OSA, 1 OCB2d 45 (BCB 2008)

(IP) (Docket No. BCB-2631-07).

Summary of Decision: The Union alleges that the New York City Health and Hospitals Corporation violated NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) when it failed to provide information requested about employees whose civil service title had been changed from Senior Management Consultant after the Union gained representation rights for that title, and that HHC violated NYCCBL § 12-306(a)(1) by changing the title of these employees to deprive it of members and these employees of their rights of collective bargaining. The Board found that the Union has a right to the requested information, that HHC has not provided all the information requested, that HHC violated NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) by failing to provided the information requested, and orders HHC to provide the requested information within thirty days of the date of the Order. Accordingly, the Union's petition is granted in part. The Union, upon receipt of the requested information, will be permitted to submit any such information it deems germane to the outstanding issues in this case, prior to the Board rendering a final decision on the Union's claim that HHC violated the NYCCBL by changing the civil service titles of these employees. ***(Official Decision Follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

THE ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Respondent.

DECISION AND ORDER

On July 6, 2007, the Organization of Staff Analysts ("Union" or "OSA") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC")

alleging that HHC violated rights granted in § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)("NYCCBL") in violation of NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) when it failed to provide information about employees whose civil service titles had been changed from Senior Management Consultant ("SMC") after the Union gained representation rights for that title. HHC argues that the failure to provide information claim is now moot as it has, in response to the instant petition, provided all the requested information and that the claims regarding the title changes are untimely as the Union was on notice as to these title changes more than four months prior to the filing of the petition. The Union also alleges that HHC violated NYCCBL § 12-306(a)(1) by changing the title of these employees to deny the Union of members and the employees of their rights of collective bargaining; while HHC argues that the title changes were a legitimate exercise of managerial rights pursuant to NYCCBL § 12-307(b). We find that the Union has a right to the requested information, that HHC has not provided all of the requested information, and that HHC violated NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) by failing to provided the requested information, and so we order HHC to provide the information requested within thirty days of the date of the Order attached hereto. Accordingly, the Union's petition is granted in part and we will permit the Union, within thirty days of receipt of the requested information, to submit such information received that it deems germane to the outstanding issues in this case, prior to our rendering a final decision upon the Union's claim that HHC violated NYCCBL § 12-306(a)(1) by changing the civil service titles of these employees.

BACKGROUND

After seven days of hearings, the trial examiner found the totality of the record established the relevant background facts to be as follows.[1]

On March 24, 2006, after a certification proceeding, the Board of Certification added employees in the titles SMC (Business Organization and Methods) Levels I and II (Title Codes 983711 and 983712) employed at HHC to the Union's bargaining certificate, Certification No. 3-88. *OSA*, 78 OCB 1 (BOC 2006). Based on data collected during the certification proceeding, the Union expected to represent approximately 252 SMCs. (Tr. 23). Although the Union began receiving dues payments for some newly represented SMCs in September 2006, it was not until October 23, 2006, that the Union received from HHC the list of employees placed in the Welfare Fund as of September 1, 2006 ("September 1st Welfare Fund list"). Upon comparing the September 1st Welfare Fund list with the Union's own database, the Union's Executive Director, Sheila Gorsky, noticed that over ten percent of the employees she believed should have been on the September 1st Welfare Fund list were not, in fact, on the list. That is, Gorsky identified individuals who were listed as SMCs during the certification proceeding who did not appear September 1st Welfare Fund list ("Former SMCs").

The Union began investigating the status of the Former SMCs to determine whether they were left off of the September 1st Welfare Fund list by accident, whether they had left HHC, or whether their civil service title had changed, and, if so, whether the title change was appropriate. As part of this investigation, the Union requested information from HHC. Gorsky also had her staff contact the Former SMCs' last known place of employment. The Union determined that some of

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[1] As explained, *infra*, we do not in this decision address the merits of the Union's claim that HHC violated NYCCBL § 12-306(a)(1) by changing the civil service titles of its employees; accordingly, only background relevant to failure to provide information claim is summarized herein.

the Former SMCs had retired, resigned, or been terminated, but could not determine the status of others.

Gorsky, therefore, arranged a meeting with HHC's Assistant Vice President of Labor Relations in January of 2007. The meeting addressed the Union's concerns regarding some, but not all, of the Former SMCs. At the meeting, Gorsky requested the "functional job descriptions of [their] new titles" for these Former SMCs. (Tr. 67). In addition to the request made at the January 2007 meeting, the Union made six information requests between November 2006 and May 2007.

