COBA, 17 OCB2d 1 (BCB 2024)

(IP) (Docket No. BCB-4512-23)

Summary of Decision*:** The Union claimed that the DOC violated NYCCBL § 12-306(a)(1) when an Assistant Deputy Warden interfered with a facility tour by Union officials and admonished a Union delegate during a labor-management meeting. The City argues that the Union has not alleged facts that establish a violation of the NYCCBL and that the Assistant Deputy Warden had legitimate business reasons to engage in the actions alleged to be interference. The Board found that Assistant Deputy Warden's interference with the Union's facility tour violated NYCCBL § 12-306(a)(1), but that his comments during the labor-management meeting did not. 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,[1]

Respondents.

DECISION AND ORDER

On March 2, 2023, the Corrections Officers' Benevolent Association ("Union" or "COBA") filed a verified improper practice petition alleging that the City of New York ("City")

[1] The petition named Assistant Deputy Warden Luis Matos as a respondent. As individuals are not proper respondents under the NYCCBL, we amended the caption *nunc pro tunc* to remove his name. *See DC 37*, 6 OCB2d 14 at 2, n. 1 (BCB 2013) (citing NYCCBL §§ 12-303(g) (defining public employer for the purposes of the NYCCBL) and 12-304 (scope of the NYCCBL)).

and the New York City Department of Correction ("DOC") violated § 12-306(a)(1) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when Assistant Deputy Warden Luis Matos ("Assistant Deputy Warden") interfered with Union delegates' tour of a facility.[2] The Union alleges that a second act of interference occurred during a labor-management meeting on January 12, 2023, when the Assistant Deputy Warden made comments to a Union delegate in an attempt to chill Union activity. The City argues that the Union has failed to show any proof of the alleged acts of interference. In addition, the City asserts that the Assistant Deputy Warden had legitimate business reasons to engage in the actions alleged to be interference and that the Union's allegations concerning the labor-management meeting are purely speculative. The Board finds that Respondents violated NYCCBL § 12-306(a)(1) by interfering in the delegates' facility tour but dismisses the claim of interference during the labor-management meeting. 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, and briefs, established the relevant facts set forth below.

The DOC operates facilities in all five boroughs, including the Bronx Hall of Justice ("BXHJ facility"). The Union is the certified bargaining representative for Correction Officers ("COs") employed by the DOC. COs maintain security at DOC facilities and are responsible for

[2] Following the hearing, the Union withdrew its claim that these actions also constituted retaliation in violation of NYCCBL § 12-306(a)(3).

the care, custody, control, job training, and work performance of sentenced inmates within the facilities.

Union Visitation Policy

Since at least January 30, 2013, the Union and the DOC have maintained an agreement regarding Union business conducted on DOC premises, including rules governing the visitation of DOC facilities by Union representatives ("Visitation Policy"). The policy states, in relevant part:

> 1. Department of Correction Union Representatives will be permitted access to all facility vestibules without prior notification. Upon arrival to the vestibule, they shall first report directly to the head of the facility or his/her designee to state the purpose of their visit.
>
> 2. The head of the facility or division, or his/her designee, shall make available to said Union Representatives a place within the work location where authorized business may be conducted with minimum disruption to the institution.

(Union Ex. A)

December 19, 2022 Union Tour

On December 19, 2022, Union Chief of Staff and Treasurer Angel Castro and Union Second Vice President Glenn Morgan planned to conduct a tour of the BXHJ facility. Castro and Morgan were not the regularly assigned Union delegates responsible for touring that facility but had decided to do so to speak with bargaining unit members about complaints they had filed with the Union. Castro testified that he routinely visits DOC facilities as part of his duties as a delegate and that he has toured the BXHJ facility in the past. Normally, when Castro arrives to the administrative area of a facility, he greets the managers that are on duty and tours the facility after he has been allowed entry. During some tours he would go to a common area and stay there, and during other tours he would walk around the facility. According to Castro, he does not disrupt

employees' or DOC operations while he is touring a facility. Castro testified that on some occasions, management directs him to meet with bargaining unit members in a specific area, and he does so when asked. According to Castro, prior to December 19, 2022, he had never been denied access or delayed from touring a DOC facility. Similarly, the Assistant Deputy Warden testified that he has never denied any Union representative permission to tour the BXHJ facility.

