SSEU, Local 371, 2 OCB2d 16 (BCB 2009) (IP) (Docket No. BCB-2713-08).

Summary of Decision: The Union claimed that the City violated the NYCCBL § 12-306(a)(1), (4), and (5) when it failed to bargain in good faith over the reassignment of duties from Congregate Care Specialists to Homemakers, with the result that employees in the higher-paid Congregate Care Specialist title were subject to layoff. The City argued that its decision was executed without anti-union animus and was a proper exercise of ACS's ability to assign work. The Board found that the decision to reorganize the nurseries in the field offices was within the discretion of management and not subject to the duty to bargain. **(*Official decision follows*.)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, DISTRICT COUNCIL 37, AFSCME,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

DECISION AND ORDER

On July 31, 2008, the Social Service Employees Union, Local 371, District Council 37, AFSCME, ("Local 371 "or "Union") filed a verified improper practice petition against the New York City Administration for Children's Services ("ACS") and the New York City Office of Labor Relations ("OLR"). The Union alleges that the City of New York ("City") violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12,

Chapter 3) ("NYCCBL") § 12-306(a)(1), (4) and (5), by refusing to bargain over ACS's decision to reassign duties performed by employees in the Congregate Care Specialist title in nurseries in four ACS field offices to employees in the title of Homemaker, resulting in ceasing the use of the Congregate Care Specialist title in those nurseries. The City argues that it had acted in accordance with its lawful discretion and had bargained to agreement with the Union with respect to any impact of its decision. Asserting that the resolution of the instant matter depends upon interpretation of the Citywide Agreement and the Social Services and Related Titles Agreement for the period of July 1, 2002, to June 30, 2005, dated September 13, 2005 ("Unit Agreement"), the City contends that this matter should be deferred to arbitration. The Board finds that the decision to reorganize the field office nurseries is not subject to the duty to bargain and denies the petition without prejudice to the filing of a request for arbitration on any contractual issues.

BACKGROUND

ACS provides child welfare services for children and families in the City for the purpose of preventing abuse and neglect of children. Nursery services are available to ACS clients while they conduct business at ACS field offices.

Prior to March 2000, the field office nurseries were staffed by employees in the titles of Houseparent, Houseparent Aide, and Home Aide. In March 2000, the Congregate Care Specialist title was created and the functions of the titles that previously staffed field office nurseries were subsumed under the title of Congregate Care Specialist. The job description of the Congregate Care Specialist states, in pertinent part, that an employee in this title may

typically provide direct supervision of children and youth in congregate care facilities and related functional areas of ACS, or in a community-based home, group residence, diagnostic-reception center or other functional area or in non-secure detention facilities under the control of the Department of Juvenile Justice ("DJJ").

On a date not specified in the pleadings, ACS decided to assign Homemakers rather than the previously assigned Congregate Care Specialists to provide direct care services to children in ACS field office nurseries. The Homemaker job description states, in pertinent part, that "an employee in this title may typically prepare and serve meals to families in their home or in a group home, provide household cleaning services for these families, accompany children to clinics, schools, playgrounds, and assist other team members who provide services to such families either in the families' homes or in group homes," but it does not specify ACS field office nurseries as a location in which employees in this title perform their work. (February 10, 2009, Letter). The Unit Agreement specifies higher minimum and maximum salaries for incumbent employees in the Congregate Care Specialist title than for those in the Homemaker title.

With respect to out-of-title claims, the Unit Agreement provides in Article VI, § 1(c), for the resolution of such a dispute as "[a] claimed assignment of Employees to duties substantially different from those stated in the job specifications. . . ." As to layoffs, the Unit Agreement provides, in Article XII, § 5, that "[t]he Employer agrees to make every reasonable effort to supply the Union with information regarding changes in working conditions, changes in job content, changes in programs, or functions prior to proposed implementation of such changes." On the subject of layoffs, the Citywide Agreement, in Article XVII, § 1, provides that, "[w]here

layoffs are scheduled affecting full-time employees in competitive, non-competitive, and labor classes the following procedures shall be used: (a) Notice shall be provided by the Office of Labor Relations to the appropriate union(s) not less than thirty (30) days before the effective dates of the projected lay-offs. . . ."[1]

According to the Union, on or about May 30, 2008, ACS announced that, as part of a reorganization, it would lay off employees in the titles Congregate Care Specialist (75), Homemakers (17), and Supervising Home Economist (1). The text of a letter from the OLR Commissioner to the Union, dated May 30, 2008, states that:

> These layoffs and/or terminations for business necessity are scheduled effective July 18, 2008, affecting employees represented by your Union. This list is subject to change due to the application of statutory and contractual layoff procedures.