The parties disagree as to the scope of these requests. The Union avers that its information requests were broad enough to encompass all descriptions of the Former SMCs' new positions. HHC asserts that the Union only requested the functional job descriptions and that the Union "made inconsistent demands, which delayed Respondent's responses." (Ans. ¶ 6). There are two types of job descriptions at HHC: the functional job description and the position description. Each employee has a functional job description created by the area in which they work.[2] Position descriptions, also known as corporate job descriptions, are created by HHC's Human Resource Department for each civil service title.

On or about March 2, 2007, HHC produced the functional job descriptions for eight Former SMCs and promised it would produce a ninth functional job description in the future. The Union

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[2] A type of functional job description called a "justification" is created by HHC when an individual is promoted or transferred to a new title. A justification is effectively the functional job description for the position the employee will assume should the transfer be approved. The only relevant distinction between a justification and a standard functional job description is that a justification is created as part of the process of an employee moving into a new position, while the standard functional job description documents the position an employee currently occupies. For some of the Former SMCs, HHC provided the justifications created to support their title changes in lieu of the standard functional job description. Therefore, at times the hearing transcript refers to a "justification."

avers it did not receive this production until after March 7, 2007–that is, within four months of the filing of the instant petition on July 6, 2007. Other functional job descriptions were produced to the Union by HHC between March and June 2007. Nine functional job descriptions were produced by HHC as an exhibit to its answer to the instant petition. One functional job description and four position descriptions were produced by HHC during the hearings.[3]

Upon review of the material produced by HHC, Gorsky concluded that there was a "large group of people that should not have had their titles changed." (Tr. 71). The instant petition listed 22 possible inappropriate title changes, but, by the start of the hearings, the Union had narrowed its claim to fourteen, and has subsequently withdrawn its claim as to one other Former SMCs, leaving only thirteen in dispute.

As of the close of the hearings, functional job descriptions for the current positions for two of the thirteen Former SMCs involved in the instant matter had not been introduced into evidence, and Gorsky testified that she has yet to receive from HHC any documents describing these two Former SMCs' current positions. (Tr. 104, 114).

POSITIONS OF THE PARTIES

Union's Position

The Union argues that HHC violated NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) by failing to provide information and that the "HHC's refusal to provide OSA with the new job descriptions

[3] The Union objected to the introduction into evidence of three position descriptions on the last day of the hearing on relevance grounds, and has renewed this objection in its closing brief. We overrule the objection, finding the position descriptions to be relevant. We note, however, that these position descriptions are not dispositive of any issue raised herein.

of former [SMCs] interferes with OSA's ability to administer its contract."[4] (Pet. at ¶ 19). The Union requested all job descriptions of the Former SMCs. Prior to its answer, HHC only produced some of the functional job descriptions. The Union requests that the Board order HHC "to provide the job descriptions for each [SMC] who has been transferred to a non-union title." (Pet., Relief Sought ¶ a).

Further, HHC violated NYCCBL § 12-306(a)(1) when it transferred "SMCs to unrepresented titles without justification [as] an attempt to frustrate and defeat OSA's right to represent the

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

> It shall be an improper practice for a public employer or its agents:
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> * * *
>
> (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:
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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. . . .

employees in the title of [SMC]." (Pet. ¶ 20). HHC has not demonstrated a legitimate business reason for the title changes. All the civil service title changes occurred between issuance of *OSA*, 78 OCB 1, in March 2006 and December 2006, showing temporal proximity. The SMC title encompasses the work detailed in the Former SMCs' new job descriptions. Indeed, the SMC title has two levels, and HHC did not consider promoting the Former SMCs from Level I to Level II. Some of the Former SMCs did not receive a salary increase with their alleged promotion, while the new salaries of those that did remained within the salary range of SMCs. Also, the Former SMCs report to the same supervisors in their new position that they reported to when they were SMCs. The Union argues that the title changes were "motivated solely by HHC's interest in depriving OSA and the [SMCs] of their rights to collective bargaining." (*Id.*).

The Union argues that the petition is timely because, although it was aware of some of the civil service title changes prior to March 2007, there could have been legitimate reasons for those title changes and it was not until after March 6, 2007, when it received the new functional job descriptions for the Former SMCs' new positions, that the Union could reasonably be deemed aware that the civil service title changes were inappropriate. The instant petition was timely filed within four months of the Union's receipt of the functional job descriptions.

