Seabron, 15 OCB2d 17 (BCB 2022)

(IP) (Docket No. BCB-4456-21)

Summary of Decision*:** Petitioner alleged that the Union violated NYCCBL § 12-306(b)(1) when a Union official insulted and threatened him in a post on a Union Facebook group. Petitioner contended that the post was in retaliation for his participation in efforts to decertify the Union in favor of a rival union. Petitioner argued that the post was coercive and inherently destructive of his rights under the NYCCBL. The Union argued that Petitioner was not engaged in protected activity and failed to allege facts sufficient to establish a violation of NYCCBL § 12-306(b)(1). The Board found that the Union official's actions did not violate NYCCBL § 12-306(b)(1). Accordingly, the petition was dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

EDWARD SEABRON,

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 983, AFSCME AFL-CIO,

Respondent.

DECISION AND ORDER

On October 2, 2021, Petitioner filed an improper practice petition against District Council 37, Local 983, AFSCME, AFL-CIO. Petitioner alleges that the Union violated New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(b)(1) when a Union official insulted and threatened him in a post on a Union Facebook group. Petitioner contends that the post was in retaliation for his participation in efforts to decertify the Union in favor of another union, the Independent Law Enforcement

Benevolent Association ("ILEBA"). Petitioner argues that the post was coercive and inherently destructive of his rights under the NYCCBL. The Union argues that Petitioner was not engaged in protected activity and failed to allege facts sufficient to establish a violation of NYCCBL § 12-306(b)(1). The Board finds that the Union official's actions did not violate § 12-306(b)(1). Accordingly, the petition is dismissed.

BACKGROUND

District Council 37, AFSCME, AFL-CIO ("DC 37") is an amalgam of 63 local unions representing over 150,000 public sector and not-for-profit employees in various agencies, authorities, boards, and corporations throughout the City of New York. DC 37 is jointly certified along with the Communications Workers of America ("CWA") and Local 237, International Brotherhood of Teamsters ("Local 237"), as certified bargaining representatives of all Traffic Enforcement Agent ("TEA"), Associate Traffic Enforcement Agent ("ATEA"), Parking Control Specialist ("PCS"), and Associate Parking Control Specialist ("APCS") titles at the New York City Police Department ("NYPD"). Local 983, an affiliated local of DC 37 ("Local 983" or "Union"), represents TEA Levels III and IV for the purposes of dues check off, grievance processing, and receiving welfare fund payments for the employees in those titles within the structure of the joint certification.

Union First Vice President Marvin Robbins maintains a Facebook group ("Facebook group") for TEAs and ATEAs represented by Local 983 and CWA to discuss workplace issues.[1] The group has approximately 1,500 members and is not open to the public. Robbins invites eligible

[1] TEA Levels I and II are members of CWA Local 1182, TEA Levels III and IV are members of Local 983, and ATEAs are members of CWA Local 1181.

Union members to join when he receives notice of their hiring and removes access to the page upon learning that an individual is no longer an active member of either union.

Petitioner began employment with the NYPD in 2000 and joined the Union at that time. Petitioner is, and was at all relevant times, a TEA Level III. Petitioner asserts that he later became dissatisfied with the representation offered by the Union and by Robbins in particular. In May 2021, Petitioner began working to decertify the Union in support of ILEBA by speaking with coworkers about signing ILEBA union cards.[2] On May 27, 2021, Petitioner resigned his Union membership.

On June 8, 2021, Robbins posted in the Facebook group in response to Petitioner's decertification efforts. The post consisted of a short, written message, several pictures, and a 7 minute 45 second video.[3] The text of the Facebook post reads as follows:

> What does decertification mean to you the members.
>
> You will lose all of your Union benefits with DC37
>
> 1. Dental
> 2. Optical
> 3. Legal Services
> 4. Education reimbursement
> 5. Prescription coverage

(Pet., Ex. A) One picture accompanying the Facebook post was an obviously photoshopped image of two people shaking hands, one dressed as a Ku Klux Klan member. A headshot of ILEBA's founder, David Casey, was pasted onto the body of the Ku Klux Klan member, and Petitioner's

[2] We take administrative notice that ILEBA filed a representation petition on June 11, 2021, seeking to replace CWA as one of the joint certificate holders. *See ILEBA*, 14 OCB2d 27 (BOC 2021) (dismissing the petition).

