STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Petition of

EDWARD SEABRON,

Appellant,

CASE NO. N-0005

- and –

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

Appellee.

For Review of Decision No. BCB-4456-21 of the Board of Collective Bargaining of the City of New York.

THE FAIRNESS CENTER (NATHAN J. McGRATH and TESSA E. SHURR, of counsel) for Appellant,

ROBIN ROACH, GENERAL COUNSEL, DISTRICT COUNSEL 37 (MICHAEL COVIELLO, of counsel), for Appellee.

NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, Amicus Curiae, STEVEN STAR, GENERAL COUNSEL (KARINE SPENCER, of counsel)

BOARD DECISION AND ORDER

This case comes to us on appeal of a final order of the New York City Board of Collective Bargaining (BCB) pursuant to § 205.5 (d) of the Public Employees' Fair Employment Act (Act), commonly known as the Taylor Law, providing in pertinent part, "that a party aggrieved by a final order issued by the board of collective bargaining in an improper practice proceeding may, within ten days after service of the final order, petition the board for review thereof" and that "within twenty days thereafter, the [PERB]

board, in its discretion, may assert jurisdiction to review such final order."[1]

Pursuant to a timely request under this provision, Appellant sought review by us of a decision by the BCB reported as *Seabron*, 15 OCB2d 17 (BCB 2022), in which the BCB dismissed an improper practice petition filed by Edward Seabron against District Council 37, Local 983, AFSCME, AFL-CIO (DC 37). We granted the Appellant's request on July 6, 2022.[2]

In its decision, the BCB found that DC 37 did not violate the New York City Collective Bargaining Law (NYCCBL) (NYC Administrative Code, Title 12, Chapter 3).[3] More specifically, the BCB found that DC 37 did not violate § 12-306 (b) (1) when a DC 37 officer posted on a DC 37-maintained Facebook group a picture which allegedly depicted Seabron as shaking hands with a member of the Ku Klux Klan and a video that threatened him in retaliation for his protected activity.

The BCB decision was not unanimous. BCB Member Carol O'Blenes dissented, writing that "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

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[1] This is the fourth such case with which this Board has treated since the enactment of § 205.5 (d) of the Act in 1978 (L. 1978, c. 291). One prior case, *City of New York (PBA)*, 9 PERB ¶ 3031(1976), was issued before the current statutory provision was enacted, and is not of precedential value. References prefaced with "R." refer to the record before the BCB.

[2] 55 PERB ¶ 3020 (2022).

[3] The NYCCBL is the New York City local equivalent of the Taylor Law and is required to be substantially equivalent to the Taylor Law. *See* CSL §§ 212 (1) and (2); *Patrolmen's Benevolent Assn of the City of NY Inc v City of New York*, 97 NY2d 378, 382-383 (2002). *See also Matter City of New York v NYS Nurses Assn*, 130 AD3d 28, 31 n 3 (1st Dept 2015), affd 29 NY3d 546 (2017) (explaining the interrelationship of PERB and BCB).

opinion, but a knowing and intentional falsehood on a highly sensitive matter—violated NYCCBL § 12-306 (b) (1)." BCB Member Charles G. Moerdler concurred in the result.

Appellee DC 37 contends that the BCB correctly found that the statements at issue did not rise to the level of "interference, restraint, or coercion against the Appellant," who, it notes, was not a member of DC 37 at the time.[4] It further claims that the BCB did not find that the statements reached "the level of an impermissible threat because of their context in a representation dispute and the fact that they concerned the Union's internal governance over its own affairs."[5] DC 37 additionally claims that BCB's findings of fact should be granted deference by us, and contends that "union actions that have no effect on the terms and conditions of employment or the representation of its members cannot constitute a basis for an improper practice."[6]

The BCB, as *amicus curie*, defends its decision on similar grounds to those asserted by DC 37. It likewise claims that "the photoshopped image and the video, 'while antagonistic' were easily recognizable as campaign propaganda, which employees can reasonably be expected to evaluate for themselves."[7] The BCB likewise claims that it "reasonably found that [the] insults are akin to those found not to violate the NYCCBL or the Act, such as calling a union's president and attorney 'sleazebags' and 'shysters,'" or demeaning a union leader's work ethic, "viciously attacking a union member by spreading false statements about his membership status," or stating that a "non-member had 'screwed' him and threatening to get her."[8]

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[4] *Seabron*, 15 OCB2d 17, at 3, and n 4.
[5] Appellee's Brief, at 1, 9-11.
[6] *Id*.
[7] BCB Brief at 16-17; *id,* at 12-16.
[8] *Id,* at 18.