The Union argues that its NYCCBL § 12-306(c)(4) claim is not moot because HHC did not provide all the requested job descriptions and much of the information was only produced in response to the instant petition. Indeed, on the last day of the hearings, HHC provided, for the first time, three position descriptions.

The Union argues that it is not challenging HHC's right to transfer employees, and that, therefore, the managerial rights clause of NYCCBL § 12-307(b) is not relevant here. Rather, the

Union argues that changing the civil service titles of employees to deny the Union of members is an improper practice.

HHC's Position

HHC raised seven affirmative defenses. First, the Union's claims are untimely since it was aware of the civil service title changes of the Former SMCs on or before December 1, 2006, and the instant petition was filed eight months later on July 6, 2007, far in excess of the four month statute of limitations. HHC avers that it never refused to produce the requested information, but rather multiple inconsistent requests from the Union delayed its production. Also, HHC always understood the Union as only requesting the functional job description.

Second, HHC argues that the Union's NYCCBL § 12-306(c)(4) claim is now moot as it provided the requested job descriptions with its answer to the petition.

Third, HHC argues that the petition must be dismissed because the civil service title changes at issue were legitimate exercises of managerial rights pursuant to NYCCBL § 12-307(b). The Board has held reclassifying employees is not a *per se* violation of the NYCCBL. The title changes of these employees were not inherently destructive to the Union, nor has the Union establish that HHC had an improper anti-union motive for the title changes. Further, the Union has not produced any evidence or testimony that the Former SMCs were engaged in Union activity.

Fourth, HHC argues that the petition must be dismissed because the Union has failed to allege any facts that demonstrate HHC's "actions were undertaken for the purpose of interfering with, restraining or coercing a public employee in the exercise of his/her rights granted in section 12-305 of the NYCCBL." (Ans. ¶ 46). Further, no NYCCBL § 12-306(a)(1) violation can be found as the Union has failed to allege any facts that demonstrate HHC's has interfered with any employee

of its organization.

Fifth, HHC argues that the Union "has failed to state a *prima facia* case and to allege facts sufficient to maintain a claim of failure to bargain in violation of Section 12-306(a)(4) of the NYCCBL." (Ans. at ¶ 54). Since the transfer, promotion and hiring of individuals is a management right, it cannot be the basis for a NYCCBL § 12-306(a)(4) failure to bargain claim. Moreover, the Union never requested bargaining, nor otherwise placed HHC on notice that it wanted to bargain the issues raised in the petition.

Sixth, HHC argues that since the petition fails to allege facts sufficient to find a violation of NYCCBL § 12-306(a)(4) or (c)(4), there can be no derivative violation of NYCCBL § 12-306(a)(1).

Seventh, since the petition fails to allege facts sufficient to find a violation of NYCCBL § 12-306 (c)(4), there can be no derivative violation of NYCCBL § 12-306(a)(4).

DISCUSSION

Timeliness

We first, as a threshold matter, address HHC's argument that the petition is untimely. *DC 37, Local 1457*, 1 OCB2d 32, at 21 (BCB 2008); *Walker*, 79 OCB 2, at 12 (BCB 2007). An improper practice charge "must be filed no later then four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *aff'd*, *Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and § 1-07(d) of the Rules of the Office

of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"));[5] *see also DC 37, Local 1457*, 1 OCB2d 32, at 21*; Tucker*, 51 OCB 24, at 5 (BCB 1993). In the instant case, HHC argues that the Union was aware of the civil service title changes in December 2006 but did not file the instant petition until July 6, 2007, approximately eight months later, and asks us to draw the conclusion that the petition is, therefore, untimely.

It is undisputed that, by the end of 2006, the Union was aware that there were employees it expected to represent that HHC did not add to its bargaining unit. However, the issue in the instant matter is whether the civil service title changes violated the NYCCBL and the Union could not reasonably be expected to know that until it knew the duties and responsibilities of the Former SMCs' new positions. *See COBA*, 65 OCB 19, at 7 (BCB 2000). *COBA*, like the instant case, concerned a reassignment. COBA's petition was filed more than four months after the reassignment but within four months of the union's receipt of the new Table of Organizations for the Department of Corrections ("DOC"), which was supposed to include the reassignment but did not. The Union alleged that it only realized that the grounds given for the reassignment were pretextual upon receipt

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[5] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

OCB Rule § 1-07(d) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . .

of the new Table of Organization. In declining to find the petition untimely, we held that:

> We cannot say, as a threshold matter, that the Union's petition is untimely. The petition admittedly was filed more than four months after the grievant's reassignment. However, the Union's claim that its receipt of the new Table of Organization was its first notice that the DOC's explanation for the grievant's reassignment was pretextual, arguably brings this matter within the limitations period. If the Union could show that the reassignment was, in fact, improperly motivated and that the motivation was not known to the grievant and the Union until the Table of Organization was received, then the petition would be timely.