Castro and Morgan arrived at the BXHJ facility at 11:00 a.m. to conduct their tour. Upon entering the facility, they signed the logbook and wrote that they intended to tour "all" parts of the facility. (Union Ex. E) Castro spoke with the officer on duty at the front gate, CO Carr, who called the Assistant Deputy Warden's office to inform him that the delegates had arrived. Castro testified that the officer on duty did not ask the reason for their tour that morning. The officer on duty then told the delegates that a Captain was coming out to speak with them. They waited for approximately fifteen minutes before Captain Middleton arrived and asked them why they were there, stating that he was just following the Assistant Deputy Warden's orders. Castro testified that he felt it was unusual to be asked this question but that he and Morgan answered the Captain. The Captain then left, and the delegates waited for another fifteen minutes, according to Castro. Eventually, Castro asked the officer on duty if the delegates could be allowed into the facility, which the officer on duty then permitted. The delegates entered the facility and began to greet and speak with the COs who were on duty, when the Captain returned and asked them to accompany him to the Assistant Deputy Warden's office.

According to Castro, when the delegates arrived at the Assistant Deputy Warden's office, Castro offered to shake the Assistant Deputy Warden's hand, but he rebuffed the offer. Castro stated that he and Morgan were at the facility to speak with a couple of COs regarding complaints they had filed with the Union. The Assistant Deputy Warden responded by telling the delegates

that they were not assigned to that facility and that they should not be there because there was no ongoing emergency that required their presence. Castro responded by disputing the claim that the delegates could only be present in the event of an emergency and further that the Assistant Deputy Warden could not dictate whether it was appropriate for the Union to tour the facility or which facility Union officials should visit. The Assistant Deputy Warden repeated his complaint that they were not the Union delegates assigned to cover that facility, that their presence was disruptive to DOC operations, and that they should leave. According to Castro, the Assistant Deputy Warden threatened to call Labor Relations and his superior, Acting Warden Joseph Caputo, and stated that Castro cannot show up at the facility whenever he wanted. Castro testified that both he and the Assistant Deputy Warden raised their voices during this exchange and that bargaining unit members subsequently informed him that they overheard the conversation through the open door. After the Assistant Deputy Warden told them to leave the facility, Castro testified that he sat down and refused to leave the Assistant Deputy Warden's office until he was allowed to tour. Eventually, the delegates left the office and proceeded to tour the facility.

The Assistant Deputy Warden's account of the events of December 19 differs from Castro's.[3] Generally, the Assistant Deputy Warden maintained that it is his policy to abide by the protocols outlined in the Visitation Policy when Union delegates visit the facility. If he feels that the facility is not safe for delegates to tour, he is required to designate a safe location for them to meet with unit members. The City averred in its answer that on December 19, the officer on duty informed the Assistant Deputy Warden when the delegates had arrived to tour the facility, but the Assistant Deputy Warden was busy and so he instructed Captain Middleton to ask the delegates to

[3] The City submitted a sworn affidavit from the Assistant Deputy Warden attached to its answer, in addition to his testimony in this matter. (City Ex. 1) CO Morgan, Captain Middleton and CO Carr were not called to testify.

wait to begin their tour. The Assistant Deputy Warden testified that that he did not recall speaking with Captain Middleton about the Union delegates. Rather, he testified that his staff notified him after Castro and Morgan had entered the facility and began their tour, at which point he ordered Middleton to escort them to his office. However, during cross-examination, the Assistant Deputy Warden testified that he had learned of the Union delegates' visit prior to their arrival at the BXHJ facility when a subordinate informed him that they were touring an adjacent DOC facility across the street. The Assistant Deputy Warden testified that he then monitored the BXHJ facility's CCTV cameras and observed the delegates walk into the BXHJ facility. According to the Assistant Deputy Warden, the delegates entered the facility and proceeded to his office after they were instructed to do so.