BCB also adverted to a prior decision of this Board which found that calling incumbent union officers "crooks and incompetents," which BCB rightly characterizes as speech that we declined to find violated the Act or warranted setting aside an election, in the factual context in which those actions took place.[9]

FACTS

DC 37 is an amalgam of 63 local employee organizations representing over 150,000 public sector and not-for-profit employees of various agencies, authorities, boards, and corporations within the City of New York. DC 37 is jointly certified with the Communications Workers of America (CWA) and Local 237, International Brotherhood of Teamsters, as the bargaining representatives of all relevant titles herein. Those titles encompass Traffic Enforcement Agents (TEA), Associate Traffic Enforcement Agents (ATEA), Parking Control Specialists (PCS), and Associate Parking Specialists (APCS), all at the New York City Police Department (NYPD).

Local 983, a DC 37 affiliate, represents TEA Levels III and IV for the purposes of dues deductions, processing of grievances, and welfare fund payments for the employees in these titles. By contrast, employees in the TEA title at Levels I and II are represented by CWA Local 1182, and ATEAs are represented by CWA Local 1182.

Local 983 First Vice President, Marvin Robbins, maintains a Facebook group limited to TEAs and ATEAs represented by Local 983 and CWA in which to discuss workplace issues. That group comprises approximately 1,500 members, invited by Robbins. Individuals are expelled from the group by Robbins upon his learning that an

[9] *Id*. *See LEEBA*, 7 OCB2d 21, 12-14 (BCB 2014); *United Univ Professions*, 20 PERB ¶ 3056, 3123 (1987); COBA, 14 OCB2d 10, 72-73 (BCB 2021); *Town of Greenburgh*, 32 PERB ¶ 3025, 3053-3054 (1999); *Yonkers Board of Education*, 10 PERB ¶ 3057 (1977).

individual is no longer an active member of either union.

Edward Seabron was first employed by the NYPD in 2000. He is, and was at all relevant times, a TEA Level III. Seabron declared himself to be dissatisfied with the representation provided by Local 983, and by Robbins specifically. In May 2021, Seabron began actively supporting an effort to decertify Local 983 in favor of the Independent Law Enforcement Benevolent Association (ILEBA). On May 27, 2021, Seabron resigned his membership in Local 983.

On June 8, 2021, Robbins posted three items in the Facebook group: (1) a short written message; (2) several pictures, including one of the card Seabron was asking unit members to sign, one of a CWA flier denouncing David Casey, who had previously been a CWA official, and was also a founder of ILEBA; and (3) a video in which Robbins speaks.[10] ILEBA filed a representation petition on June 11, 2021, seeking to replace CWA as one of the joint certificate holders.[11]

Robbins written message states:

> What does decertification mean to you the members.
>
> You will lose all of your Union benefits with DC 37
>
> 1 Dental
>
> 2 Optical
>
> 3 Legal Services
>
> 4 Education reimbursement

[10] Seabron, 15 OCB2d 17, at 3-4.
[11] *See ILEBA*, 14 OCB2d 27 (BOC 2021) (dismissing the petition).

5 Prescription coverage[12]

One picture included in the Facebook post depicted two men shaking hands. The two men were Seabron, who is African American, and the other, Casey, whose head appears to have been photoshopped onto the body of man wearing a Ku Klux Klan robe. Seabron's face is also photoshopped onto a different body.[13]

The video depicts Robbins speaking in his car. A transcript of the message reads as follows:

> Good evening, brothers and sisters. Today is six eight, the time is four thirty, so I, I just wanna touch base with everyone, so that, um, everyone knows what's going on. It's my understanding that . . . the independent losers are coming to [tow] pound locations at four o'clock and two o'clock in the morning, like the snakes that they are, um. . . they're coming. And they're asking members to sign stuff and not making them aware of the fact of what it is that they're signing. Um, they're asking you to sign, um, to become an independent loser with the independent LEEBA organization, owned and operated by, uh, people who make racist statement[s] about black people. Uh, people that, entrepreneurs, trying to start their own business, and couldn't get that right, can't even pass the shop steward[']s course, taking the shop steward's course four times . . . and hasn't passed once, and the local had to pay for it. So these are the people. But my thing is, ask them: If you're part of DC thirty-seven, you know you have legal. You have optical. You have dental. There's people who depend on medications.
>
> We have individuals . . . We fought to come to DC thirty-seven and we left the previous union. We went two years without representation to be picked up by DC thirty-seven. All of our members receive *one hundred thousand dollars* in prescription coverage. Let me say it again: one hundred thousand dollars. Why would we ever want to go back to a group of independent losers that's gonna give us thirty-five hundred, and we have to pay out of pocket. What sense does that make? Ask them about what kind of dental plan they have, what kind of benefit package do they have. Ask them to show you a copy of their bylaws. Ask them. Ask them for a copy of their bylaws. My thing is: as soon as you decert, and

