

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,**

Charging Party,

CASE NO. U-34655

- and -

COUNTY OF PUTNAM,

Respondent.

**DAREN J. RYLEWICZ, GENERAL COUNSEL (PAUL S. BAMBERGER
of counsel), for Charging Party**

**ROEMER WALLENS GOLD & MINEAUX LLP (MARY M. ROACH
of counsel), for Respondent**

DECISION OF ADMINISTRATIVE LAW JUDGE

On November 9, 2015, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) filed an improper practice charge alleging that the County of Putnam (County) violated §§ 209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) when its Director of Constituent Services approached CSEA's local president during a union rally, "grabbed her by her jacket...and began to shake her in an extremely aggressive manner," and spoke to her "in a threatening tone."¹

The County filed an answer denying the material allegations of the charge and asserting, as affirmative defenses, that the charge fails to state a violation of the Act for

¹ Administrative Law Judge (ALJ) Ex 1.

which relief can be granted and that the County "has acted at all times within its legitimate managerial prerogatives."²

A hearing was held on April 26, 2016, during which both parties were represented by counsel. Both parties have filed post-hearing briefs.

FACTS

Labor Relations Specialist Glenn Blackman testified on behalf of CSEA. Blackman, who has been assigned to CSEA's Putnam County bargaining unit since 2005, served as CSEA's lead negotiator for the Collective Bargaining Agreement (contract) in effect from January 1, 2012 through December 31, 2016.³

During the negotiations for that contract, CSEA presented a proposal that established a health insurance contribution rate for retirees, dependent upon their years of service.⁴ According to Blackman, County Executive Mary Ellen Odell participated in those negotiations. Ultimately, CSEA was unable to secure a contractual provision setting retiree health insurance contributions for the 2012 – 2016 contract.⁵

Blackman stated that, in October of 2015, he became aware of one of Odell's budget proposals⁶ that would increase retiree health insurance contribution rates. He testified that there had been no prior discussion with CSEA, and that he "only learned of it upon review of the budget proposal" during a County budget meeting that he attended.⁷ Following the meeting, Blackman sent an e-mail to Odell, notifying her of

² ALJ Ex 3.

³ Joint Ex 1.

⁴ Charging Party's Exs 2-4.

⁵ Joint Ex 1.

⁶ Charging Party's Ex 1.

⁷ Tr, at 18.

CSEA's concerns regarding the proposed changes to retirees' health insurance.⁸

Blackman testified that the proposed change was very significant and, although CSEA did not have the ability to negotiate on behalf of those who had already retired, it "tried to exercise a little bit of political clout. . . and [tried] to lobby the various legislators... and persuade them that this increase was just completely devastating in some respects to some of the retirees."⁹ According to Blackman, the proposal, if adopted, would cause retiree health insurance contribution amounts to increase from \$400 to as much as \$5000 annually. He also stated that this increase would result in a savings of approximately \$400,000 for the County.

Jane Meunier-Gorman testified next on behalf of CSEA. Meunier-Gorman is the local president of CSEA's Unit 840, a position she has held for 18 years. She is also on CSEA's negotiating committee.

Meunier-Gorman testified that, after hearing about Odell's plan to increase retiree health insurance contribution rates, she organized an "informational gathering and demonstration with [CSEA] unit members, to come to the legislative meeting and also to attend the candlelight vigil for domestic violence in Putnam County."¹⁰ According to Meunier-Gorman, the "informational picket" was initially going to be held on October 26, 2015, at 4:30 p.m., "in front of the courthouse steps."¹¹ However, when Meunier-Gorman became aware of the planned domestic violence vigil, she instead held the gathering in the park located behind the courthouse and to the right of the County Office Building, and ordered pizza for the attendees.

⁸ Charging Party's Ex 6.

⁹ Tr, at 19.

¹⁰ Tr, at 22-23; Charging Party's Exs 7 and 8.

¹¹ Tr, at 23.