The Assistant Deputy Warden testified that that he did not recall refusing to shake Castro's hand when he entered his office. During his testimony, he denied telling the delegates that they could only tour the facility in the event of an ongoing emergency, but rather, said that he explained to them that he was concerned about their safety because they intended to tour while not in uniform. The Assistant Deputy Warden testified that he told the delegates that the best solution would be for him to designate a secure location in the facility where they could speak with their members, rather than having them tour the facility as they wished.[4] However, he testified that he has never had to designate a secure location in this manner for any union visitor to the facility. According to the Assistant Deputy Warden, Castro sat down and told him that he would not leave his office,

[4] The Assistant Deputy Warden's affidavit states that he expressed his concern that the delegates had violated the Visitation Policy when they failed to report directly to his office and inform him of the purpose of their visit to the facility. The affidavit further states that he reminded the delegates that the purpose of the Visitation Policy is to minimize operational disruptions.

but that Morgan convinced Castro to leave. The Assistant Deputy Warden testified as follows regarding his interaction with Castro and Morgan:

> Q: So you claim that Castro became threatening and challenging, correct?
> A: Yes.

(Tr. 208)

> Q: And you remained calm during this event in your office?
> A: Yes. At that time Officer Morgan told Castro "Let's go." He was the one that told him to go, and then Castro got up from the chair, and they both left and began touring the command without any restrictions.

(Tr. 209-210)

It is undisputed that the delegates eventually left the Assistant Deputy Warden's office and toured the facility. The Assistant Deputy Warden further testified that he reported the encounter to the Acting Warden but denied threatening to call Labor Relations.

December 19, 2022 Charges and Specifications

That same day, Captain Leila Walters issued charges and specifications against CO Kadrie Dzeloska ("the CO") at the BXHJ facility. In pertinent part, the charges stated that when Captain Walters ordered the CO to correct her uniform, the CO refused and acted in an insubordinate manner. The Assistant Deputy Warden testified that Captain Walters spoke with him about the incident, but he could not recall whether the conversation occurred before or after the delegates' visit. That same day, the Captain submitted a proposed Command Discipline ("CD") to the Assistant Deputy Warden for review.

As part of his duties, the Assistant Deputy Warden is responsible for reviewing proposed disciplinary cases that may arise concerning DOC personnel under his supervision and proposing the appropriate disciplinary penalty for his supervisor, the Acting Warden, to approve, deny, or

modify. After reviewing the documentation, the Assistant Deputy Warden decided to recommend escalating the CD to a formal Memorandum of Complaint ("MOC"), along with a penalty of an eight-day unpaid summary suspension. On December 28, 2022, the Assistant Deputy Warden submitted the MOC seeking an eight-day unpaid summary suspension to the Acting Warden. On January 3, 2023, the Acting Warden approved the CO's suspension.

On January 11, 2023, the CO was served a notice of summary suspension stating that she would be placed on unpaid leave for eight days, effective immediately. Afterwards, the CO called COBA Bronx Borough Trustee Matt Romano and asked him for help challenging the suspension. Romano testified that he called the Assistant Deputy Warden and asked him to reconsider the suspension, but he refused to modify it. Romano then called the Acting Warden to complain that a severe penalty had been imposed against the CO for a minor violation. Castro also contacted the Acting Warden and advocated for the penalty to be reconsidered. Ultimately, Union President Benny Boscio called the Acting Warden to discuss the CO's suspension. The Acting Warden testified that during this call, Boscio not only argued that the suspension was unduly harsh, but also that suspending a CO would be detrimental to the DOC due to the ongoing staffing shortage. The Acting Warden testified that he found the Union President's concerns about the ongoing staffing shortage to be compelling.[5] Accordingly, the Acting Warden overruled the CO's suspension on January 12, 2023.