Id.

Here, the Union requested information from HHC as to the Former SMCs' new positions promptly upon learning of the civil service title changes and cannot be charged with knowledge of possible improper practice as to those title changes prior to the receipt of the requested information. HHC does not claim to have supplied all of the requested information prior to filing its answer–nine functional job descriptions were only produced as exhibits to HHC's answer. The claims are, therefore, timely.

Further, we note that to hold otherwise would create a perverse incentive to require a party to file an improper practice petition immediately upon recognizing the possibility of a NYCCBL violation, as opposed to actual or constructive knowledge thereof. By first pursuing cooperative labor relations and taking a reasonable time to investigate, the Union was able to significantly narrow the issues in the instant petition. *See Great Neck Water Pollution Control Dist.*, 27 PERB ¶ 3057, at 3134 (1994) (charge found timely even though filed more than four months after violation because "[w]hether intentionally or not, the [employer] induced [the union] to refrain from filing a charge in the interest of cooperative labor relations.").

Failure to Provide Requested Information

The Union argues that HHC violated NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) by failing to provide the requested information, specifically the job descriptions for the current positions of the Former SMCs. HHC does not dispute that the Union has a right to the requested information, nor deny its obligation to produce the same. Rather, HHC argues that because it provided the requested functional job descriptions with its answer, the Union's NYCCBL § 12-306(c)(4) claim is now moot.

However, the Court of Appeals has held that a claim is only moot when "a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy." *Matter of Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach,* 98 N.Y.2d 165, 172 (2002); *see also DC 37, Local 1457*, 1 OCB2d 32, at 24-25; *PBA*, 23 OCB 79, at 2 (BCB 1979) (an improper practice charge is moot when a change in circumstances eliminates the underlying controversy).

In the instant matter, the Union and HHC disagree as to the scope of the Union's request for information, with the Union averring that it requested all job descriptions for the Former SMCs and HHC averring that the Union only requested the functional job descriptions. It is undisputed that HHC did not provide the position descriptions prior to the filing of the instant petition. Indeed, four position descriptions were only produced by HHC during the hearing itself. Further, no functional job descriptions have been provided for two Former SMCs. Therefore, an underlying actual controversy still exists in this case as to the Union's NYCCBL § 12-306(c)(4) claim. *See Matter of Sowell v. New York City Police Dept.*, 292 A.D.2d 187, 187 (1st Dept. 2002) ("Petitioner's argument is valid insofar as he argues that the petition is not moot, since the [agency] has failed to demonstrate that it in fact provided petitioner with the records responsive to his [information] request.").

More importantly, a party can not render moot a failure to provide information claim merely by providing the requested information in response to an improper practice petition. A contrary holding would discourage good labor relations by encouraging brinksmanship. We have repeatedly held that an "improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remain open to consideration." *DC 37, Local 1457*, 1 OCB2d 32, at 22-23; *Cosentino*, 29 OCB 44, at 11 (BCB 1982) (same); *see also New York City Sch. Dist.*, 40 PERB ¶ 4550, at 4640 (2007); *Southold Union Free Sch. Dist.*, 36 PERB 4508 (2003) (in depth discussion of mootness doctrine); *Plainedge Union Free School District*, 31 PERB ¶ 3063 (1998) (corrective action may effect remedy but "does not render moot the District's violation.").

