

DC 37, L. 1087, 14 OCB2d 30 (BCB 2021)

(IP) (Docket No. BCB-4284-18).

Summary of Decision: The Union alleged that the NYPD violated NYCCBL § 12-306(a)(1) by encouraging Union members to cease paying union dues and by distributing materials that discouraged union membership. The City argues that the Union’s claims do not establish conduct that was inherently destructive of important employee rights nor has there been any evidence that there have been any significant repercussions for its members. The Board found that the supervisor’s actions constituted violations of NYCCBL § 12-306(a)(1). Accordingly, the petition was granted. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
AND ITS AFFILIATED LOCAL 1087,**

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On September 28, 2018, District Council 37, AFSCME, AFL-CIO and its affiliated Local 1087 (collectively, “Union”) filed a verified improper practice petition against the City of New York (“City”) and the New York City Police Department (“NYPD”).¹ The Union alleges that the City and the NYPD violated the New York City Collective Bargaining Law (New York City

¹ This matter was held in abeyance between early 2019 and early 2021 while the parties attempted to reach a resolution.

Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(a)(1) by encouraging Union members to cease paying union dues and by distributing materials that discouraged union membership. The City argues that the Union’s claims do not establish conduct that was inherently destructive of important employee rights nor has there been any evidence that there have been any significant repercussions for its members. The Board finds that the supervisor’s actions violated NYCCBL § 12-306(a)(1). Accordingly, the petition is granted.

BACKGROUND²

The Union represents NYPD employees in the titles of Compositor and Printing Press Operator, among others. The NYPD Printing Section (“Print Shop”) is comprised of approximately 30 employees in titles including, but not limited to, Compositors, Printing Press Operators, Graphic Artists, Book Binders, and Stock Workers. The Print Shop occupies two floors at NYPD headquarters at One Police Plaza and is responsible for printing posters and other materials such as shooting targets and parking plaques. The Union’s claims arise from events that occurred in the Print Shop on July 19, 2018, involving its Director, Julio Rosado.

On or around July 18, 2018, Rosado received an email from “bob@newchoiceny.com” with the subject “choices.” (Pet., Ex. A; Ans., Ex. 2) The email stated that:

You now have a real choice

For decades, public employees in New York were told to pay the union or quit their job.

Those days are over.

² Unless otherwise noted, the Background facts are not disputed. In lieu of a hearing, the parties submitted a stipulation of facts (“Joint Ex. 1”) and an uncontested audio recording of the July 19, 2018 meeting in issue (“July 19 Recording”). The recording is part of the record pursuant to paragraph 8 of the parties’ stipulation of facts.

The U.S. Supreme Court’s ruling a few weeks ago means you now have a *real* choice. State and local government workers **can no longer be forced to pay money to a union.**

You deserve to know how to exercise your rights and the facts that will help you make an informed decision—facts you may not get from your usual sources like your union rep or even your personnel department.

Here’s a fact you should know:

If and when a union rep asks you to sign or re-sign a membership card—and you don’t want to sign—**you have every right to say no.** What’s more, you’re certainly under no obligation to sign it right there and then.

This is not a sales pitch. Our only goal is to provide information—information that some people don’t want you to have.

But we believe you’re smart enough to make a good decision for yourself and your family—if armed with the facts.

You can find them at **newchoiceny.com.**

Here’s wishing you all the best.

(Pet., Ex. A; Ans., Ex. 2) (emphasis in original)³

According to Rosado, he “believed that the email was sanctioned by the NYPD and [he] did not realize that it was essentially ‘junk mail’ from an outside organization that had ascertained access to NYPD employees” email addresses. (Ans., Ex. 1) He asserts that he decided to share the email and information from New Choice NY with his subordinates because they do not regularly check their own NYPD email addresses since they do not regularly have access to a computer during the workday.