(Ans. Ex. 1). The Commissioner's letter invited the Union, which is the exclusive representative for collective bargaining purposes of both Congregate Care Specialists and Homemakers, to contact his office if the Union wished to schedule a meeting to discuss the matter.[2] (Ans., Ex. 1).

On June 9, 2008, some 22 representatives from OLR, ACS, DC 37, Local 371, and the New York City Office of Management and Budget met to discuss the matter. City

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[1] Although the record does not directly identify the classification to which the Congregate Care Specialist title belongs, it appears to be of the competitive class. Unlike the job description of the Congregate Care Specialist which does not specify title class, the job description of the Homemaker title does identify the latter as a title in the non-competitive class. The Citywide Agreement provides, in Article XVII, § 2, that, "[w]hen a layoff occurs, the Employer shall provide to the appropriate bargaining representative a list of permanent competitive class employees who are on a preferred list with the original date of appointment utilized for the purpose of such layoff. . . ." The City, in its February 4, 2009, letter supplementing the record, states that 11 Congregate Care Specialists were placed on a preferred list following the announcement that they would be laid off.

[2] Certificate No. 37-78.

representatives told Union representatives that the Congregate Care Specialist title would no longer be used at ACS field office nurseries and that, as a result of this reassignment of duties, due to budgetary constraints, employees in that title would be laid off. It is likewise undisputed that telephone discussions about this took place between the date of that meeting and July 2, 2008, at which time the City and the Union met again over the City's plan to reassign the tasks performed by the Congregate Care Specialists by reassigning eight of 17 Homemakers who, themselves, had also been slated for layoff, and the resultant layoff of the Congregate Care Specialists. The Union asserts that its representatives had noted at that meeting that field office nurseries were then and previously had been staffed by Congregate Care Specialists. The Union also asserts that its representatives pointed out that no negotiations had taken place concerning any reorganization of the nurseries.

On July 8, 2008, Union Vice President Wells called OLR Associate Commissioner Brewer asking the City to negotiate over the reorganization plans. The Union states, and the City generally denies, that the Associate Commissioner "did not agree to negotiate." (Pet. ¶ 5). On July 10, 2008, the Union Vice President again spoke by phone with the Associate Commissioner as well as with OLR Assistant Commissioner Yates and ACS General Counsel Cardieri. Wells reiterated his contention that the use of Homemakers in the field office nurseries was a "misuse" of the title and, in his view, not permissible. (Pet. ¶ 6). The Union states, but the City generally denies, that the City again declined to negotiate. In an e-mail dated July 17, 2008, OLR notified the Union that eight Homemakers were going to be assigned to work in the field office nurseries. Additionally, the e-mail provides that six of the Congregate Care Specialists had been assigned to the DJJ; while nine employees qualified for positions at the DJJ, three of the lines were "leave

lines," which could not be filled.[3]

The City and the Union agree that, to date, a total of eight Congregate Care Specialists who were assigned to ACS field nurseries have been laid off and that no more are slated for layoff. The Union has in its pleadings and in its February 10, 2009, letter to the Trial Examiner reiterated its contention that the thrust of its claim is the City's "refusal to bargain over the reorganization and reassignment of work from Congregate Care Specialists to Homemakers at lower salaries," of which the "layoffs are only a portion." (February 10, 2009, Letter; *see also* Pet. ¶ 1). As relief, the Union seeks an order that the City cease and desist from (1) terminating the use of the Congregate Care Specialist title in the nurseries in field offices at ACS; (2) replacing Congregate Care Specialists with Homemakers; and (3) assigning the work performed by Congregate Care Specialists to Homemakers in the field office nurseries. Additionally, the Union seeks an order "[d]irecting ACS to bargain over the assignment of work and layoff of Congregate Care Specialists." (Pet. at p. 2).

[3] The City asserts, in its February 4, 2009 letter supplementing the record, that by July 2, 2008, the number of employees in the Congregate Care Specialist title stood at 47, of whom 34 were provisional, 11 permanent. The 11 permanent employees in the Congregate Care Specialist title were placed on a preferred list. Eight of them qualified for DJJ positions and were certified from that list. Six of the eight were actually appointed by DJJ; two of the eight declined. As of February 4, 2009, the preferred list contained five names (the three that were not qualified for DJJ and the two that had declined). The possibility of relocating Congregate Care Specialists to the New York City Health and Hospitals Corporation was explored but Counsel for the City asserts that no vacancies were available.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that ACS violated NYCCBL § 12-306(a)(1) and (4) by refusing to bargain in good faith on matters within the scope of collective bargaining, namely, its decision to stop using the higher paid Congregate Care Specialist title in ACS field office nurseries in favor of using the lower-paid Homemaker title and the resulting reassignment of work heretofore performed by Congregate Care Specialists to Homemakers in the field office nurseries.[4] The Union argues that Homemakers have not previously performed this work and that it does not fall within the Homemaker job description.

