inherently destructive of rights under the NYCCBL, an inquiry into her subjective intent is unnecessary. *See UFA*, 8 OCB2d 3, at 26 (BCB 2015) (citing *L. 375, DC 37*, 6 OCB2d 15, at 10 (BCB 2013) ("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 9 (BCB 2003) ("Actions that are inherently destructive of important employee rights may constitute unlawful interference even in the absence of improper motive."); *DC 37, L. 376*, 73 OCB 6, at 11 (BCB 2004) (conduct found to be inherently destructive "[r]egardless of what [the manager's] intentions may have been, [as] the effect of her actions was to discourage and inhibit the members" in the exercise of their rights).

We reach a similar conclusion regarding the statements the Warden made to McCauley in her office on April 19, 2019. We credit McCauley's testimony that the Warden told him that he had to follow the chain of command and that if he did not work things out with the ADW she would have them both administratively transferred.[9] Although the Warden denied that she ever threatened to transfer McCauley, she also had no memory of the meeting. In contrast, McCauley offered a reasonably detailed account of the circumstances of the meeting, its location, and what was said. *See Local 376, DC 37*, 14 OCB2d 22, at 14 (BCB 2021) (crediting witness's testimony

[9] The Union alleges that the Warden violated NYCCBL § 12-306(a)(1) by ordering McCauley to go up the chain of command to address union issues as a delegate. We do not reach this broad claim, because we do not find sufficient evidence that the Warden ordered McCauley to follow the chain of command for all labor-management issues. Instead, we credit the Warden's assertion that she directed McCauley to address his question to facility managers who were responsible for oversight of the splashing incident and find that this instruction to obtain the requested information from sources more familiar with the information did not interfere with or discourage union activity in violation of the NYCCBL.

based on its detail and specificity) (citing *SBA*, 4 OCB2d 50, at 23 (BCB 2011)). As with the ADW's ordering a written report regarding McCauley's union activity, the Warden went beyond merely stating that he needed to follow the chain of command. We find that the threat to transfer McCauley if he could not get along with the ADW was based on McCauley's union activity the prior day and "directly and unambiguously penalizes or deters protected activity" in violation of NYCCBL § 12-306(a)(1). *CIR*, 51 OCB 26, at 42; *see City Employees Union, Local 237,* 77 OCB 3, at 13-16 (BCB 2006) (threat to transfer employee to an undesirable location violated § NYCCBL 12-306(a)(1)).[10]

Accordingly, we grant the petition as to the claims that the DOC violated § NYCCBL 12-306(a)(1) when the ADW ordered McCauley to submit a written report about why he had emailed the Warden and when the Warden threatened to administratively transfer McCauley in response to this union activity. We deny the petition as to all other claims.

ORDER

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

ORDERED, that the improper practice petition filed by the Correction Officers Benevolent Association against the City of New York and the New York City Department of Correction, docketed as BCB-4328-19, is granted as to the claims that the City of New York and the New York City Department of Correction violated NYCCBL § 12-306(a)(1) by requiring Union delegate

[10] The City asserts that, because the Warden had a good relationship with the Union, her statements could not have been motivated by anti-union animus. However, as noted above, an inquiry into subjective intent is unnecessary where an employer agent's statements are found to be inherently destructive of rights under the NYCCBL. *See UFA*, 8 OCB2d 3, at 26; *L. 1180, CWA*, 71 OCB 28, at 9; *DC 37, L. 376*, 73 OCB 6, at 11.

Edward McCauley to submit a written report about why he had emailed the Warden in regard to a "splashing" incident and threatening him with administrative transfer; 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 Correction violated NYCCBL §§ 12-306(a)(1) and (3); and it is further

ORDERED, that the City of New York and New York City Department of Correction cease and desist from interfering with McCauley's union activity; and it is further

ORDERED, that the New York City Department of Correction 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: October 5, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES MOERDLER
MEMBER

PETER PEPPER
MEMBER

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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 25 (BCB 2021), determining an improper practice petition between Correction Officers Benevolent Association and the City of New York and New York City Department of Correction.

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-4328-19, filed by Correction Officers Benevolent Association against the City of New York and New York City Department of Correction, hereby is granted in part; and it is further

DETERMINED, that the City of New York and New York City Department of Correction violated § 12-306(a)(1) by requiring Union delegate Edward McCauley to submit a written report about why he had emailed the Warden regarding a labor-management issue and threatening him with administrative transfer; and it is further

ORDERED, that the New York City Department of Correction cease and desist from interfering with, restraining, or coercing Union delegate Edward McCauley from engaging in protected union activity; and it is further

ORDERED, that the New York City Department of Correction 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 Correction
(Department)

Dated: _____

Posted By: _____
(Title)