[12] *Seabron*, 15 OCB2d 17, at 3.
[13] Amicus Brief of NYC Office of Collective Bargaining, p. 17, *compare* R. 79, 80-81.

then they go on and tell members that, um, you're gonna reap the benefits of having DC thirty-seven, and you're gonna be with the independent losers of LEEBA. I'm telling you right now: if they decert, you lose *all* of your union benefits; you, your family members, your retirement, everything you're going to lose, so be mindful of what it is that they're asking you to sign. Right? You have an . . . individual, can't get it right.

I want to give kudos out to Rebecca Greene[sp], the *new* president from eleven eighty-one, who stepped up her game and got her members a one point six [?] increase with regards to the membership, something that the independent loser could not get for his members. So again, he couldn't get it for the members, Rebecca Brown [Greene] got it, increased the salary for the supervisors. Kudos to her, she has the upmost, I, I have the utmost respect for her, and I wish her all the best because she's putting her best foot forward trying to represent the supervisors the way they should have been sup-represented, not by a sellout who answers to management and all that management has been doing whatever. Be mindful of who it is that's trying to start this organization. Um, so I'm telling you, they're telling you that you're going to keep your benefits with DC thirty-seven. I'm telling you, once they decert, you will automatically lose anything that you get from DC thirty-seven; no more dental, no more optical, no more legal services. If you plan on getting a home, no more education—ask them about the education fund. How much it—independent LEEBA losers, what kind of education package do you have for members? What kind of benefits? Dental? Optical? Legal Services? If they get in trouble, who's gonna represent them?

I'm telling you, watch what they asking you to sign, because they got members and they're not telling them everything about what it is. You know what you got, but you don't know what you gonna get. But I'm telling you, as soon as you decert, you lose everything [that] you get from DC thirty-seven. There goes your benefit, and this is what they're not telling you. Ask these independent losers what it is that they're gonna give you. What benefits are you gonna get if you, if you sign and you go with them? I've got people signing and they're coming and "but this, they told me I'm gonna keep my benefits"; they're *lying* to you. They're a lying sack of shit. Telling you a bunch of lies to get you to sign something, and then not giving you all of the information. I'm telling you, ask anybody; I'm keeping it straight, I'm keeping it real, I'm giving it to you, I'm telling you that . . . whosever giving you the paper, if it's Seabron, if it's Curt—if it's, if it's Seabron if it's if it's if it's, that Casey, I'm telling you, ask them questions: What am I getting? Where's my benefits? Where's your bylaws? How much are my dues? And if they're telling you you're gonna keep

> your DC 37 benefits . . . [inaudible—6:06] . . . they're full of shit. I'm telling you right now they're full of shit. I'm trying to keep it real I want you to know everything that you're going to be entitled to . . . you know what you got with DC thirty-seven; one hundred thousand dollars worth of prescription coverage. We got housing, assistance if you wanna buy a house. Ask them what kind of assistance they're gonna give you if you wanna buy a house, if you wanna close on a house. Ask them about how much is there [*sic*] dental package. Ask them for their bylaws. Ask them to start showing you what it is that they're asking you to sign for. They're giving you this card talking about signing up for independent LEEBA, the losers, but ask them what you're getting with them. Because I'm telling you, be mindful of what it is.
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> My promise to 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 thirty-seven, they will be dealt with. If they're part of nine eight-three, let me know. We will move to take action against any one of them that are nine eighty-three members that are passing out that form; I'm telling you right now. Gloves off. You wanna play dirty, we gonna play dirty. You sneaky, conniving son of a bitches, it's on! We gon' play this game, we gon' play it together.[14]

DISCUSSION

As a threshold matter, in cases of review of BCB decisions pursuant to § 205.5 (d) of the Act, we "do not assert jurisdiction over alleged procedural improprieties[;] these are properly matters to be considered on judicial review of a BCB decision" under Article 78 of the Civil Practice Law and Rules.[15] Rather, we have long interpreted the statutory mandate as implying that the "standard of review is substantive consistency between BCB and PERB decisions in improper practice cases."[16] However, we did not