Meunier-Gorman testified that, at around 5:15 p.m., approximately 60 people had gathered. She stated that it was around this same time when Nicholas DePerno, Jr. approached the area where CSEA was gathered.¹² DePerno is the County's Director of Constituent Services, and also serves as Odell's "security person" and driver for County-related business.¹³ Meunier-Gorman stated that she saw DePerno approach CSEA staff member Lisa Seymour and testified:

I recall him asking who was in charge, and Lisa asked him if he would like a ribbon to support the candlelight vigil, and his reply was, 'No, I support domestic violence.'¹⁴

Meunier-Gorman stated that after speaking to Seymour, DePerno approached her while she was talking with Tom Vargas, a CSEA shop steward. She testified that DePerno stood behind Vargas and that:

[DePerno] was acting aggravated that I wouldn't give my attention to him...and he was kind of huffing and puffing like he was annoyed with me.¹⁵

Meunier-Gorman stated that, after she finished her conversation with Vargas, DePerno "got in my face, about six inches from my nose, and grabbed my red jacket and started shaking me by my collar."¹⁶ According to Meunier-Gorman, DePerno shook her more than once, "very aggressively," and that he was yelling at her to "make sure that this mess is cleaned up."¹⁷

Meunier-Gorman testified that Vargas intervened by grabbing DePerno's hands,

¹² Tr, at 24-25.

¹³ Tr, at 25.

¹⁴ *Id.*

¹⁵ Tr, at 26.

¹⁶ Tr, at 27.

¹⁷ *Id.*

stepping in between them, and pushing DePerno away from her.¹⁸ She stated that after Wargus stepped in, she assured DePerno that they would clean up the mess. Meunier-Gorman then observed DePerno turn to Wargus and begin "aggressively tickling him, like kind of making it like a joking matter."¹⁹ At that point, both Meunier-Gorman and Wargus "turned around and walked away,"²⁰ and proceeded to the legislative meeting, where Blackman made a presentation on behalf of CSEA opposing the retiree health insurance proposal.

On October 28, 2015, Meunier-Gorman filed a police report regarding the incident.²¹ In substance, the narrative recounts the incident in the same manner as Meunier-Gorman testified. The narrative also states that Meunier-Gorman told the officer that, in the past, DePerno has made joking comments that "made her uncomfortable."²² It continues, stating that although Meunier-Gorman found DePerno's prior conduct to be "offensive or rude at times...[she] felt that Monday's incident crossed the line."²³ According to the report, Meunier-Gorman also told the officer that she "was surprised by the contact and felt it was meant to be demeaning because it was done in front of the CSEA members."²⁴

Meunier-Gorman also filed a workplace violence report that, like the police report, is consistent with Meunier-Gorman's testimony herein. In the workplace violence report, Meunier-Gorman described DePerno's actions as "very hostile" and that he was telling

¹⁸ *Id.*

¹⁹ Tr, at 28.

²⁰ *Id.*

²¹ Respondent's Ex 1.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

her to clean up the mess in a "raised and threatening tone."²⁵ The report goes on to state that Meunier-Gorman was "[s]hocked, intimidated, humiliated and extremely shaken by what had. . . occurred." Meunier-Gorman also noted in the report that after the incident, as everyone was walking toward the courthouse to attend the legislative meeting, "DePerno attempted to bump [her] with his butt and [she] pushed him away and continued walking to be with [her] fellow employees and members."²⁶ The report further states that the experience was particularly traumatic for Meunier-Gorman and that "experiencing this treatment by an authority figure has really been an eye opener."²⁷

During cross-examination, Meunier-Gorman admitted that, in the past, DePerno has greeted her by kissing her on the cheek and that she has reciprocated "as a polite gesture."²⁸ However, Meunier-Gorman confirmed that on the afternoon of CSEA's picket, DePerno did not greet her in that manner. She further acknowledged that she has heard others use the expression "It's just Nick being Nick," in reference to DePerno's past "history of being who he is."²⁹

Thomas Vargas also testified on behalf of CSEA. Vargas is employed by the County as a clerk in the IT department, a position that he has held for approximately 16 years. Vargas is also a CSEA union steward.

Vargas testified that he was present at the picket organized by CSEA on October 26, 2015. He testified that around 5:15 p.m., he was talking with Meunier-Gorman when he observed DePerno approach Meunier-Gorman and grab her. Vargas

²⁵ Respondent's Ex 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Tr, at 30.