HHC's reliance on *PBA*, 73 OCB 14 (BCB 2004), *aff'd in part and remanded, Patrolmen's Benevolent Ass'n v. City of New York,* No. 113062/04 (Sup. Ct. N.Y. Co. Feb. 4, 2005), *aff'd*, 27 A.D.3d 381(1st Dept. 2007), is misplaced.[6] *PBA* does not support HHC's argument that a party can moot a NYCCBL § 12-306(c)(4) claim by providing the requested information as part of its answer,

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[6] In *PBA*, 73 OCB 14, we held that the issue was moot because the City had provided the requested information to the Municipal Labor Committee ("MLC"), to which the petitioner unions belonged. The New York State Supreme Court "affirmed that portion of the decision finding that the City had fulfilled its statutory obligation" but also "found that a further issue was not moot, and remanded to the Board the question whether the City properly responded to the document requests by providing the information through the MLC rather than directly to each union." *PBA*, 79 OCB 6, at 3 (BCB 2007) (further proceeding). Upon remand, we held that the City had a duty to supply the information directly to each requesting union. *Id.*, 79 OCB 6, at 16. HHC cites *PBA*, 73 OCB 14, for the premise that "issues raised in an improper practice charge [are] moot when a change in circumstances eliminates the underlying controversy and the policies of statutory law are not served by further consideration of such a charge." (HHC Closing Brief at 44) (quoting *PBA*, 73 OCB 14, at 9).

for to allow it to do so would encourage parties to avoid their responsibilities under the NYCCBL unless and until an improper practice charge is filed. That is, "the policies of statutory law are [] served by further consideration" of a NYCCBL § 12-306(c)(4) claim where the employer has waited until an improper practice charge is filed to provide the requested information, and therefore such a claim is not mooted by a belated production. *PBA*, 73 OCB 14, at 9.

HHC's reliance on *Matter of Tellier v. New York City Police Dept.*, 267 A.D.2d 9 (1st Dept. 1999), is similarly misplaced. HHC cites *Tellier* for the premise that "a case is 'properly dismissed as moot' when the 'records responsive to the request' are produced 'during the pendency of the litigation.'" (HHC Closing Brief at 44-45) (quoting *Tellier*, 267 A.D.2d at 10). The *Tellier* court, however, in dismissing the petition also relied upon the "petitioner's failure to exhaust his administrative remedies." *Tellier*, 267 A.D.2d at 10; *see also Gaudio v. Kerik*, 302 A.D.2d 225 (1st Dept. 2003).[7]

The last case cited by HHC is *North Carolina Press Assoc. v. Spangler*, 87 N.C. App. 169 (N.C. Ct. App. 1987), which HHC argues stands for the premise that "[w]henever, during the course of litigation it develops that the relief sought has been granted . . . the case should be dismissed." (HHC Closing Brief at 45-46) (quoting *Spangler*, 87 N.C. App. at 10).[8] Beyond the fact that

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[7] Further, *Tellier* appears to be restricted to requests under the Freedom of Information Law, and judicial proceedings to compel production of the requested information. *See Matter of Madrassa Cmty. Coalition v. New York City Dept. of Ed.*, 2008 NY Slip Op 51367U, * 6 (Sup. Ct. New York Co. June 30, 2008); *Sowell*, 292 A.D.2d at 188.

[8] In *Spangler*, the Chancellor of a public university appealed the ruling of a trial court that he had to make certain documents publically available. Before the Appellate Court could rule on the petition, the appellants withdrew the petition and "publicly disclosed the chancellors' reports that are the subject of this appeal," rendering the appeal moot. *Spangler*, 87 N.C. App. at 170. In *Spangler*, it was the acts of the party seeking to assert its rights that mooted the legal controversy and *Spangler* is not analogous to the instant case where HHC arguably only complied with its obligations

Spangler, as it comes from another jurisdiction, can only provide persuasive authority, its rule does not comport with the law of this State, as evolved in administrative proceedings before this Board or with the limits on the mootness doctrine affixed by the courts of this State. Moreover, the *Spangler* court was summarizing and quoting an earlier Supreme Court of North Carolina case, *In re Peoples*, 296 N.C. 109 (1978), under which this matter would not be found moot. *In re Peoples* concerned whether the resignation of an official moots a proceeding to remove him, which it found turned upon whether the sole purpose of the proceeding was the removal of the official or whether the commission had other powers, such a sanctions. If the former, then a resignation would moot the proceedings, but if the later, it would not. The Board's powers in an improper practice petition are more analogous to the later, as the Board has the power to order additional actions, such as posting a notice. Therefore, under the rationale of *In re Peoples*, which we do not adopt, this matter is not moot.

Finally, even if we were to find that the dispute had been rendered moot, the circumstances present here–arguable compliance only in response to the filing of an improper practice petition–presents "the established exception to mootness for disputes capable of repetition, yet evading review." *DC 37, Local 1457*, 1 OCB2d 32, at 24 (quoting *Davis v. FEC*, __ U.S.__, 2008 U.S. LEXIS 5267, * 21 (June 26, 2008)); *see generally Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U.S. 498, 515 (1911); *Matter of M.B.*, 6 N.Y.3d 437, 447 (2006).[9]

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under the NYCCBL after a petition was filed against them.