January 12, 2023 Labor-Management Meeting

On January 12, 2023, Union and DOC officials met for their regularly scheduled monthly labor-management meeting. The meeting was attended by Union officials Romano, Melinda

[5] The Acting Warden testified that by overruling the summary suspension, the disciplinary process would be allowed to "play itself out," and the CO would be able to work while the disciplinary process is pending. (Tr. 293)

Martinez, and Executive Board Members Lionel Cumberbatch and Jamar McMorris. The Assistant Deputy Warden attended on behalf of the DOC. Sometime before that meeting began, the Acting Warden called the Assistant Deputy Warden to tell him that he had reversed the CO's suspension. The Acting Warden did not tell the Assistant Deputy Warden the reasons why he decided to reverse the suspension, but the Assistant Deputy Warden was aware that the Union had been advocating for the suspension to be reversed because of the phone calls he had received.

Among the topics to be discussed at the January labor-management meeting was progressive discipline. The Assistant Deputy Warden described progressive discipline as a process by which violations of a serious nature could be escalated and warrant higher penalties. Romano testified that the Assistant Deputy Warden cited three recent examples in which COs had been suspended and Romano had not contacted him on their behalf. Those three COs were either Black or Latino, whereas the CO for whom Romano advocated is White. According to Romano, the Assistant Deputy Warden told him that he should "should represent everyone equally." (Tr. 113) Romano testified that the situations with the other COs were not comparable, that he does not call the Assistant Deputy Warden every time a member is suspended, and that he did in fact contact the Assistant Deputy Warden about one of the three COs he referenced.[6] Romano testified that he felt that the Assistant Deputy Warden's statements insinuated that he only represented the CO because she was white and were meant to smear his reputation as a delegate because of his protected activity on behalf of the CO.

[6] Romano testified that the comparisons made by the Assistant Deputy Warden were misplaced because in those three cases there was "clear cut evidence" of the alleged violations, including one case where the CO could be seen repeatedly striking an inmate on CCTV. (Tr. 114)

Martinez corroborated Romano's testimony that the Assistant Deputy Warden directly criticized Romano by insinuating that he had only strenuously advocated for the one CO because of her ethnicity. Martinez described her reaction:

> Q: How did you react to that?
> A: We were -- we were all shocked because we couldn't believe that he was bringing up race in it. It had nothing to do with race. Everybody had a different suspension. Dzeloska's suspension was different from the other suspensions and he just was insinuating that Romano was going extra hard for Dzeloska because he never called for any other officer, and the reason he didn't call for every other officer is because their suspension was different. Dzeloska's was kind of petty and the fact that it had to do with a uniform, when the other officers, theirs was more substantiated with the department.

(Tr. 146)

By contrast, the Assistant Deputy Warden testified that Romano initially raised the concern that the recommended suspension of the CO on January 11 was unduly harsh. The Assistant Deputy Warden admitted that he stated that Romano had called him to contest that CO's discipline but had not challenged his recommendation to suspend three other COs. Specifically, he admitted that Romano "had no interest in those three members and their penalties for being suspended." (Tr. 276) The Assistant Deputy Warden repeatedly denied that he meant this as a criticism of Romano. He explained that Romano is an "excellent officer" and that they were simply "having a conversation." (Tr. 277-278) However, when asked if he was pointing out the Romano was fighting harder for Dzeloska than the other COs, the Assistant Deputy Warden stated, "I had just spoken – we spoke about that, yeah, what the intention for Dzeloska and the other members. That was a topic of conversation." (Tr. 279) In his sworn affidavit, the Assistant Deputy Warden stated that he "made no comment that CO Romano's response was racially motivated, only that his response in this instance was unusually strident." (City Ex. 1) According to the Assistant Deputy

Warden, no one who heard the conversation objected to the comments or displayed an adverse reaction.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the DOC violated NYCCBL § 12-306(a)(1) when the Assistant Deputy Warden interfered with the Union delegates' tour of the BXHJ facility and during the labor-management meeting when he insinuated that Romano had only advocated to overturn the CO's suspension because of her ethnicity. The Union argues that the Assistant Deputy Warden's conduct towards the Union delegates was inherently destructive and had a chilling effect on their protected activity. As evidence of this, the Union stresses that the Assistant Deputy Warden's testimony on cross-examination contradicts the factual statements set forth in the City's answer, in his own sworn affidavit, and his testimony under direct examination during this hearing. Accordingly, the Union argues that this Board should afford him no credibility in this matter.

