DC 37, Local 376, 1 OCB2d 37 (BCB 2008)

(IP) (Docket No. BCB-2704-08). **Aff'd**, *Matter of City of New York v. NYC Bd. of Coll. Barg.*, Ind. No. 403010/08 (Sup. Ct. N.Y. Co., Oct. 23, 2009) (Lehner, J.).

Summary of Decision: The Union claimed that the New York City Department of Transportation refused to provide reports of accidents involving Union members in violation of NYCCBL § 12-306(a)(1), (a)(4) and (c)(4). The City argues that the Union is not entitled to the reports because the DOT has not altered the terms and conditions of employment, the Union has not demonstrated that the reports are reasonably necessary for contract administration, the Union has not demonstrated a clear present or future threat to employee safety necessary to establish a practical impact, and the Board has not made any finding of practical impact. Further, the City notes that under Department of Labor Regulation § 801.35, 12 NYCRR § 801.35 (iv), the DOT is only obligated to provide employee representatives part of the incident reports or an equivalent substitute. The Board found that the Union was entitled to the information for the purpose of contract administration and to determine whether to request impact bargaining over employee safety. Therefore, the City had a duty to provide the requested reports. Accordingly, the Union's petition is granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 376,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Respondents.

DECISION AND ORDER

On June 26, 2008, Local 376 of District Council 37, AFSCME, AFL-CIO ("Union"), filed a verified improper practice petition against the City of New York ("City") and the New York City

Department of Transportation ("DOT"). The Union alleges that the City violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (a)(4) and (c)(4), when the DOT refused to provide the Union with reports of accidents that have resulted in injuries to its members. The Union contends that it seeks the requested information for contract administration and to determine whether to request impact bargaining over employee safety. While the City does not dispute that the Union's request relates to the health and safety of its members, it asserts that the Union is not entitled to the reports because the DOT has not altered the terms and conditions of employment. The City also argues that the Union has not demonstrated that the reports are reasonable necessary for contract administration. Further, the City argues that the Union has not demonstrated a clear present or future threat to employee safety necessary to establish a practical impact, nor has the Board made any finding of practical impact. Finally, the City asserts that under New York State Department of Labor ("DOL") regulations, the DOT is only obligated to provide employee representatives part of the incident reports or an equivalent substitute. This Board finds that the Union is entitled to the reports it has requested for the purpose of contract administration and to assist it in determining whether to request impact bargaining over employee safety. The City is therefore obligated to provide the reports. Accordingly, the petition is granted and the City ordered to provide the requested reports.

BACKGROUND

Whenever there is an accident, DOL Regulations (New York Codes, Rules and Regulations, Title 12, Chapter 11) ("NYCRR"), requires that the DOT complete a DOL incident report form known as a SH 900.2. One section of the SH 900.2 is entitled "Information about the case" and DOL Regulation § 801.35 (iv), 12 NYCRR § 801.35 (iv), requires that the DOT provide employee

representatives this section or an equivalent substitute.[1] It is undisputed that the DOT regularly provides the Union the "Information about the case" section of the SH 900.2 or an equivalent substitute.

The DOT has an office of Occupational Safety and Health ("OSH"). On occasion, the OSH may investigate an accident and may create additional reports. These are the reports at issue in the instant case. The Union has requested any such reports relating to four accidents, identified by the date of the incident and the Union member involved.

The OSH holds quarterly labor-management meetings with various unions to resolve health and safety issues. On June 21, 2007, at one such meeting between the Union and the OSH, the Union made a verbal request for OSH's reports on accidents involving Union members. The City alleges that the Union's request was too vague for the DOT to comply with. (Ans. ¶ 27). The Union repeated its information request at a second labor management meeting held on September 20, 2007. The City characterizes the Union as "demanding *all* information in DOT possession pertaining to accident victims who are Union members of DC 37" and alleges that "[d]ue to the Union's lack of clarity, DOT was unable to ascertain what information they were seeking." (Ans. ¶ 28) (emphasis in original). A third labor management meeting was held on December 6, 2007, at which the Union

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[1] DOL Regulation, 12 NYCRR § 801, is entitled "Recording and Reporting Public Employees' Occupational Injuries and Illnesses" and 12 NYCRR § 801.35 (iv) provides:

> When an authorized employee representative asks for copies of the SH 900.2 incident reports for an establishment where the agent represents employees under a collective bargaining agreement, the employer must give copies of those forms to the authorized employee representative within seven calendar days. The employer is only required to give the authorized employee representative information from the SH 900.2 incident report section titled information about the case. The employer must remove all other information from the copy of the SH 900.2 incident report or the equivalent substitute form that the employer gives to the authorized employee representative.

made a verbal request for reports regarding a specific incident, a work zone accident on Staten Island. The City alleges that the DOT asked the Union to be more specific as "[d]ue to the Union's lack of clarity, DOT was unable to ascertain what information the Union specifically wanted." (Ans. ¶ 30).