²⁹ Tr, at 31.

stated that when he saw DePerno put his hands on Meunier-Gorman, he was "shocked," so he "stepped in, took his hands off of her and got between them."³⁰ Wargas also testified that he "physically grabbed [DePerno's] hands and removed [them] from her coat," and that he "got between [Meunier-Gorman and DePerno], facing [DePerno]...with my hands out, just trying to walk him back."³¹ Wargas testified that after stepping in between Meunier-Gorman and DePerno, he recalled DePerno "poking at my midsection, tickling me."³² Wargas stated that he interpreted the poking and tickling as DePerno's attempt to maneuver away from him and back toward Meunier-Gorman.

Nicholas DePerno, Jr. testified on behalf of the County. DePerno is employed by the County as the Director of Constituent Services, a position he has held since 2011. In that position, DePerno explained that he handles "all complaints coming in to the County, anywhere from Department of Social Services complaints...[c]omplaints about highways, roadways, byways...the golf course. Any County properties that people may have a complaint about, I would handle."³³ DePerno was hired by, and reports directly to, County Executive Odell.³⁴ In his role, DePerno also serves as Odell's driver and transports her to meetings for County-related business.³⁵ His normal work day is 9:00 a.m. to 5:00 p.m., Monday through Friday.³⁶

DePerno testified that he has known Meunier-Gorman for approximately three

³⁰ Tr, at 39.

³¹ Tr, at 39-40.

³² Tr, at 40.

³³ Tr, at 47-48.

³⁴ Tr, at 68.

³⁵ Tr, at 61.

³⁶ Tr, at 48.

years through their work at the County. DePerno testified that he "sometimes" greets Meunier-Gorman with a kiss on the cheek, and that he greets other women in the same manner.³⁷

DePerno testified that, in October of 2015, although he knew that Meunier-Gorman was a CSEA board member and on CSEA's negotiating committee, he was unaware of her status as CSEA's local president. DePerno stated that he was aware that CSEA was going to hold a rally on October 26th via an e-mail that he saw from Meunier-Gorman. When asked what he knew about the gathering, DePerno answered that he knew "they were upset" regarding a retirement benefits proposal.³⁸

Regarding the incident, DePerno testified that at approximately 5:15 p.m. on October 26, 2015, he left work in the County Office Building, went outside and was leaning on a car parked next to the park where CSEA was gathered, "talking with some people."³⁹ He continued to describe the incident as follows:

...I saw [Meunier-Gorman] standing in the parking lot and Tom Vargas was with her. I walked over to Jane and just put my hands over here (indicating). I said, 'Jane, Baby, Sweetheart, could you do me a favor? Can you not make a mess of this place? Could you make sure the place gets cleaned up?' And she says, 'Of course, Nick. Who do you think you're talking to?' Tom pushed me back and said, 'Hey, that's no way to treat a lady.' There was no aggression. . . And that's when we were. . . I was trying to tickle him, and he pushed me back, and I stayed back. . . it only lasted for seconds, and that was it. That was the end of the whole incident.⁴⁰

DePerno asserted that he did not use a threatening tone, and that they were "kidding

³⁷ Tr, at 49.

³⁸ Tr, at 50.

³⁹ Tr, at 51-52.

⁴⁰ Tr, at 52.

around.”⁴¹

DePerno stated that the improper practice charge’s description of his behavior as “aggressive,” as well as the charge’s allegation that his behavior was an attempt to “interfere with, restrain...and coerce employees in the exercise of their protected rights,” are “unfair statement[s].”⁴² DePerno did, however, admit that he poked and tickled Vargas after Vargas “removed [him] from [Meunier-Gorman].”⁴³

DePerno acknowledged that he made a comment that he supported domestic violence but, in response to a leading question, agreed that he was joking.⁴⁴ DePerno also denied that he was “aggravated” prior to his interaction with Meunier-Gorman, or that he was “huffing and puffing.”⁴⁵

DePerno stated that he discovered Meunier-Gorman had filed a police report regarding the incident when a state trooper called and advised that he had been reported for harassment, but that no charges would be filed. According to DePerno, the trooper stated: “Nick, you know the routine. . .stay away from her.”⁴⁶

When asked if Meunier-Gorman’s status as a union officer had anything to do with the October 26, 2015 incident, DePerno responded that it had “no role.”⁴⁷ He was also asked if he intended to embarrass Meunier-Gorman in front of the union membership, to which DePerno responded that he did not.