First, the Union asserts that on December 19, 2022, the Assistant Deputy Warden engaged in deliberate acts to deter and interfere with Castro and Morgan's attempt to meet with Union members about their complaints. In the past, Union delegates, including Castro, have been free to tour the BXHJ facility without interference in accordance with the Visitation Policy. The Union alleges that the Assistant Deputy Warden made repeated attempts to delay and interfere with the Union delegates' visit. The Union notes that the City claimed in its answer that when the delegates arrived on December 19, the Assistant Deputy Warden stated that he was not able to meet with them because he was busy and so he asked them to wait. However, the Assistant Deputy Warden' testimony contradicted this assertion and made clear that he was aware of the delegates' presence

at BXHJ facility before they even attempted to enter the facility. The Assistant Deputy Warden refused to allow them entrance to the facility, sent Captain Middleton to disrupt their visit multiple times, and ultimately had Middleton escort them to his office. The Union asserts that once there, the Assistant Deputy Warden berated the delegates for non-existent violations of the Visitation Policy, goaded Castro into an argument, and threatened to call Labor Relations to have them removed. The Union claims that this argument and the Assistant Deputy Warden's threats were heard by bargaining unit members outside of the Assistant Deputy Warden's office.

Second, the Union alleges that on January 12, 2023, the Assistant Deputy Warden slandered Romano by implying that he had a racist motivation for advocating on behalf of the CO. It asserts that the Assistant Deputy Warden had recently learned that the CO's suspension had been overruled due to Union advocacy, including by Romano. According to the Union, this suspension had been important to the Assistant Deputy Warden, as evidenced by his recent refusal to modify the suspension. The Union argues that the Assistant Deputy Warden implied that Romano did not advocate equally on behalf of Black and Latino members in the presence of Romano's colleagues in an attempt to denigrate his work as a Union advocate. According to the Union, the Assistant Deputy Warden's comments were an attempt to discourage future protected activity. This is further evidenced by the Assistant Deputy Warden's inability to provide any explanation for his comments to Romano on January 12. Accordingly, the Union asserts that the Assistant Deputy Warden's conduct was inherently destructive of Union rights, in violation of NYCCBL § 12-306(a)(1). As a remedy, the Union asks that the Board order the City to post notices that they engaged in unfair labor practices against COBA, enjoin the Assistant Deputy Warden from engaging in any further discriminatory and harassing conduct towards Union representatives, and order any other relief that the Board believes just and proper.

City's Position

The City argues that it did not violate NYCCBL § 12-306(a)(1) because the record is devoid of any factual support that Respondents' conduct was inherently destructive of Petitioner's rights under the NYCCBL. Concerning the events of December 19, 2022, the City argues that the Assistant Deputy Warden took the initiative when he sent Captain Middleton to inform the delegates of their obligation to notify the facility manager under the Visitation Policy. The City argues that Castro's testimony concedes that he, not the Assistant Deputy Warden, was combative, as demonstrated by Castro's refusal to leave the office. Importantly, it is undisputed that the Union delegates were ultimately able to tour the BXHJ facility without interference.

The City characterizes the Union's claims regarding the January 12, 2023 labor-management meeting as distorted or fabricated. In any case, the Union's claims are refuted by the record. Romano acknowledged that he "inferred" the negative implications of the Assistant Deputy Warden' comments. (Tr. 116) Such conclusory statements do not state a violation of the NYCCBL. According to the City, the Union has provided no evidence that Respondents engaged in any conduct that can be characterized as "inherently destructive." Accordingly, the City urges the Board to dismiss the instant petition in its entirety.