³ This email and the other documents from New Choice NY allude to the U.S. Supreme Court’s ruling in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

On the morning of July 19, 2018, Rosado verbally notified Print Shop employees that there would be a meeting in the Print Shop in a few minutes. At the meeting, Rosado placed two documents from the New Choice NY website on a table. The first document appears to be a printout of the main page of the New Choice NY website, and the second is a template for a letter that employees could personalize and send to their payroll offices to opt-out of paying union dues (“Form Letter”).⁴ NYPD Compositor and Local 1087 Shop Steward Joseph Piscopo recorded the approximately seven-minute meeting using his cell phone. The audio recording was provided by the Union, and the content is not disputed. The pertinent content of the meeting follows:

Rosado: I just have an announcement to make. So the Supreme Court recently gave New York the option that you don’t have to, you know the Supreme Court ruled you no longer have to pay Union dues if you are a union worker.

Unidentified Voices: What? [laughter]

Rosado: It doesn’t ...

Unidentified Voices: [laughter and chatter]

Piscopo: Don’t even think about it.

Rosado: You are still under contract, your contract remains the same.

Piscopo: Don’t think about it.

⁴ The Form Letter states, in pertinent part:

I write to notify you that I do not want to be a member of the union that represents my position. If your records indicate that I am a union member, I hereby resign my membership in the union.

The United States Supreme Court has ruled that I cannot be compelled to pay any union dues or fees as a condition of my employment. I no longer want to pay any dues or fees to the union. As of this date, I revoke any dues deduction authorization that I may have signed, and no longer authorize the deduction of any union dues or fees from my paycheck.

If you refuse to accept this letter as a resignation of union membership or revocation of dues deduction authorization, please inform me promptly, in writing, of your reasons for so doing.

Rosado: If union dues, um you are still covered if let's say you get in trouble the union will still represent you.

Piscopo: Don't listen to this shit. Believe me. Don't listen. I understand, don't listen to him.

Rosado: You can do this later at the union meeting.

Piscopo: No, I can do it when I want to do it. I'm the union guy.

Rosado: Yeah, but this, I'm having a meeting.

Piscopo: Yeah well, this is bullshit. Don't get out of the Union.

Rosado: I'm just telling you what is here. Okay.

Piscopo: Do what you got to do.

Rosado: So, if you want you can go right to this site New Choice NY. And they have a form that you fill out right there, and you just send it, it's a minute, and your union dues will be removed from your payroll.

Piscopo: And you see me before you do it.

(July 19 Recording)

Next, Rosado read the text of the email he received from New Choice NY. At one point, he stopped reading, and the following conversation ensued:

Rosado: Obviously, like you know and I understand, the union is going to say yeah you should pay, you should pay, you should pay, okay, but they can't force you to pay. And they can't . . .

Piscopo: They can't force you, but if you don't pay this is what happens, they'll walk all over you, they'll walk all over you, like they are trying to do already.

Rosado: Well just to counter that, the union still has to represent you.

Piscopo: Yeah, how we going to represent you without money?

Rosado: You don't pay your dues and you get in trouble, the Union still has to represent you.

Piscopo: How do we represent you without money?

(July 19 Recording) Rosado finished reading the text of the New Choice NY email. He then stated, "this is from the Payroll Office and it says, I write to notify you that Oh, this is the letter if you don't want to pay and you don't go to the website, you can print this out and then send it in," and he read the text of the Form Letter. *Id.* He then stated:

So either way you could either print out the letter and send it in yourself or you could do the online thing at New Choice NY. All the information is there. I am just giving you the information

because you have a choice. Okay. You are still, you are still getting the same money. The contract is still your contract, there is no change to that. It is not going to change. It just means that you don't have to uh pay the Union dues. Okay. Anyone who wants it it's here to look at if you want extra copies I will print them for you. You can go to again New Choice NY and see for yourself. Of course, Frank and Ronny are probably going to talk to you, I mean Joe and Ronny are going to talk to you. I have no skin in this game. I am just giving you the information that . . . was given to me to give to you because you have a choice and you need to be informed if you want or don't want to do it. Okay. So, Joe, it is not, I don't care, I have no skin in the game. I have no skin in the game at all. I am just giving you the information that was given to me to give to you.