[3] After submission of the pleadings, the Trial Examiner requested that the parties submit the full content of the Facebook post. Petitioner submitted a copy of the video accompanying the post, along with a transcript of the same, which has been marked as Petition Exhibit B.

head was pasted onto the other body. Another picture was an image of the ILEBA card Petitioner asked coworkers to sign. A third picture showed a CWA flier denouncing Casey, a former CWA official.

The video accompanying the Facebook post showed Robbins speaking into the camera. In the video, Robbins states that members will lose their benefits if the Union is decertified and repeatedly insults ILEBA and Petitioner. For example, Robbins accused ILEBA organizers, including Petitioner, of lying to their coworkers, called them a "lying sack of shit," and stated that they are "full of shit" and that ILEBA were "independent losers" owned and operated "by people who make racist statement[s] about black people." (Pet., Ex. B) Robbins concluded the video with the following message:

> My promise to you is, and, for the people that are passing it out . . . let me make this clear: I'm looking for anyone to please report to me anyone who's giving out that form . . . feel free to call me up and take a picture of them or give me a signed statement that they're the ones who gave it to you. And if they're part of DC [37], they will be dealt with. If they're part of [Local 983], let me know. We will move to take action against any one of them that are [Local 983] members that are passing out that form; I'm telling you right now. Gloves off. You wanna play dirty, we['re] gonna play dirty. You sneaky conniving son of a bitches, it's on! We gon' play this game, we gon' play it together.[4]

(*Id*.)

On June 8, 2021, the same day that he made the Facebook post, Robbins removed Petitioner from the Facebook group. Petitioner alleges that other employees have been less amenable to discussing ILEBA since the Facebook post was made and that he has scaled back his efforts to discuss decertification for fear of retaliation. Petitioner additionally claims that Robbins has visited his work location more frequently than usual since the Facebook post was made.

[4] Petitioner was not a Local 983 member at the time of the video's release.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union violated NYCCBL § 12-306(b)(1) when Robbins insulted and threatened him in the Facebook post. Petitioner asserts that he was engaged in protected activity under the NYCCBL while assisting ILEBA. He argues that the Facebook post was coercive and inherently destructive of his rights.

First, Petitioner claims that the Facebook post contains specific threats to take action against him and that he fears retaliation as a result. Robbins stated in the Facebook video that "we" would "take action" against Petitioner. (Pet., Ex. B) Additionally, Petitioner claims the photoshopped picture of him with a Klansman constitutes interference with the exercise of his rights on the basis that it is an attempt to smear him as a racist or friend of racists in retaliation for his protected union activity.

Petitioner argues that Robbins' Facebook post must be imputed to the Union. Robbins frequently posts in the Facebook group concerning Union business with the Union's awareness. Petitioner claims that the Facebook post was widely seen and discussed by Union members.

As relief, Petitioner requests that the Union be ordered to post a notice at all facilities where members of Petitioner's bargaining unit work, cease interference with Petitioner's exercise of his rights under the NYCCBL, delete the Facebook post, and remove Robbins from the Facebook group.

Union's Position

The Union argues that Petitioner has failed to allege facts sufficient to establish a violation of NYCCBL § 12-306(b)(1). It asserts that the Facebook post constitutes protected activity,

arguing that comments made in a private Union Facebook group are subject to "heightened protection" equivalent to comments made in a Union meeting. (Ans. ¶ 96)

The Union asserts that even false or misleading statements do not constitute an improper practice under NYCCBL § 12-306(b)(1) so long as they do not threaten reprisals or promise benefits. The Union denies that any information in the Facebook post was false or misleading, asserting that the photoshopped image was obviously not an actual photograph or an attempt to deceive members. The Facebook post did not threaten members against voting to decertify the Union nor threaten the loss of benefits, except to accurately point out that members would lose benefits provided by DC 37 if the Union was decertified.