DISCUSSION

The issue before us is whether the Assistant Deputy Warden's actions on December 19, 2022, and January 12, 2023, were inherently destructive of employee rights, in violation 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."[7] "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." *COBA,* 14 OC2d 25 at 15 (BCB 2021) (citations and internal quotations omitted). "[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 (BCB 2018) (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. *See COBA,* 14 OCB2d 25, at 15 (quoting *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." *CIR,* 51 OCB 26, at 41-42 (internal quotation marks and citations omitted). The second is conduct that "directly and unambiguously penalizes or deters protected activity." *Id*. at 42 (internal quotation marks and citations omitted). 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). It is immaterial whether the actions

[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.

in question actually discouraged any employees from participating in protected union activity. *See OSA*, 6 OCB2d 26, at 10-11 (BCB 2013) (finding that an email telling employees that they should disregard their union's advice would reasonably deter employees from conferring with the union in the future); *Greenburgh #11 Union Free Sch. Dist*., 33 PERB ¶ 3018, at 3059 (2000).

Indeed, this Board has held that statements that "discourage and inhibit" union members from choosing a specific union official as their representative violate the NYCCBL. *See Local 376, DC 37*, 73 OCB 6, at 11 (BCB 2004) (citing *Monticello Cent. Sch. Dist.*, 22 PERB ¶ 3002, at 3006). In *DC 37, L. 1087*, 14 OCB2d 30, at 12 (BCB 2021), this Board found that a supervisor interfered with employee rights when he convened a meeting for the sole purpose of encouraging members to withdraw from union membership. The Board held that the supervisor's subjective intent or motivation was immaterial because the supervisor had not only disseminated information on withdrawal, but explicitly encouraged the employees to withdraw from the union and/or cease paying dues. *Id.* Another instance in which the Board found that a manager's interference violated NYCCBL § 12-306(a)(1) is *OSA*, 6 OCB2d 26. In *OSA,* 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 previously issued. *Id.* at 9. The Board held that such statements 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.

Similarly, the New York State Public Employment Relations Board ("PERB") has held that derogatory statements are not necessarily a violation of the Taylor Law, but insults and actions

made by an employer towards a union official can be inherently destructive when they undermine that official's status as a union representative. *See Monticello Cent. Sch. Dist*., 22 PERB ¶ 3002, at 3005-3006 (1989) (finding that Assistant Superintendent undermined union representatives' status by behavior including refusing to meet in good faith with the representative about pending grievances, telling employees that the administration would not deal with that particular representative and that the employees also did not have to deal with him, and finally, by preventing the representative from meeting with employees in the workplace, calling the representative a "scum bag," and threatening physical contact in an attempt to make the representative leave the workplace). Conduct that has the effect of undermining a union official's ability to fulfill their representational duties is inherently destructive regardless of the employer's motive. *See Churchville-Chili Cent. Sch. Dist.,* 51 PERB ¶ 3003, at 3010 (2018) (finding a violation of § 209-a.1(a) of the Taylor Law when an employer questioned a union president about internal union communications she had with an employee in the course of her representational duties and threatened discipline if she continued to engage in the protected activity).

As an initial matter, to determine whether the Assistant Deputy Warden's actions and statements constituted unlawful interference under the NYCCBL, we must determine what was said and done during the delegates tour of the BXHJ facility on December 19, 2022, and during the January 12, 2023 labor-management meeting. For the following reasons, we credit the Union officials' testimony of the events of December 19, 2022, and January 12, 2023, over that of the Assistant Deputy Warden.

With respect to the December 19 facility tour, the Assistant Deputy Warden's testimony at the hearing was not consistent with his own affidavit or the City's assertions in its answer, and his testimony on cross-examination contradicted his prior testimony in numerous respects. The

Assistant Deputy Warden's initial testimony that he learned the Union delegates were in the facility from his staff after they had begun to tour the facility without his knowledge, was contradicted by his later testimony that he became aware of the delegates before they had arrived at the facility because a subordinate told him that they were touring another building across the street. He then observed the Union delegates enter the BXHJ Facility via CCTV. Further, the City's answer alleged that the Assistant Deputy Warden sent Captain Middleton to ask the delegates to wait because he was not available to meet with them when they arrived. Nevertheless, the Assistant Deputy Warden testified that he did not recall interacting with Middleton during this period. In addition, he testified that it was not his practice to make Union representatives wait upon arriving at the facility and that on the date in issue he was not otherwise engaged but was simply waiting for the delegates in his office. Further, the City's answer averred and the Assistant Deputy Warden's affidavit stated that he had concerns about the delegates' facility tour due to potential disruptions it might cause. However, in his testimony the Assistant Deputy Warden said that his concern was for the safety of the delegates because they were out of uniform and that accordingly he wanted to designate a safe place for them to meet with unit members.