DePerno testified that he had not talked with Odell about the retiree health

⁴¹ Tr, at 53.

⁴² Tr, at 53-54.

⁴³ Tr, at 54.

⁴⁴ Tr, at 58.

⁴⁵ Tr, at 58-59.

⁴⁶ Tr, at 56.

⁴⁷ Tr, at 59.

insurance proposal prior to the incident on October 26, 2015. He stated that he did not attend legislative meetings and is "not privy to any of that."⁴⁸ On cross-examination, DePerno acknowledged that he and Odell engage in conversation while he drives her on County business. When asked if County business or budget issues ever came up in conversation, DePerno responded "No."⁴⁹ However, the following exchange then occurred:

Q. Mr. DePerno...Are you telling me under oath that you have never spoken to the County Executive about budget issues the whole time that you've been driving her around? That has never happened?

A. No, I can't say that, that it's never happened. I inquired because of my son about the new budget issues of mostly of the health plan, but not – not for anything else but for my son's benefit. My son belongs to the Union.

.....

Q. And I want to know, isn't it true that at times the County Executive will tell you what she's been involved with with the Legislature including the budget?

A. It's a possibility.

Q. It has happened, hasn't it?

A. It's a possibility.⁵⁰

DePerno also again admitted that he was aware of Odell's proposal to increase retiree health insurance contribution rates, and that the proposal was a priority to Odell.⁵¹

According to DePerno, Odell was not in the office on October 26, 2015. He stated that he spoke to Odell over the phone and that he "most likely" advised her that

⁴⁸ Tr, at 56.

⁴⁹ Tr, at 71.

⁵⁰ Tr, at 71-72.

⁵¹ Tr, at 73.

the protest was beginning and people were gathering.⁵² When asked to provide more details regarding his conversation with Odell, DePerno responded, "I don't remember...I'm lucky if I can remember the whole conversation or any part of the conversation."⁵³ The following exchange then ensued on cross-examination:

Q. What, if anything, did she say about the protest in that phone conversation?

A. I don't remember what she said about the protest. I do remember she told me to go home.

Q. Is it fair to say that she said, 'I wish that protest wasn't going on'?

A. I'm not going to put words in her mouth.

Q. Did she say anything to that effect?

A. I couldn't tell you.

Q. Anything negative about the protest?

A. Couldn't tell you.

Q. She may have, but you don't recall if –

A. I wouldn't even say she may have. I'm not going to put words in the County Executive's mouth.

Q. I'm asking you to recall what – what you heard, not to put words in her mouth.

A. Okay. We had a conversation on the phone. I really don't remember the conversation. I do remember, though, when she told me to go home, she told me to go home.⁵⁴

On cross-examination, when asked about his interaction with Meunier-Gorman, DePerno reaffirmed that he called Meunier-Gorman "Baby" and "Sweetheart," and that

⁵² Tr, at 75.

⁵³ *Id.*

⁵⁴ Tr, at 75-76.

he was "110 percent sure" those were his words.⁵⁵ He also testified that he was "absolutely sure" that Vargas responded "[t]hat's no way to treat a lady," even though this was in conflict with Vargas' recollection of the incident.⁵⁶

CSEA recalled both Vargas and Meunier-Gorman in rebuttal. Both testified that DePerno did not refer to Meunier-Gorman as "Sweetheart" or "Baby" during the incident.⁵⁷ Vargas also testified that he did not tell DePerno, "that's no way to treat a lady."⁵⁸

DISCUSSION

Section 209-a.1(b) of the Act makes it improper for a "public employer or its agents deliberately to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving [public employees] of [their rights guaranteed in section two hundred two]."⁵⁹ As previously explained by the Board, the term "interference" in subsection (b) is "designed to prevent a public employer from meddling in the internal affairs of the organization or trying to control it."⁶⁰ In the instant matter, there are no facts that would arguably establish either an intent to interfere, or actual interference, with the formation or administration of an employee organization. Therefore, the alleged violation of § 209-a.1(b) is dismissed.