In a letter dated February 26, 2008, the Principal Program Coordinator of the Union's Safety and Health Department made the following information request of the Director of the OSH:

> As the certified representative of [Union] members employed by the [DOT], I am requesting a copy of the incident report and any other relevant information related to the accident involving [name redacted] on 2/22/08.

(Pet. Ex. A). The DOT made available to the Union the information contained on the SH 900.2 form but otherwise, as of the filing of the instant petition, has not provided the requested information.

On March 11, 2008, a fourth labor management meeting was held at which the Union once again requested reports of accidents involving its members. The OSH Director advised the Union to file a Freedom of Information Law ("FOIL") request. The Union's Principal Program Director responded in letter dated March 27, 2008, which reads, in pertinent part:

> For the past several months, I have been requesting copies of DOT incident reports related to specific incidents that have resulted in injuries to DC 37 members. At a 3/11/08 Labor-Management Safety and Health Committee meeting, I was informed by [the DOT OSA Director] that the Union must file a [FOIL] request in order to receive this information.
>
> Please note that as the certified employee representative and collective bargaining agent for [Union] members employed by [the DOT], the Union has a legal right to receive this information.
>
> I urge you to reassess this request for information in order to avoid an improper practice charge.

(Pet. Ex. B). A third letter from the Union's Principal Program Director to the OSH Director was sent on April 2, 2008, "requesting of DOT incident reports for the following [three] cases that

resulted in injuries to DC 37 Local 376 members: [name redacted], Brooklyn, 2/8/08[;] [name redacted], Brooklyn, 3/13/08[;] [name redacted], Queens, 4/1/08[.]" (Pet. Ex. C). The DOT made available to the Union the information contained on the SH 900.2 forms but otherwise, as of the filing of the instant petition, has not provided the requested information.

POSITIONS OF THE PARTIES

Union's Position

The Union has requested all reports regarding the four accidents identified in its petition and in the letters to the DOT. The Union argues that the DOT violated NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) by failing to provide information which is a mandatory subject of bargaining, specifically by failing to provide all the requested reports.[2] The DOT cannot satisfy the obligations of NYCCBL

[2] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents
> * * *
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> * * *
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

NYCCBL § 12-305 provides, 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.

NYCCBL § 12-306(c) provides, in pertinent part:

> The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
> * * *

by merely producing the SH 900.2 forms or an equivalent substitute.

The Union contends that the "reports are needed to monitor and assess the pattern of particular injuries in particular work locations . . .; to monitor DOT compliance with health and safety standards when assigning employees to work on roadways; and to determine whether DOT has implemented uniform and appropriate policies regarding health and safety matters as well as the impact on health and safety measures or lack thereof on the bargaining unit members." (Pet. ¶ 13). In support of its argument, the Union cites to Board cases holding that the duty to bargain requires an employer to provide information reasonably necessary to contract administration and also cites a National Labor Relations Board decision holding that information related to the safety of unit employees is relevant to the administration of a collective-bargaining agreement. (Rep. ¶ 12). Additionally, the Union argues that it needs the reports to determine whether to request impact bargaining over employee safety.

City's Position

The City does not dispute "that the Union's request relates to incidents involving the health and safety of several members." (Ans. ¶ 45). However, it contends that its "responsibility to provide information concerning matters within the scope of bargaining is not endless." (Ans. ¶ 38). The Union is not entitled to all the reports "because DOT, through their recordings of the accidents, have not altered the terms and conditions of employment of [Union] members." (Ans. ¶ 39). The reports themselves do not pertain to changes in health and safety as "[w]hether DOT's investigation of how the respective accidents occurred will alter their safety procedures, methods or training is yet to be

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> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. . . .

determined." (*Id.*). The City argues that there "is no violation of the NYCCBL as the Union is not claiming that DOT has taken a unilateral action with respect to a mandatory subject of bargaining." (Ans. ¶ 47). Further, the "DOT is not making unilateral changes in its safety procedures, methods, or training. . . . Any alteration to DOT's responsive training, though, will not be found in DOT's incident reports but rather, in their training procedures or safety manuals." (*Id*). The City argues that the Union has not met its "burden to demonstrate that the information they are requesting is relevant to and reasonably necessary for the purposes of collective negotiations or contract administration." (Ans. ¶ 59).