Turning to the labor-management meeting on January 12, 2023, the testimony of Union witnesses Romano and Martinez concerning the Assistant Deputy Warden's statements and the exchange at the labor-management meeting corroborated one another. *See COBA*, 2 OCB2d 7, at 52 (BCB 2009) (corroboration strengthens credibility). Further, the Assistant Deputy admitted that he raised the fact that Romano had advocated for Dzeloska, but not the other COs. While he denied that citing these facts was a criticism of Romano's union advocacy, maintaining that it was simply part of a conversation, this explanation simply does not make sense.

In sum, we find that the Assistant Deputy Warden's testimony concerning the events of December 19 was not reliable and credit the testimony of Union Representative Castro regarding the Assistant Deputy Warden's statements and actions on December 19. We find that the Assistant Deputy Warden told him that they should not be there because they were not the delegates assigned to the facility, that there was no ongoing emergency that required their presence, that their presence was disruptive and asked them to leave. In addition, we credit Castro's testimony that the Assistant Deputy Warden told him that he could not show up at the facility whenever he wanted and threatened to call Labor Relations. With respect to the January 12 labor-management meeting, we credit Romano and Martinez's testimony that during a discussion of progressive discipline, the Assistant Deputy Warden described three COs suspensions that Romano had not appealed and told Romano that he should "represent everyone equally." (Tr. 113)

Having made this determination concerning the facts, we first consider the Union's claim of interference arising from the Union delegates' tour of the BXHJ facility on December 19, 2022. We find that the evidence shows that the Assistant Deputy Warden engaged in conduct that had the potential to interfere with protected activity and diminish the Union's capacity to effectively represent employees. *See OSA*, 6 OCB2d 26, at 10-11. The record reflects that Castro and Morgan had been able to tour the facility in the past without incident, that they arrived at BXHJ to conduct such a tour, and that they followed the appropriate procedure by signing in and stating the purpose of their visit. Nevertheless, Castro and Morgan waited for permission to enter for approximately thirty minutes and then, after beginning the tour, were interrupted by the Captain and escorted to the Assistant Deputy Warden's office. Thereafter, the Assistant Deputy Warden made repeated efforts to interfere with the delegates' ability to continue to conduct Union business. Specifically, the Assistant Deputy Warden delayed the delegates from touring the facility by questioning their

authority and the appropriateness of conducting the tour. Such conduct by the Assistant Deputy Warden does not comport with his admission that he was aware that the delegates were touring facilities and had entered BXHJ and that, in the past, he has never made Union delegates wait before they enter the facility and meet with unit members.

We further find no evidence supporting any of the Assistant Deputy Warden's professed reasons for delaying the delegates. His claim that the delegates violated the Visitation Policy is unsupported by the evidence. The policy states, "Department of Correction Union Representatives will be permitted access to all facility vestibules without prior notification. Upon arrival to the vestibule, they shall first report directly to the head of the facility or his/her designee to state the purpose of their visit." (Union Ex. A, ¶ 1) The record shows that the delegates notified the officer on duty of their visit when they arrived, that the Assistant Deputy Warden was aware that they were there, and that after being asked to wait, they were permitted entry by the officer on duty. Further, we find that the Assistant Deputy Warden's claims that he had concerns because the delegates were not in uniform is belied by the undisputed fact that he had the authority to designate an area for them to safely meet with members but failed to do so. Moreover, there was no evidence that delegates are required to or normally tour in uniform. Accordingly, we conclude that the Assistant Deputy Warden interfered with the delegates' visit, their capacity to represent members and deterred union activity, in violation of NYCCBL § 12-306(a)(1). The fact that the delegates were ultimately able to conduct their visit does not lessen the potential effect of that interference. *See OSA,* 6 OCB2d 26, at 10-11; *Monticello Cent. Sch. Dist.*, 22 PERB ¶ 3002, at 3006.