Section 209-a.1(c) of the Act provides that it is an improper practice for a public employer, or its agents, to deliberately "discriminate against any employee for the

⁵⁵ Tr, at 76-77.

⁵⁶ Tr, at 77.

⁵⁷ Tr, at 80, 82.

⁵⁸ Tr, at 80.

⁵⁹ *Monroe BOCES #1*, 28 PERB ¶ 3068, 3157 (1995).

⁶⁰ *County of Rockland and Rockland County Community College*, 13 PERB ¶ 3089, 3143 (1980).

purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization." PERB has adopted a three-pronged analysis to be applied in charges alleging unlawful discrimination under § 209-a.1(c) of the Act. Specifically, a charging party must prove, by a preponderance of the evidence, that the affected individual was engaged in protected activity under the Act, that such activity was known to the person(s) who took the alleged adverse employment action, and that the adverse action would not have been taken "but for" the protected activity.⁶¹

To satisfy the above standard of proof, it is necessary that the employer undertook an action that resulted in employment-related consequences suffered by the member-employee.⁶² For instance, subjecting an employee to discipline or termination,⁶³ issuing a negative performance evaluation,⁶⁴ or refusing to promote an employee,⁶⁵ have all been found by PERB to be adverse employment-related actions. However, PERB has also found that a threat, standing alone, is insufficient to sustain a charge under § 209-a.1(c) when there is no correlated, adverse employment-related consequence.⁶⁶ The record in this matter contains no evidence that Meunier-Gorman, or any CSEA member, experienced an adverse employment-related consequence as a result of their participation in the rally. Accordingly, the alleged violation of § 209-a.1(c) is also dismissed.

⁶¹ *City of Salamanca*, 18 PERB ¶ 3012 (1985).

⁶² *Village of Hempstead*, 21 PERB ¶ 4582 (1988); *State of New York (Dept of Correctional Services)*, 41 PERB ¶ 4515 (2008).

⁶³ *Binghamton City Sch Dist*, 22 PERB ¶ 3034 (1989); *BOCES of Franklin, Essex & Hamilton Counties*, 22 PERB ¶ 3038 (1989).

⁶⁴ *Bd of Educ of the City Sch Dist of the City of NY*, 37 PERB ¶ 3012 (2004); *City of White Plains*, 22 PERB ¶ 3053 (1989).

⁶⁵ *City of Dunkirk*, 23 PERB ¶ 3025 (1990).

⁶⁶ *Village of Hempstead*, 21 PERB ¶ 4582.

Continuing on to the remaining alleged violation, § 209-a.1(a) of the Act provides that "it shall be an improper practice for a public employer or its agents deliberately. . .to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights." The rights provided to public employees under § 202 of the Act include, *inter alia*, "the right to form, join and participate in" an employee organization of their choice. To establish a violation of § 209-a.1(a) of the Act, the charging party must prove that the employer, or its agent, acted deliberately for the purpose of depriving employees of protected rights.⁶⁷ Deliberate action is that which is "knowingly undertaken" by the employer.⁶⁸

As stated above, § 209-a.1(a) requires the actor to be either the employer, or an agent of the employer. To determine whether an employee is acting as an agent for the employer with respect to certain conduct, it must be shown that a reasonable basis exists to hold the employer responsible for the employee's actions.⁶⁹ In addition, the employer need not specifically authorize the employee's conduct, provided that the employee is acting within the scope of his or her employment.⁷⁰

In the instant matter, I find that DePerno is an agent of the employer, thus making his actions attributable to the County. DePerno's role as Director of Constituent Services is a high-level position in which he has discretion to deal with matters of public concern. He also has a close working relationship with County Executive Odell, serves as her driver, and reports to her directly. As Odell's personal driver, he has exposure to

⁶⁷ *Greenburgh #11 Union Free School Dist*, 33 PERB ¶ 3018 (2000).

⁶⁸ *City of Cohoes*, 25 PERB ¶ 3042, 3086 (1992).

⁶⁹ *City of Schenectady*, 26 PERB ¶ 3038 (1993).