The City argues that allegations that it has violated NYCCBL § 12-306(a) are premature as the Board has not made any finding of practical impact. Nor has the Union demonstrated a clear present or future threat to employee safety necessary to establish a practical impact. As the form and purpose of the reports "has not changed significantly in the past year, their creation does not present a threat or future threat." (Ans. ¶ 56). Further, because the reports do not "directly alter the terms and conditions of employment," they do not have a practical impact. (Ans. ¶ 57).

Finally, the City asserts that under the DOL Regulations, the DOT is only obligated to provide employee representatives part of the SH 900.2 form or an equivalent substitute.

DISCUSSION

This case raises no material issues of disputed fact, only a legal question as to whether the DOT is obligated to provide all the reports requested by the Union. The Union has requested reports related to four accidents involving Union members that it has identified by person and date, specifically accidents that occurred on February 8 and 22, March 13, and April 4, 2008. The City does not dispute that the reports relate to working conditions–the health and safety of Union

members–and that such is a mandatory subject of bargaining. Rather, the City claims that the reports are not reasonably necessary to contract administration and that no practical impact has been shown; therefore it has no duty to provide the information the Union has requested. We find that the information requested to be relevant to and reasonably necessary for contract administration, that the requested information will assist the Union in determining whether to request impact bargaining, and, therefore, that the City violated NYCCBL § 12-306(a)(1) and (4).

NYCCBL § 12-306(a)(4) creates a mutual obligation on public employers and public employee organizations to bargain in good faith, and NYCCBL § 12-306(c)(4) explicitly provides that the duty to bargain in good faith includes the obligation "to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." *See SSEU, Local 371*, 1 OCB2d 11, at 9-10 (BCB 2008); *UFA*, 71 OCB 19, at 11-12 (BCB 2003); *CSTG, Local 375*, 25 OCB 41, at 10 (BCB 1980).

We have held that "[t]his duty extends to information relevant to and reasonably necessary for the administration of the parties' agreements, such as processing grievances, and/or for collective negotiations on mandatory subjects of bargaining." *PBA*, 79 OCB 6, at 14 (BCB 2007) (citing *DC 37*, 77 OCB 23, at 13-14 (BCB 2006); *Captains Endowment Assn.*, 77 OCB 22, at 12-13 (BCB 2006); *accord*, *Board of Educ., City Sch. Dist. of Albany*, 6 PERB ¶ 3012 at 3030 (1973); *State of New York (Office of Mental Retardation and Developmental Disabilities)*, 38 PERB ¶ 3036 (2005)). As an "employer's failure to supply the information directly to the Unions interferes with the statutory right of employees to be represented, it also constitutes a violation of NYCCBL § 12-306(a)(1)." *PBA*, 79 OCB 6, at 17 (citing *Schyler-Chemung-Tioga Board of Coop. Educ. Servs.*, 34 PERB ¶ 4521 (2001); *Greenburgh No. 11 Union Free Sch. Dist.*, 33 PERB ¶ 3059 (2000)).

Here, the City argues that the requested information is not necessary because the DOT has not altered the terms and conditions of employment–that the DOT has not taken an "unilateral action with respect to a mandatory subject of bargaining." (Ans. ¶ 47). However, "whether an issue is a mandatory subject of bargaining is not dispositive when, as here, the Union seeks the information for contract administration, not negotiation." *DC 37, Local 1508*, 77 OCB 23, at 16 (BCB 2006) (individual interview sheets relevant and reasonable necessary to the inquiry into whether the City followed its own promotion policies and therefore necessary for contract administration).