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[14] *Seabron*, 15 OCB2d 17, at 4; R. 79-81.
[15] *Organization of Staff Analysts*, 17 PERB ¶ 3114, 3177 (1984) (*OSA* I); see also *Lara*, 24 PERB ¶ 3041 (1991).
[16] *Organization of Staff Analysts*, 18 PERB ¶ 3067, 3143 (1985) (*OSA* II); *Lara*, 24 PERB ¶ 3041.

expressly reject the relevance of a finding that "a BCB decision is grossly repugnant to fundamental rights under the [Act]."[17] As a proposed general standard of review, we found it too onerous and inconsistent with the policies of the Act, as opposed to the broader standard of review we have adopted. That said, a decision rendered by the BCB that was in fact grossly repugnant to fundamental rights under the Act could hardly be the result of substantive consistency between BCB decisions and those rendered by this Board.

A review here of the relevant statutory provisions of the NYCCBL and the Act demonstrate that consistency exists at the level of the statutory framework.[18]

Section 209-a.2 (a) of the Act states in pertinent part that "[i]t shall be an improper practice for an employee organization or its agents deliberately (a) to interfere with, restrain[,] or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause a public employer to do so." Section 12-306 (b) (1) of the NYCCBL contains the same language, adding only an exemption for where an employee organization "limits its services to and representation of non-members of the employee organization."

In sum, for our purposes in deciding the matter before us, the two statutes are effectively identic, with the definition of union impropriety mirroring the definition of employer impropriety contained in § 209-a.1 (a) of the Act and § 12-306 (a) (1) of the NYCCBL.[19] The question before us, then, is whether the application of these statutory

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[17] *OSA II*, at 3143.
[18] *Id.*
[19] Jerome Lefkowitz, *et al.,* eds., PUBLIC SECTOR AND EMPLOYMENT LAW (1988), p. 167; *see generally* William A. Herbert, *et al.*, eds., LEFKOWITZ ON PUBLIC SECTOR LABOR AND EMPLOYMENT LAW (2019), p. 373.

texts by the BCB is consistent with the decisions of this Board.

As former PERB Board Chair, Jerome Lefkowitz, wrote in 1988, although both sections require "deliberate" misconduct, (that is, "knowingly undertaken" action), "a union's action, unlike an employer's, need not be for the specific purpose of depriving employees of their protected rights."[20] Accordingly, "union conduct, which interferes with employees' rights is improper under § 209-a.2 (a), regardless of whether it was implemented with [such] specific intent."[21]

In order to support a finding of a violation of § 209-a.2 (a), three elements must be shown: (1) action must deliberately—that is, knowingly—be taken by a union; (2) such action must be attributable to the union under ordinary agency principles; [22] and (3) such action must interfere with employees' protected rights.[23] The standard is whether the union's conduct, viewed from an objective perspective, would interfere with,

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[20] Lefkowitz, at 182, n 99; *see Cohoes City School District*, 12 PERB ¶ 3065 (1979).
[21] Lefkowitz at 167; Herbert, at p 372. *Compare Rochester City Sch Dist*, 10 PERB ¶ 3097 (1977) with *Roslyn Union Free Sch Dist*, 8 PERB ¶ 3010 (1975) (charge dismissed where union's actions not for the purpose of depriving employees of their protected rights).
[22] Herbert, at p 372; Lefkowitz at p168. *See Elmira Teachers' Assn*, 13 PERB ¶ 3070 (1980) (dismissing charge where threat to employee for supporting rival union was personal and not attributable to agent of incumbent union).
[23] Although the statute defines the violation as to "interfere, restrain or coerce" employees in the exercise of their rights, this Board's decisions have treated the analysis as the same without regard to which of the prohibitions has been alleged. Moreover, as "the protection from interference seemingly affords the employee the greatest degree of protection, the marked tendency in our reported decisions has been to premise violations on this ground, thereby obviating any need for interpreting the other two." Herbert, at p 372; Lefkowitz, p 168.

restrain, or coerce a reasonable employee's exercise of statutorily protected rights.[24]

As a threshold matter, Seabron's advocating for decertification of the incumbent union in the context of a campaign is patently protected activity under both the NYCCBL and the Act, as properly found by the BCB.[25]

In the instant case, the applicability of the first two prongs is clear; Robbins was acting in his capacity as Local 983 First Vice President in posting the altered photographs making up part of the Facebook post and in his oral recorded statements. Robbins's action in his capacity as a high-ranking officer of DC 37 is sufficient to establish an agency relationship sufficient to impute his actions to DC 37. As in *County of Nassau*, Robbins's actions were "not clandestine, expressly prohibited, or immediately renounced," but in fact were broadcast online to approximately 1,500 employees in the bargaining unit.[26] Accordingly, we find, in context, that Robbins was acting as an agent of DC 37, cognizable under § 209-a.2 (a) of the Act.