(July 19 Recording)

Piscopo said a few things and then asked, “[w]ho is going to pay the money for the Union to go and do the contract.” (July 19 Recording) In response, Rosado stated that “He is right. You know the Union dues pay for representation, for legal fees, for everything, everything, everything. But again you don't have to You are still going to be represented, that's a fact, they can't say no.” *Id.* Then, Piscopo and at least one other meeting attendee asserted that the Union pays for legal fees and other benefits. In the end, Rosado said “I'm just giving you the information You guys make your own choices. Okay. It doesn't have to be a public choice, you can do it on the sneak, whatever you want no one I don't think will know, but I don't, again I have no skin in this game, just giving you the information.” *Id.*

Shortly after the meeting, Rosado's supervisor, Deputy Commissioner Robert Martinez, met with Rosado and explained that he was not permitted to speak to his subordinates about their union rights. Additionally, the Deputy Commissioner of Labor Relations, John Beirne, consulted with the NYPD Information Technology Bureau (“ITB”), who confirmed that the New Choice NY email was unsolicited junk mail and had been sent to all NYPD employees without the knowledge

or consent of the NYPD.⁵ The NYPD also informed Rosado that the email was not sanctioned by the NYPD and that he should not have discussed it with his subordinates.

Later that day, Rosado called another meeting of the Print Shop employees and told them to disregard what he said earlier about the New Choice NY email.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the NYPD violated NYCCBL § 12-306(a)(1) by encouraging Union members to cease paying union dues and by distributing materials that discouraged union membership.⁶ It alleges that Rosado, as the supervisor of the Print Shop and as an agent of the NYPD, held a mandatory staff meeting for the sole purpose of discouraging union membership. Additionally, it claims that in an attempt to thwart and weaken the Union, Rosado distributed provocative and damaging materials including a form letter that employees could use to stop paying union dues. Thus, it contends that Rosado's speech and actions were inherently destructive and served to chill and interfere with important employee rights guaranteed under NYCCBL § 12-305.

Additionally, the Union argues that, when conduct contains an innate element of interference or coercion, motive and proffered business justification are irrelevant because of the

⁵ Upon determining that the emails were unsolicited junk mail, ITB blocked future emails from the sender.

⁶ NYCCBL § 12-306(a) states 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[.]

conduct's potentially chilling effect. It asserts that, since Rosado's statements and actions contained an undisputed element of interference and discouraged union membership, this Board should not consider any defense of alleged lack of anti-union motive or legitimate business reason in making its determination. Moreover, the Union alleges that the City has failed to proffer a legitimate reason why Rosado held the meeting. Finally, it contends that it is irrelevant whether Rosado's actions actually discouraged employees from participating in protected union activity or whether "Rosado 'apologized' for his speech and conduct after being reprimanded by the Commissioner." (Rep. Br. at 4) The Union argues that Rosado's speech and actions interfered with, restrained, or coerced employees in the exercise of rights guaranteed under the NYCCBL, and therefore violated the NYCCBL.

As a remedy, the Union seeks an order directing the NYPD to rescind any materials distributed; cease and desist from engaging in anti-union speech; post notices; and any further relief the Board deems just and proper.

City's Position

The City argues that the Union has failed to establish a breach of NYCCBL § 12-306(a)(1) because Respondents have not engaged in any activity that is inherently destructive of important employee rights. It also contends that the evidence presented does not demonstrate any significant repercussions for Union members.

Regarding Rosado's actions, the City asserts that Rosado initially believed that the information he had received via email was in some way sanctioned by the NYPD and felt that he was assisting the Print Shop employees by providing them with the information because they do not have regular access to their NYPD email addresses. It claims that Rosado did not force documents upon employees or mandate that they withdraw their Union membership. Instead, it

argues that Rosado “stipulated that this information was not coming directly from him, and that everything he stated was in the flyer distributed by New Choice NY.” (Ans. ¶ 28) Additionally, it asserts that when the Print Shop employees explained that their benefits come from the Union, Rosado “quickly acknowledged that withdrawing membership was probably not the best option and they should disregard what he had said.” (Ans. ¶ 28) Further, the City maintains that the NYPD took immediate action once it became aware of Rosado’s behavior. Within a few hours of the meeting, Rosado’s supervisor informed Rosado that he was not permitted to speak with his subordinates regarding their union rights. Additionally, the Director of Labor Relations consulted with ITB, who determined that the email was unsolicited junk mail and took action to prevent this occurrence from happening again. Moreover, it claims that within a few hours of the original conversation, Rosado “apologized to his employees” and instructed them to disregard his previous statements regarding union membership. (Ans. ¶ 31)

Thus, the City argues that given the brief nature of the original conversation, and the fact that an apology was issued within mere hours, Rosado’s actions did not directly inhibit or penalize his subordinates’ protected union activity nor did it have “far-reaching effects which would hinder future bargaining, or conduct which discriminated solely on the basis of . . . union activity.” (Ans. ¶ 32) Consequently, the City requests that the Board dismiss the petition in its entirety.