In the instant case, the material requested by the Union–all reports of accidents involving its members–clearly "falls within the scope of information 'reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.'" *SSEU, Local 371*, 1 OCB2d 11, at 10 (BCB 2008) (quoting *PBA*, 79 OCB 6, at 14) (other citations omitted). *See also, County of Erie (Sheriff)*, 36 PERB ¶ 3021 (2003), *aff'd*, 14 A.D.3d 14 (3d Dept. 2004), *enforced*, 789 N.Y.S.2d 453 (3d Dept. 2005) (employer required to produce an Equal Employment Opportunity investigator's summary of interviews and its findings); *see also Southern California Gas Company and Utility Workers Union of America, Local 483*, 344 N.L.R.B. 231; 2005 NLRB LEXIS 25 (information related to the safety of unit employees held to be relevant to the Union's administration of the collective-bargaining agreement). As we recently stated, "we find that the purposes underlying the statutory obligation to bargain will be better served if reasonable requests for information from which a certified representative can assess whether a management action or decision constitute an improper practice are granted." *SSEU, Local 371*, 1 OCB2d 11, at 10 (citing *UFA*, 71 OCB 19, at 13).

The City's related argument that the Union is not entitled to the requested information until it establishes a practical impact misconstrues our holdings. As we clarified in *UFA*, 71 OCB 19, the

obligation to provide information maintained in the regular course of business arises not upon proof of or a finding of practical impact, but rather arises whenever a *bona fide* question of practical impact is raised:

> We believe that the purposes underlying the statutory obligation to bargain over the alleviation of practical impact will be better served if reasonable requests for information from which a certified representative can assess whether a management action or decision will result in a practical impact within the meaning of the law are granted. Therefore, harmonizing NYCCBL § 12-306(c)(4) with the practical impact bargaining clause of § 12-307(b), we now hold that the duty to bargain includes the duty to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper understanding of the question whether a management action or decision will result in a practical impact on the terms and conditions of employment of affected employees.

Id. at 13. In the instant case, the Union requires the reports "for full and proper understanding of the question whether a management action or decision will result in a practical impact" to assist it in determining whether to request impact bargaining over employee safety. *Id.* Therefore, the City's failure to produce all the reports that the Union requested on accidents involving its members violated NYCCBL § 12-306(a)(1) and (4).

As for the City's argument that under the DOL Regulations, the DOT is only obligated to provide employee representatives part of the SH 900.2 form or an equivalent substitute, we do not opine as to what obligations the DOL Regulations has placed upon the DOT, or whether the DOT has fulfilled any such obligations, as our jurisdiction is limited to claims arising under the NYCCBL. *See Colella*, 79 OCB 27, at 52 (BCB 2007); *James-Reid*, 77 OCB 29, at 15 (BCB 2006); *Edwards*, 65 OCB 35, at 10-11 (BCB 2000).

However, it is well established that compliance with statutory mandates other than the NYCCBL does not, of its own weight, discharge distinct statutory obligations arising under the NYCCBL. As we have held: "A public employer may not insulate its actions from compliance with

applicable requirements of the NYCCBL merely by demonstrating that its actions were in accord with statutory law." *DC 37*, 75 OCB 14, at 13 (BCB 2005); *see also Doctors Council*, 69 OCB 31, at 10 (BCB 2002) (same); *COBA*, 43 OCB 72, at 11 (BCB 1989) ("the City may not insulate its action from compliance with applicable requirements of the NYCCBL or oust this Board of its jurisdiction in collective bargaining and contractual matters merely by demonstrating that the measures it took were permitted by law.").

Accordingly, we direct the City to produce to the Union, within sixty (60) days, all reports related to the accidents involving Union members of February 8 and 22, March 13, and April 4, 2008.[3]

[3] We note that the City has not pleaded any factual allegations or made any legal arguments tending to suggest that there exists any countervailing public policy that would insulate the more detailed reports from the public policy which "strongly favors the use of collective bargaining," and we therefore determine this case under the normal presumption that the employer "possess the broad powers needed to negotiate with employees as to all terms and conditions of employment." *Matter of City of New York v. Patrolmens' Benev. Assn.*, ___ A.D.3d ___, 2008 NY Slip Op 7798, *4; 2008 N.Y. App. Div. LEXIS 7631, **7-8 (1st Dept. Oct. 16 2008) (citing cases).

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, Docket No. BCB-2704-08, filed by Local 376, District Council 37, against the New York City Department of Transportation, be, and the same hereby is, granted, and it is further

ORDERED, that the City produce, within sixty (60) days of the date of this Order, the reports at issue herein, specifically all reports regarding accidents involving Union members that occurred on February 8 and 22, March 13, and April 4, 2008.

Dated: November 10, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
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M. DAVID ZURNDORFER
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