Turning to the labor-management meeting held on January 12, 2023, we do not find that the Assistant Deputy Warden' comments were inherently destructive of employee rights under the NYCCBL. We have held that speech, even if reprehensible, did not deter employee protected

activity in violation of NYCCBL § 12-306(a)(1) because "the utterances were not threatening or coercive." *See PBA*, 77 OCB 10, at 21 (BCB 2006). As noted earlier, it is a violation of the NYCCBL when the effect of an employer's actions is to discourage and inhibit the bargaining unit members from choosing a certain individual as their representative. *See DC 37, L. 376*, 73 OCB 6, at 11. Whether or not any employees were actually deterred is immaterial. *See OSA*, 6 OCB2d 26, at 10-11. Further, 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).

This Board has held that insulting and/or disparaging remarks alone do not rise to the level of interference, restraint, or coercion. An employer's criticism of union leadership, their tactics, and/or name calling have not been found to violate protected employee rights when the comments were not coercive or threatening. For instance, in *PBA*, 77 OCB 10, the Board held that comments, even if construed as intemperate, did not amount to improper interference where, as here, they "contain no threat of reprisal, promise of a benefit, attempt to impede reaching of an agreement, or attempt to subvert the employees' organizational or representational rights." *Id.* at 20. While the Assistant Deputy Warden's comments do not advance sound labor relations, we find that the statements were not coercive or threatening. *Id.* at 21 (citing *Town of Greenburgh*, 32 PERB ¶ 3025, at 3053-3054 (1999) (finding no impermissible interference where Chief of Police called the union's president and attorney "sleazebags" and "shysters" at a labor-management meeting because the communications, though "vitriolic," were opinions and were stated in a non-coercive manner)); *Yonkers Bd. of Educ.*, 10 PERB ¶ 3057, at 3101-3102 (1977) (criticism of union leader's work ethic, loyalty to students and the community, as well as purposefully misstating his last name were not found to be interference or coercive).

The comments at issue here took place during a labor-management meeting attended by Union delegates, including Martinez, who works as a CO at the facility, and the Assistant Deputy Warden. We credit both Romano and Martinez's testimony that, in the context of the discussion, the Assistant Deputy Warden criticized Romano's conduct as a Union representative when he stated that he should treat all unit members equally and that Romano had no interest in challenging the suspension of three other COs.

We find that the overall comments and, specifically, the Assistant Deputy Warden's statement that Romano "should represent everyone equally" were critical of Romano's motivations as a representative and, more generally, the Union's representation of bargaining unit members. (Tr. 113) We note that the Assistant Deputy Warden's subjective intent when he made the comments is immaterial to our analysis. We find that the comments do not rise to the level of conduct that violates NYCCBL 12-306(a)(1) because, while they were criticisms and/or insults, they did not contain any threats or coercive language. *See PBA*, 77 OCB 10 at 21-22. Accordingly, we find that the Assistant Deputy Warden's comment at the labor-management meeting did not interfere with, restrain, or coerce bargaining unit members in the exercise of their rights in 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 the Correction Officers' Benevolent Association, against the City of New York, the New York City Department of Correction, docketed as BCB-4512-23, be, and the same hereby is, granted in part and denied in part; and it is further

ORDERED, that the New York City Department of Correction and its agents cease and desist from interfering with COBA and its representatives in the exercise of rights protected by the NYCCBL; and it is further

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

Dated: February 21, 2024
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. 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 COBA, 17 OCB2d 1 (BCB 2024), determining an improper practice petition between the New York City Correction Officers' Benevolent Association and the City of New York and the 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-4512-23, is granted in part and denied in part; and it is further

ORDERED, that the New York City Department of Correction and its agents cease and desist from interfering with COBA and its representatives in the exercise of rights protected by the NYCCBL; 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)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.