The BCB cites several of its own decisions, and of ours, in which we found that intemperate and even inflammatory language generally falls within the protective ambit of the Act and of the NYCCBL. We affirm the finding of the BCB that the statements comprised in the transcript and the online video were not, as to Seabron, coercive or

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[24] *See, eg, State of New York (Office of Addiction Services and Supports)*, 55 PERB ¶ 3015, 3071, n 45 (2022) (applying this standard to employer speech); *Pleasantville Union Free Sch Dist*, 51 PERB ¶ 3024, 3104 (2018) (same). *See also Lake Shore Cent Sch Dist*, 18 PERB ¶ 4058, 4100 (1985) (finding election must be set aside where "objective, reasonable voter could have been coerced" by union's statements).
[25] *Seabron*, 15 OCB2d 17, at 7.
[26] *County of Nassau*, 48 PERB ¶ 3023, 3087 (2015); *compare City School District of the City of Buffalo*, 48 PERB ¶ 3001, 3004 (2015) (immediate unanimous repudiation of Board member's speech established that speech was idiosyncratic position of individual, and agency relationship not established).

intimidating. Such a finding is substantively consistent with our prior decisions. However, the remaining issue is whether the manipulated image broadcast online and deployed in the Facebook post to roughly 1,500 of Seabron's coworkers in the bargaining unit, would, from an objective viewpoint, reasonably interfere with Seabron's exercise of his rights. The impact of the portrayal of Seabron (himself an African American man) as literally hand-in-hand with Casey, depicted as a Klansman, was simply not addressed by the BCB. Whether Seabron's having been so publicly traduced before so large a number of his coworkers would reasonably lead a similarly situated employee to abandon the exercise of his rights is not pellucid on the facts before us.

The instant case is anomalous, in that the matter requires a review of the facts. The BCB dissent, herself a part of the fact-finding body, points out the "sensitive matter" of such racial depictions, which she labels as "a knowing and intentional falsehood," one that was broadcast by the Local 983 First Vice President to roughly 1,500 of Seabron's coworkers in the bargaining unit, and argued that its impact warranted a finding that DC 37 had violated the NYCCBL and thus the Act.

Acting as an appellate body here and in the absence of a hearing on the facts, we are unable to determine whether the posting of the manipulated image constituted mere invective or, whether in the specific factual context of the workplace, it was "plainly intended to inhibit [Seabron] from exercising [his] protected rights."[27] As a result, we cannot determine on the record before us whether there is substantive consistency between the BCB's decision and our prior decisions.

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[27] *County of Nassau*, 48 PERB ¶ 3023, at 3087.

Certainly, the possibility exists that a hearing, or stipulated facts, could elucidate the workplace culture and milieu in which this conflict arose. We note that this case may, or, depending on the finding of the facts, may not have a resonance with the decision in *Lake Shore Central School District*, in which the union unit president issued threats to unit members that if the union won the election without their support, those members' concerns would be addressed last during bargaining.[28] In a decision by the then-Director of Public Employment Practices and Representation, the statements made by the unit president were deemed to "relate to actions that were in the control of the employee organization and [were] clearly prohibited threats of retaliation."[29] Where employees are aware of such threats by a union to certain employees, those employees who become aware of the threats "certainly would have been discouraged from voicing support, or campaigning, for the rival union," as "[f]ear of becoming the object of similar retaliation would have a chilling effect on their union activity."[30]

We are unable to determine based upon the record before us whether this matter falls within the broad protective ambit afforded by our cases to even vituperative union speech, or whether in the context of that workplace, Robbins's online display would interfere with a reasonable employee's exercise of their protected rights.

Accordingly, we remand the matter to the BCB for further proceedings consistent with this opinion.

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[28] *Lake Shore Cent Sch Dist*, 18 PERB ¶ 4058.
[29] *Id.,* at 4099.
[30] *See also Manhasset Union Free School District*, 12 PERB ¶ 3059 (1979).

SO ORDERED.

DATED: March 6, 2023
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member