DISCUSSION

At issue here is whether the Print Shop Director’s actions were inherently destructive and discouraged the exercise of the rights of employees under the NYCCBL. NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents “to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this

chapter.”⁷ The Board has long recognized that conduct that contains “an innate element of coercion, irrespective of motive, [can] constitute conduct which, because of its potentially chilling effect . . . is inherently destructive of important rights guaranteed under the NYCCBL.” *SSEU, L. 371*, 3 OCB2d 22, at 15 (BCB 2010) (quoting *ADWA*, 55 OCB 19, at 40 (BCB 1995); see *UFA*, 8 OCB2d 3, at 26 (BCB 2015). Additionally, “a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions.” *DC 37, L. 1087*, 11 OCB2d 41, at 15 (BCB 2018).

Further, the Board has previously found that speech that has the potential to chill or discourage an employee from participating in union activities is a violation of NYCCBL § 12-306(a)(1). For example, in *OSA*, 6 OCB2d 26 (BCB 2013), a union representative sent an email to a group of employees who had expressed concern about their agency’s policy regarding absences. An assistant commissioner responded to this email by telling the employees to “disregard” the advice from their union and that it was “inappropriate” for their representative to directly email members and provide instructions in “contradiction to the email” the assistant commissioner had issued. *Id.* at 9. The Board held that such actions violated NYCCBL § 12-306(a)(1) because they “deterred employees from engaging in protected activity and diminished the Union’s capacity to effectively represent its members.” *Id.* at 11. Additionally, in *SSEU, L. 371*, 3 OCB2d 22 the Board found that a supervisor’s comment at a staff meeting, in the context of an employee’s termination, that “nobody could threaten him with the Union,” was a veiled threat

⁷ NYCCBL § 12-305 states, 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.

and could lead an employee to conclude that any union involvement would be detrimental to their working relationship in violation of NYCCBL § 12-306(a)(1)). *Id.* at 15-16; *see also CSTG, L. 375*, 3 OCB2d 14 (BCB 2010); *DC 37, Local 376*, 73 OCB 6 (BCB 2004).

In this instance, we find that Rosado's actions encouraged the meeting attendees, including bargaining unit members, to withdraw from paying dues and/or being union members.⁸ There is no dispute that Rosado, a supervisor, convened a meeting with the sole purpose of sharing information regarding withdrawing from union membership. He read and disseminated a form to request withdrawal of union membership, explained that the employees' terms and conditions of employment would not change if they withdrew their membership, and offered to make copies of the information, including the membership withdrawal form. Indeed, by stating in essence that their coverage under the collective bargaining agreement would not change and the union would still have to represent them, he conveyed that it would be wasteful or unnecessary to pay union dues. Additionally, he further encouraged their withdrawal by stating that it did not have to be a public choice, "you can do it on the sneak, whatever you want, no one I don't think will know."⁹ (July 19 Recording) Therefore, in context, his statements were not limited to providing employees with information on their rights to withdraw from union membership but encouraged employees to do so. *Cf. PBA*, 77 OCB 10 at 14 (BCB 2006) (internal quotations and citations omitted) (noting that an employer's dissemination of information is permissible where it did not include a threat of

⁸ Further, we note that it is immaterial whether Rosado's actions actually discouraged employees from participating in protected Union activity. *See OSA*, 6 OCB2d 26, at 10-11 (finding that an email telling employees that they should disregard their union's advice would reasonably deter employees from conferring with the union); *Greenburgh #11 Union Free Sch. Dist.*, 33 PERB ¶ 3018, at 3059 (2000) (citations omitted).