⁷⁰ *Town of Huntington*, 26 PERB ¶ 3073 (1993).

the County's top executive, and frequent opportunity to privately discuss County business and budget issues with Odell. On this point, I find that he has done so, despite his attempts to evade questions in this area during cross-examination.

Significantly, although at first he unequivocally denied ever speaking to Odell about County business during their car trips, he later admitted that it was a "possibility," and then admitted that he had discussed the retiree health insurance proposal with her.⁷¹

DePerno also testified that just before he approached CSEA's rally, he had a telephone conversation with Odell, during which he "most likely" discussed the fact that CSEA members had begun to gather outside to protest Odell's retiree health insurance proposal.⁷² The fact that DePerno was on the phone with Odell, clearly keeping her apprised of what was transpiring at work in her absence, is additional compelling evidence of the relationship between the Director of Constituent Services and the County Executive. Therefore, I find that a reasonable basis exists to hold the County responsible for DePerno's actions, which occurred on County property shortly after he spoke to Odell about CSEA's rally. The fact that DePerno's conduct may not have been specifically authorized by the County does not undermine this conclusion. As the Board has previously held, an employer need not specifically authorize an employee's conduct to be held responsible for it.⁷³ DePerno's actions clearly demonstrate that he was asserting the authority of his position as Director of Constituent Services when he approached Meunier-Gorman.

Having found that DePerno was acting as the County's agent during the incident

⁷¹ Tr, at 71-72.

⁷² Tr, at 75.

⁷³ *Town of Huntington*, 26 PERB ¶ 3073.

in question, I also find that DePerno acted deliberately for the purpose of interfering with CSEA members' right to participate in their employee organization, in violation of § 209-a.1(a) of the Act, for the reasons that follow.

The parties somewhat dispute the facts of the incident but, based upon the credibility of Meunier-Gorman's and Vargas's testimony, I believe CSEA's version of events. This determination is based upon both the clarity of their testimony and their demeanor at the hearing. Both individuals testified that DePerno approached Meunier-Gorman during the gathering, grabbed her by the coat collar and aggressively shook her, while yelling that she should "make sure that this mess is cleaned up," in reference to the pizza that CSEA had purchased.⁷⁴ Both Meunier-Gorman and Vargas also consistently testified that Vargas had to intervene and remove DePerno's hands from Meunier-Gorman's collar.

On the other hand, I do not credit DePerno's version of the event, which was an attempt to downplay his actions and offer an innocent intent. His testimony recounted a much more amicable version of the events testified to by Meunier-Gorman and Vargas. For instance, he testified that he called Meunier-Gorman "Baby" and "Sweetheart," and asserted that they were "kidding around."⁷⁵ Both Meunier-Gorman and Vargas denied that he used those words, and their interpretation of DePerno's demeanor and tone was certainly not that he was joking. I do not find DePerno credible as a witness because, overall, his testimony throughout was evasive and defensive. Interestingly, his recollection was solid on points that benefitted him, while he couldn't remember other more questionable interactions. For instance, DePerno testified that he was "110

⁷⁴ Tr, at 27.

⁷⁵ Tr, at 52-53.

percent sure" of the words he spoke to Meunier-Gorman; yet, on cross-examination, he had only a vague recollection of his telephone conversation with Odell, which occurred just minutes before his interaction with Meunier-Gorman and Wargas.⁷⁶

DePerno did admit that it was likely he had discussed with Odell, during their telephone conversation, the fact that CSEA had begun to gather outside. I credit CSEA's version of events where, shortly after that telephone conversation with Odell, DePerno inserted himself into the middle of CSEA's gathering, grabbed Meunier-Gorman by her jacket, shook her, and yelled at her in front of approximately 60 people including CSEA members. Accordingly, I find that DePerno's actions in physically accosting Meunier-Gorman and yelling at her in this manner and at this particular venue was so inappropriate and outside the boundaries of normal, professional interaction one should have with a co-worker, that it demonstrates DePerno acted for the specific purpose of interfering with CSEA's rally and intimidating Meunier-Gorman. DePerno's testimony that Meunier-Gorman's status as CSEA's president had "no role" in his actions does not alter my conclusion.⁷⁷ This statement has little probative value, in light of the fact that it was elicited by counsel through a leading question that specifically asked what role Meunier-Gorman's union status had on DePerno's actions toward her.