[9] HHC also quoted *Black's Law Dictionary*: "A case is 'moot' when 'determination is sought on a matter, when rendered, cannot have any practical effect on the existing controversy.'" (HHC Closing Brief at 43). However, *Black's Law Dictionary* goes on to recognize the exception to the mootness doctrine for matters likely to recur: "one [is] not entitled to judicial intervention *unless* the issue is a recurring one and likely to be raised again between the parties." *Black's Law Dictionary*,

Accordingly, we find that the Union's NYCCBL § 12-306(c)(4) claim raised in the instant petition is not moot and proceed to the merits. We do not find it reasonable for HHC not to have provided the position descriptions, which contained the Former SMCs' new civil service titles, when it was undisputably aware that the Union was investigating whether the civil service title changes were appropriate. However, we need not determine the scope of the Union's initial requests. First, HHC undisputably did not comply with the Union's request as it understood it, for it failed to produce nine of the requested functional job descriptions until it answered the instant petition. Indeed, to date, HHC has not provided current functional job descriptions for two Former SMCs (Lerhfeld and Prabhaker). Therefore, even under the narrow view advocated by HHC, it is in violation of NYCCBL § 12-306(c)(4) for failing to provide all of the requested functional job descriptions in a timely manner. Second, by the end of the hearings, if not before, HHC was unquestionably on notice of the Union's request for all job descriptions–functional and position–for the Former SMCs and, to the extent such has not yet been produced, we order HHC to promptly so produce.

A failure to supply information in violation of NYCCBL § 12-306(c)(4) "necessarily constitutes a violation of the duty to bargain in good faith pursuant to NYCCBL § 12-306(a)(4)." *COBA*, 75 OCB 17, at 8 (BCB 2005); *see also 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). HHC's sole argument as to why a NYCCBL § 12-306(a)(4) should not be found due to its failure to provide the requested information is that "Petitioner has failed to allege facts sufficient to find a violation

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1008 (6th ed. 1990) (citing *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974)) (emphasis added).

of NYCCBL § 12-306 (c)(4)." (Ans. ¶ 64). Since we have found to the contrary–that the Union has established a NYCCBL § 12-306 (c)(4) violation–we find that HHC has violated NYCCBL § 12-306(a)(4) by failing to provide the requested information.

Similarly, HHC's sole argument as to why a NYCCBL § 12-306(a)(1) violation should not be found due to its failure to provide the requested information is "because Petitioner has failed to allege facts sufficient to find a violation of NYCCBL § 12-306 [](a)(4) and (c)(4)." (Ans. ¶ 62). Once again, as we have found to the contrary–that the Union has established NYCCBL § 12-306 (a)(4) and (c)(4) violations–we find that HHC has violated NYCCBL § 12-306(a)(1) by failing to provide the requested information.[10]

Therefore, we direct HHC to provide to the Union, within thirty (30) days of the date of this decision, the current job descriptions, both functional and position, to the extent that they exist, for the two Former SMCs (Lerhfeld and Prabhaker) that had not been provided to the Union as of the close of the hearings. We will permit the Union, within thirty (30) days of receipt of the requested information, to submit any information provided in response hereto it deems germane to the outstanding issues in this case, upon which the Board will proceed to adjudicate the Union's claim that HHC violated NYCCBL § 12-306(a)(1) by changing the civil service titles of these employees.

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[10] Both this Board and Public Employees Relations Board have repeatedly held that 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; *see COBA*, 75 OCB 17, at 8; *Schyler-Chemung-Tioga Board of Coop. Educ. Servs.*, 34 PERB ¶ 4521 (2001); *Greenburgh No. 11 Union Free Sch. Dist.*, 33 PERB ¶ 3059 (2000).

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-2631-07, filed by the Organization of Staff Analysts against the New York City Health and Hospitals Corporation ("HHC"), be, and the same hereby is, granted in part, and it is further

ORDERED, that HHC produce, within thirty (30) days of the date of this Order, the current job descriptions, both functional and position, to the extent that they exist, for the two Former SMCs (Lerhfeld and Prabhaker) that had not been provided to the Union.

Dated: New York, New York
December 17, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

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