⁹ The Board notes that some of Rosado's statements may have also been inaccurate or misleading.

reprisal, offer a promise of a benefit, attempt to impede reaching agreement with a union, or subvert the employees' rights of organization and representation). As a result, his conduct discouraged union membership, and interfered with and restrained employee rights under NYCCBL § 12-305.

In reaching this conclusion we need not determine whether Rosado was motivated by anti-union animus. We have long held that “[a]ctions which are inherently destructive of important employee rights may constitute unlawful interference even in the absence of proof of improper motive.” *L. 1180, CWA*, 71 OCB 28, at 9 (BCB 2003) (citations omitted); *see DC 37, L. 1087*, 11 OCB2d 41, at 20; *CSTG, L. 375*, 3 OCB2d 14. This Board has also held, in the context of independent NYCCBL § 12-306(a)(1) violations, that “a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions.” *Local 1180, CWA*, 71 OCB 28, at 10; *see DC 37, L. 1087*, 11 OCB2d 41, at 20. Accordingly, Rosado’s subjective intent or motivation is immaterial and does not negate the inherently destructive effect of his conduct on employee rights.¹⁰

Finally, we are not persuaded by the City’s argument that given the brief nature of the original conversation or the fact that later that day Rosado instructed the employees to disregard his earlier comments about the New Choice NY email, Rosado’s actions did not violate the

¹⁰ We do not find that the cases cited by the City require a different result. *See ADWA*, 55 OCB 19 (BCB 1995) (finding that an employer’s withholding promised slippage money to deputy wardens in order to compel withdrawal of a pending representation petition was coercive, irrespective of motive, had the potential to discourage union organizing and was inherently destructive of employee rights under the NYCCBL); *CIR*, 51 OCB 26 (BCB 1993), *affd. Matter of Committee of Interns and Residents v. Dinkins*, Index No. 12706/1993 (Sup. Ct. N.Y. Co. Nov. 29, 1993) (Lobis, J.) (finding that a department chair’s criticism of the union and its grievance during a rare appearance at a residents' conference discouraged the residents from filing grievances and deterred union activity).

NYCCBL. “[I]t 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) (citations and internal quotations omitted), *affd. Correction Officers’ Benevolent Assn. v. NYC Bd of Coll Barg.*, City of New York, and the New York City Department of Correction, Index No. 154546/2018 (Sup. Ct. N.Y. Co. Feb. 1, 2019) (James, J.); *see also Plainedge Union Free School Dist.*, 31 PERB ¶ 3063 (1998). In this instance, the NYPD took prompt and effective steps in response to Rosado’s conduct. It investigated the source of the New Choice NY email, informed Rosado that the email was not sanctioned by the NYPD and told him that he should not have discussed it with his subordinates. In addition, within a few hours of the initial meeting, Rosado called another meeting of the Print Shop and told them to disregard what he said earlier about the New Choice NY email. While these actions are noteworthy and may have been intended to ameliorate the impact of Rosado’s morning meeting, we find that the harm occurred when the statements and documents discouraging union membership were delivered to the group of Print Shop employees including bargaining unit members.

Accordingly, we find an independent violation of NYCCBL § 12-306(a)(1), and the improper practice is granted.

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, AFSCME, AFL-CIO and its affiliated Local 1087, against the City of New York and the New York City Police Department, docketed as BCB-4284-18, is hereby granted as to the claims that the City of New York and the New York City Police Department violated NYCCBL § 12-306(a)(1) when the Director of the NYPD Printing Section encouraged Union members to cease paying union dues and distributed materials that discouraged union membership; and it is further

ORDERED, that the New York City Police Department 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: December 2, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
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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 30 (BCB 2021), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO and its affiliated Local 1087, and the City of New York and the New York City Police Department.

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

ORDERED, that the improper practice petition filed by District Council 37, AFSCME, AFL-CIO and its affiliated Local 1087, against the City of New York and the New York City Police Department, docketed as BCB-4284-18, is hereby granted; and it is further

DETERMINED, that the City of New York and New York City Police Department violated NYCCBL § 12-306(a)(1) when the Director of the NYPD Printing Section, encouraged Union members to cease paying union dues and distributed materials that discouraged union membership; and it is further

ORDERED, that the New York City Police Department 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 Police Department
(Department)

Dated: _____

Posted By: _____
(Title)