In addition, I also find that the County violated § 209-a.1(a) under the "per se" standard established by the Board in *Greenburgh #11 Union Free School District (Greenburgh)*.⁷⁸ In that case, PERB recognized that, in certain limited circumstances, the facts of a matter can establish a presumption that the employer's actions were

⁷⁶ Tr, at 76-77.

⁷⁷ Tr, at 59.

⁷⁸ 33 PERB ¶ 3018.

undertaken for the purpose of interfering with protected activity in violation of § 209-a.1(a) of the Act, even where no evidence of animus toward the union or union member, circumstantial or otherwise, is offered.⁷⁹ Where the allegations "involve conduct which has a chilling effect upon the organizational rights of unit employees," this *per se* standard applies.⁸⁰ As stated by the Board in *Greenburgh*, in certain instances "the deprivation of fundamental employee rights, however erroneous or innocent, violates § 209-a.1(a)."⁸¹ There, the Board found that where an employer's action is "so inimical to the exercise of rights protected by the Act," improper motive may be imputed.⁸² Once a presumption of intent has been established, the employer may rebut the presumption by offering credible evidence of a legitimate explanation for its conduct.⁸³

I find that DePerno's behavior at CSEA's rally was so egregious that it would have a chilling effect on employees exercising the fundamental rights afforded them under the Act. The Board's decision in *Greenburgh* recognizes that the rights conveyed to employees pursuant to § 202 of the Act are fundamental.⁸⁴ Actions taken by the employer that, by their very nature, discourage employees from participating in the employee organization of their choice, blatantly contradict the Act's protections. There can be no question that DePerno's actions, i.e., grabbing, shaking, and yelling at CSEA's local unit president during a union rally, would have a chilling effect on the right of CSEA's members to participate in union activities. Indeed, approximately 60 CSEA

⁷⁹ *Id.*

⁸⁰ *Id.*, at 3048.

⁸¹ *Id.*, citing *City of Newburgh*, 11 PERB ¶ 3108 (1978), *conf'd*, 70 AD2d 362, 12 PERB ¶ 7020 (3d Dept 1979).

⁸² *Greenburgh*, 33 PERB ¶ 3018, at 3048, citing *State of New York (Dept of Health and Roswell Park Memorial Institute)*, 26 PERB ¶ 3072 (1993).

⁸³ *Greenburgh*, 33 PERB ¶ 3018, at 3049.

⁸⁴ *Id.*

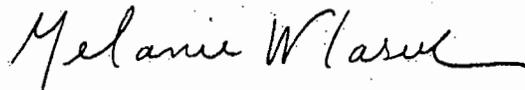
members were present at the rally that day, and DePerno's status as a high level managerial employee, with close ties to County Executive Odell, only heightens the chilling effects of his behavior.

Although *Greenburgh* allows for a *per se* violation to be rebutted by a legitimate explanation by the employer that justifies its actions, or those of its agents, none here was presented. The County offered evidence that people who know DePerno often use the phrase, "it's just Nick being Nick" (referring to DePerno), as an apparent attempt to downplay DePerno's inappropriate conduct, on the basis that he engages in such conduct often and is known by County employees for doing so. I find this argument without merit. The fact that DePerno may often engage in inappropriate behavior does not diminish, negate, or excuse his actions at the CSEA rally in the case before me.

Therefore, on the basis of the foregoing, I find that the County violated § 209-a.1(a) of the Act. The County is hereby ordered to:

1. Not interfere with, restrain, or coerce either CSEA Local Unit President Jane Meunier-Gorman, or other CSEA unit members, in the exercise of their rights guaranteed in section 202 of the Act; and
2. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

Dated at Albany, New York
this 28th day of January, 2019



Melanie Wlasuk
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Putnam (County) in the bargaining unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the County will forthwith:

1. Not interfere with, restrain, or coerce either CSEA Local Unit President Jane Meunier-Gorman, or other CSEA unit members, in the exercise of their rights guaranteed in section 202 of the Act.