Further, the Union claims that Petitioner cannot establish that he was engaged in protected activity. The Union asserts that Petitioner has made only conclusory and unsupported allegations regarding his alleged protected activity and the Union's alleged interference with that activity. Finally, the Union notes that Petitioner has not provided evidence to support his claims that individuals withdrew their support from his decertification campaign as a result of the Facebook post.[5]

DISCUSSION

The initial petition in this matter was filed on October 5, 2021. Based on this filing date, Petitioner's claims must have arisen on or after June 4, 2021, in order to be timely. *See* NYCCBL § 12-306(e). All claims asserted by Petitioner arise from the Facebook post created on June 8, 2021, and thus are timely.

[5] The Union notes that Petitioner initially served the petition on or about October 5, 2021, and as a result any claims that flow from events that occurred prior to June 5, 2021, fall outside the four-month statute of limitations.

The NYCCBL provides that "[p]ublic 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." NYCCBL § 12-305. Here, Petitioner was engaged in protected union activity when he spoke to coworkers about signing ILEBA union cards and encouraged decertification of the Union and certification of ILEBA. *See OSA*, 13 OCB2d 2, at 24 (BCB 2020). The NYCCBL protects employees from both employer and union interference with those rights set forth in NYCCBL § 12-305. Specifically with respect to unions, NYCCBL § 12-306(b)(1) provides that it is an improper practice for a public employee organization 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, or to cause, or attempt to cause, a public employer to do so." The same language in NYCCBL § 12-306(a)(1) protects employees from employer actions.

This Board has recognized a broad right to free speech in the context of union representation disputes. As a result, the Board does not closely regulate statements made by employees, employers, or unions during organizing campaigns. For example, we have acknowledged that, "because an average employee would surely be able to recognize the statements as campaign propaganda which, by its very nature, is intended to persuade employees to take a certain action," we do not generally find "false and misleading" information to violate NYCCBL § 12-306(b)(1) where "a reasonable member of the class could not have been misled." *LEEBA*, 7 OCB2d 21 at 12-14 (BCB 2014) (citing *United Univ. Professions*, 20 PERB ¶ 3056, at 3123 (1987) (incumbent union's claim that benefits would be lost if a rival union won an ongoing representation election found to not violate NYCCBL § 12-306(b)(1)) (internal quotations omitted). Similarly, false or misleading remarks by an employer have not been held to interfere with, restrain or coerce employees in violation of NYCCBL § 12-306(a)(1). *See COBA*, 14 OCB2d

10, at 72-73 (BCB 2021).

In addition, we have found that certain insulting and/or disparaging remarks did not rise to the level of interference, restraint, or coercion. For example, an employer's criticism of union leadership, their tactics, and/or name calling have not been found to violate protected employee rights. *See PBA*, 77 OCB 10, at 21 (BCB 2006) (Mayor's statements that union leaders were responsible for layoffs, criticizing leadership for failure to make concessions or represent their members' interests and encouraging members to reject union leadership did not deter employee protected activity in violation of NYCCBL § 12-306(a)(1) because "the utterances were not threatening or coercive"); *Town of Greenburgh*, 32 PERB ¶ 3025, at 3053-3054 (1999) (where Chief of Police called the union's president and attorney "sleazebags" and "shysters" at a labor management meeting, PERB did not find impermissible interference because the communications, though "vitriolic," were opinions and were stated in a non-coercive manner); *Yonkers Board of Education*, 10 PERB ¶ 3057 (1977) (criticism of union leader's work ethic, loyalty to students and the community, as well as purposefully mis-stating his last name were not found to be interference or coercive). In contrast, remarks by an employer that contain a promise of benefit or threat of reprisal based on employee activity protected by NYCCBL § 12-305 have been found to be unlawful interference, restraint or coercion. *See, e.g., UFOA*, 69 OCB 5, at 8 (BCB 2002).

Generally, this Board does not have jurisdiction over internal union affairs. *See Lawtone-Bowles*, 15 OCB2d 4, at 10 (BCB 2022). We have held that, "[u]nlike federal labor laws protecting the rights of union members in the private sector, the NYCCBL does not regulate internal union affairs." *Archibald,* 57 OCB 38, at 27 (BCB 1996) (citations omitted). However, simply because conduct takes place at a union meeting or is a communication between a union and its members does not place it outside of the jurisdiction of the NYCCBL. Therefore, the mere fact that Robbins'

statements were made in a Union member Facebook group, does not mean that they are insulated from the protections afforded by NYCCBL § 12-306(b)(1). Instead, we must consider the statements themselves to discern if they rise to level of interference, restraint, or coercion.