The Union also argues that ACS has violated NYCCBL § 12-306(a)(5) by instituting these changes unilaterally and by refusing to bargain with the Union over the changes. By doing so, the Union argues that ACS has also violated NYCCBL § 12-306(a)(1), in that it is restraining and coercing public employees in the exercise of their rights guaranteed by § 12-305 of the NYCCBL.[5]

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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:
(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;
(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

[5] 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

The Union further argues that the City's admission that it informed the Union that it had decided to reassign the work from Congregate Care Specialists to Homemakers "for 'economic' and 'budgetary' reasons" establishes that the purposes of the discussions with the Union regarding this decision was not to bargain over the decision, but to inform the Union of a decision it had made.

The Union has acknowledged that the City has placed some employees who were laid off either within ACS or at DJJ; subsequently, and with the consent of the City to its filing an additional submission, the Union reaffirmed that "the layoffs are only a portion of the Respondents' refusal to bargain over the reorganization and reassignment of work." Moreover, in the Reply, the Union contests the City's attempt to frame the argument as contract-based and specifically eschews any suggestion that it means to argue that the instant matter is referable to arbitration. The Union seeks a statutory remedy only.

City's Position

The City argues that ACS has no duty to bargain over the personnel changes which it admittedly has made as they are discretionary matters which the agency is permitted, under the NYCCBL, to take unilaterally.[6] The City characterizes the Union's position as a failure to

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through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

[6] NYCCBL § 12-307(a) states in pertinent part:
Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) [and] working conditions. . . .

bargain over a practical impact, specifically the impact of the layoffs on the employees whose employment is terminated. The City contends such a claim is premature because the Union has assertedly failed to address the issue of practical impact through what the City characterizes as "the proper proceeding," *i.e.*, a petition seeking a scope of bargaining determination which might require an evidentiary hearing to determine questions of bargainability. (Ans. ¶¶ 33 and 39). In the absence of a Board determination as to whether ACS's reorganization of the nurseries has created a practical impact, the Union's assertion that the City has improperly refused to bargain over the alleviation of any perceived impact is premature. Should the Board decide that the reorganization has created a *per se* impact, the City avers that its representatives have made substantial efforts to negotiate with the Union to ameliorate the impact on the potentially displaced workers. The City asserts that it and the Union have engaged in several bargaining sessions to discuss specifically the issues surrounding any impact on the 75 Congregate Care Specialists to be laid off, by placing the employees in other titles and by finding work for them in other agencies.

As to the claim that NYCCBL § 12-306(a)(1) has been violated, the City argues that the Union has made no allegations to support any derivative or independent claim that the agency's decision was improperly motivated. Finally, the City urges that the matters about which the Union complains in this case – layoffs and out-of-title work – have been negotiated to conclusion by the parties and that the agreement has been memorialized in the parties' Unit Agreement and Citywide Agreement. The City notes that the Union has never filed an out-of-title grievance relating to this issue. Insofar as the instant complaint concerns contract interpretation, the City maintains that this matter should be deferred to arbitration. On this point, the City cites Article

VI, § 1 (c), and Article XII, § 5, of the Unit Agreement and Article XVII of the Citywide Agreement.[7]

DISCUSSION

The instant matter poses the question of whether the City's decision to reorganize staffing at ACS field office nurseries, reassigning work, and thus replacing employees in the Congregate Care Specialist title with employees in the Homemaker title, is violative of NYCCBL § 12-306(a)(1), (4), and (5).