Dated

By

on behalf of the **County of Putnam**

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

The following is an extract of PERB's Rules of Procedure, 4 N.Y.C.R.R. Parts 200-215. Any party filing exceptions or other papers with the Board should consult the Rules of Procedure to ensure compliance with all requirements. The Rules are available at: <http://perb.ny.gov/PERBRules.asp>.

Exceptions to Decision of Director; Exceptions to Administrative Law Judge's (ALJ) Decision and Recommended Order; Action by Board

(a) Within 15 working days after receipt of the decision of the Director or the decision and recommended order of the ALJ, a party may file with the Board an original and four copies of a statement in writing setting forth any exceptions thereto, and a separate original and four copies of a brief in support thereof, together with proof of service of copies of such exceptions and brief upon each party. A copy of such exceptions and briefs shall be simultaneously served upon all other parties.

(b) The exceptions shall:

- (1) Set forth specifically the questions of procedure, fact, law or policy to which exceptions are taken;
- (2) Identify that part of the decision or order to which objection is made;
- (3) Designate by page citation the portions of the record relied upon; and
- (4) State the grounds for exceptions. An exception to a ruling, finding, conclusion or recommendation which is not specifically urged is waived.

(c) The Board shall not determine violations of the Act and affirmative defenses that were not properly pled.

Cross-Exceptions

Within seven working days after receipt of exceptions, any party may file an original and four copies of a response thereto, or cross-exceptions and a separate brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and four copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding.

Request for Extension of Time

A request for an extension of time within which to file exceptions and briefs shall be in writing, and filed with the Board before the expiration of the required time for filing, provided that the Board may extend the time during which to request an extension of time because of extraordinary circumstances. A party requesting an extension of time shall notify all the parties to the proceeding of its request and shall indicate to the Board the position of each other party with regard to such request.

Objection to Certification Without Election

A written objection to the Director's determination that an employee organization should be certified without an election may be filed within five working days after receipt of the Director's determination. A party may file a response to the objection within five working days after its receipt of the objection. The objection and any response must be served on all parties.

Oral Argument Before the Board

If a party desires to argue orally before the Board, a written request with reasons therefore shall accompany the exceptions filed, the response thereto, or the cross-exceptions filed and be prominently displayed on the first page of the party's papers. The Board may grant such a request; it may also direct oral argument on its own motion.

Board Action

(a) Upon receipt of the case, the Board may adopt, modify or reverse the Director's or ALJ's decision or order.

(b) Unless a party files exceptions to the decision and recommended order of the Director or ALJ within 15 working days after receipt thereof, the decision and any accompanying order will be final, except that the Board may, on its own motion, decide to review any remedial action recommended within 20 working days after receipt by the parties of the decision and recommended order.

Party

The term "party", as used in PERB's Rules of Procedure, means any public employee, employee organization or public employer filing a charge, petition or application under the Act or these Rules; any public employee, employee organization or public employer named as a party in a charge, petition or application, filed under the Act or these Rules; or any other public employee, employee organization or public employer whose timely motion to intervene in a proceeding has been granted.

Working Days

The term "working days", as used in PERB's Rules of Procedure, shall not include a Saturday, a Sunday, or a legal holiday.

Filing; Service

(a) The term "filing", as used in PERB's Rules of Procedure, shall mean delivery to the Board or an agent thereof, or the act of mailing to the Board, or deposit with an overnight delivery service for overnight delivery.

(b) The term "service", as used in PERB's Rules of Procedure, shall mean delivery to a party or the act of mailing to a party, or deposit with an overnight delivery service for overnight delivery.

NOTICE TO PARTIES

Judicial Appeal of Board Orders.

A party may appeal a final order of the Board by filing with the court and serving the necessary parties the pleadings and papers required by Article 78 of the New York Civil Practice Law and Rules (CPLR) and New York Civil Service Law (CSL) §213 within thirty days after service of the Board's order. The Board's "filing" and "service" definitions (above) do not govern the filing and service requirements of the CPLR or CSL, which are covered by the terms of those statutes. Failure to comply with a final order of this agency will result in an enforcement proceeding in New York Supreme Court pursuant to CSL §213.