Here, Robbins posted a clearly photoshopped image of Petitioner and Casey, ILEBA's founder, implying that Casey interacts with or is a member of the Ku Klux Klan. He also posted a video in which he accused ILEBA organizers, including Petitioner, of lying to their coworkers and stated that they are "full of shit." (Pet., Ex. B) He also stated that ILEBA were "independent losers" owned and operated "by people who make racist statement[s] about black people." (*Id*.) We find that Robbins's statements and actions, while antagonistic, were easily recognizable as his attempt to denigrate Petitioner and Casey and persuade members not to support the rival union. In addition, the singling out of Petitioner, as a representative of the rival union, and the derogatory and offensive characterizations, even if false or misleading, do not constitute interference with his exercise of § 12-305 rights in violation NYCCBL § 12-306(b)(1). *See LEEBA*, 7 OCB2d 21, at 14 ("Regardless of whether the statements are true or false, we do not consider them to be improper interference because an average employee would surely be able to recognize the statements as campaign propaganda which, by its very nature, is intended to persuade employees to take a certain action.")

We reach a similar conclusion with respect to Robbins' statements in the video asking Union members to report who is seeking to decertify the Union and threatening to "take action" against them if they are Union members. (Pet., Ex. B) Robbins states that "if they're part of DC [37], they will be dealt with…. Gloves off. You wanna play dirty, we['re] gonna play dirty." (*Id*.) While these statements may be viewed as hostile, in context we conclude that any threat was limited to the Union's ability to internally govern or discipline its members.

We have consistently found that "there is no violation of statutory rights such as those guaranteed by [NYCCBL § 12-305] where the alleged union conduct does not affect the employee's terms and conditions of employment and has no effect on the nature of the representation accorded to the employee by the union." *Velez*, 23 OCB 1, at 9 (BCB 1979).[6] Therefore, this Board has found that actions taken by unions that fall solely within the union-member relationship cannot constitute a basis for a finding of improper practice. *Sharon*, 27 OCB 1, at 6 (BCB 1981) (finding no jurisdiction over claim that a union member was harassed, abused, prevented from speaking, and threatened with reprisals at a union meeting because he was critical of recent official union activities). Similarly, in *CSEA*, 9 PERB ¶ 3064 (1976), PERB held that a claim that the union interfered with employee protected rights by stripping a member of several union officer positions because he had invited a rival union to attend a chapter meeting and solicited support for different union representation was outside the Taylor Law's jurisdiction. In its entirety, the statements in the Facebook post do not impact either Petitioner's terms and conditions of employment or the nature of the Union's representation afforded him. Accordingly, we cannot find that Robbins' statements in the Facebook post interfered with employee rights, and specifically those of Petitioner, in violation of NYCCBL § 12-306(b)(1).

For the reasons given above, we do not find that Local 983 violated NYCCBL § 12-306(b)(1), and we dismiss the petition in its entirety.

[6] The scope of the Board's jurisdiction is similar to that of the National Labor Relations Board in the private sector. *See, e.g., NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968) (finding that § 8(b)(1)(A) of the National Labor Relations Act "assures a union freedom of self-regulation where its legitimate internal affairs are concerned").

ORDER

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

ORDERED, that the improper practice petition, docketed as BCB-4456-21, filed by Edward Seabron against District Council 37, Local 983, AFSCME, AFL-CIO, hereby is dismissed in its entirety.

Dated: June 1, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent (see attached dissent) CAROLE O'BLENES
MEMBER

I concur in the result CHARLES G. MOERDLER
MEMBER

***Seabron*, 15 OCB2d 17 (BCB 2022)**

(IP) (Docket No. BCB-4456-21)

Dissenting Opinion of Carole O'Blenes

I dissent with respect to the aspect of the decision concerning the photoshopped image purporting to depict a Ku Klux Klan scene. In my view, even in the context of a representation dispute, the posting of that image — which was not an opinion, but a knowing and intentional falsehood on a highly sensitive matter — violated NYCCBL§12-306(b)(1).

June 1, 2022

CAROLE O'BLENES
Carole O'Blenes