Pursuant to NYCCBL § 12-307(a), public employers and public employee organizations have the duty to bargain in good faith over wages, hours, and working conditions. It is an improper practice under § 12-306(a)(4) for a public employer to refuse to bargain in good faith on matters within the scope of collective bargaining. *NYSNA*, 71 OCB 23, at 11 (BCB 2003). However, under both the NYCCBL and the Taylor Law, certain areas lie outside the scope of mandatory bargaining, and thus fall outside the scope of collective bargaining, including the right to allocate duties among its employees, and "personnel decisions concerning termination of employees because of economic or other legitimate reasons." *Antoine*, 73 OCB 8, at 10-11 (BCB 2004)(editing marks omitted; quoting *CWA, Local 1180*, 63 OCB 19, at 11 (BCB 1999)); *see also DC 37*, 15 OCB 21 (BCB 1975), *aff'd*, *City of New York v. Board of Collective Bargaining*, N.Y.L.J., Mar. 18, 1976 (Sup. Ct. N.Y. Co. Mar. 15, 1976); *see generally DOITT*, 77 OCB 13, at

[7] Those provisions pertain to Article XII (the employer to make reasonable efforts to inform the Union with regard to impending changes in working conditions, job content, etc.) and Article VI, § 1(c) (out of title work) of the Unit Agreement and Article XVII (30-day notice prior to layoffs, preferred list for competitives, etc.).

16-17 (BCB 2007)(decision to assign or not to assign overtime within discretion of management); *UFA*, 71 OCB 19, at 6 (BCB 2003); *see also City of New York*, 40 PERB ¶ 3017, at 3067 (2007) (distinguishing mandatory demand for bulletproof vests for police officers from proposals that "seek to limit managerial discretion regarding deployment of personnel"); *City School District of the City of New Rochelle*, 4 PERB ¶ 3060, at 3706-3707 (1971); *City of White Plains and Professional Fire Fighters Ass'n*, 5 PERB ¶ 3008, at 3014 (1972)(decision to make reduction in force not mandatory subject of bargaining).

In the case before us, the Union has asserted that it seeks to bargain over the decision to reorganize the manner in which the ACS nurseries provide services to clients at its field offices and to reassign the work from Congregate Care Specialists to Homemakers. The Union has not contested that the decision to reassign the work performed by Congregate Care Specialists to Homemakers was motivated by economic and budgetary reasons. Accordingly, we find that the City's decision to reorganize the field office nurseries and to reassign the tasks in question is not one that is subject to the duty to bargain. *Antoine*, 73 OCB 8, at 10-11.[8] Accordingly, we dismiss any claim arising from the decision to reorganize and the resulting layoffs based on the record herein.

The City has identified certain contractual provisions which it asserts govern the

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[8] As we reaffirmed in *Antoine*, "[u]nder NYCCBL § 12-307(b), questions concerning the practical impact of management's decision to layoff employees [are] bargainable." *Id.*; *citing CWA, Local 1180*, 63 OCB 19, at 13-14 (BCB 1999); *DC 37, Locals 983 and 1062*, 45 OCB 6, at 28 (BCB 1990); *Probation and Parole Officers Ass'n, Local 599, SEIU*, 17 OCB 2, at 10-11 (BCB 1976); *see also City of Troy*, 28 PERB ¶ 4657 (1995). The Union has not alleged, and indeed the factual submissions of the parties do not support, any claim that the City has declined to bargain with the Union as to the practical impact of the layoffs resulting from the decision to reorganize and to reassign the employees here.

controversy here. As we have often noted, "this Board, like the Public Employment Relations Board, must comply with Civil Service Law § 205.5(d)," which states in pertinent part:

> the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

SSEU, L. 371, 1 OCB2d 20, at 12 (BCB 2008); *DC 37*, 79 OCB 11, at 9-10; *see also City Empl. Union, L., 237*, 75 OCB 24, at 15 (BCB 2006). However, resolution of the issue of whether the City's duty to bargain over its decision to reorganize the provision of services at its field office nurseries does not require interpretation of any contractual provision.

This finding does not, of course, preclude any contractual claim that the transfer of work from Congregate Care Specialists to Homemakers requires Homemakers to do work that is outside of the job duties of their title, which may be filed subject to contractual limitations. *See CSTG*, 29 OCB 33, at 6-9 (BCB 1982); *SSEU, L. 371*, 65 OCB 27, at 6 (BCB 2000).

Accordingly, the instant petition is dismissed in its entirety. Our determination is without prejudice to the Union's right to seek arbitration of any claims that may arise from any alleged failure to comply with the provisions of the agreements referenced here. *SSEU, L. 371*, 1 OCB2d 20, at 12 (BCB 2008); *see also CEA*, 79 OCB 39, at 17 (BCB 2007).

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, BCB-2713-08, filed by the Social Service Employees Union, Local 371, District Council 37, AFSCME, be, and the same hereby is, dismissed, without prejudice to the filing of a Request for Arbitration in accordance with the Decision herein.

Dated: April 22, 2009
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PETER PEPPER
MEMBER