DC 37, Local 2507, 2 OCB2d 28 (BCB 2009)

(IP) (Docket No. BCB-2767-09).

Summary of Decision: The Union alleged that the FDNY violated NYCCBL § 12-306(a)(1), (2), and (4) when it posted in locations visible to all employees a letter addressed to the Union president. The Union alleges the letter set forth bargaining positions and demands and also threatened bargaining unit members with work actions. The City contends that the letter was a legitimate communication from management to the bargaining unit members, that the Union has not alleged facts necessary to assert that the FDNY engaged in direct dealing, and that the FDNY did not interfere with Union. The Board finds that the FDNY did not engage in direct dealing and did not interfere with the administration of the Union. Accordingly, the Union's petition was dismissed in its entirety. ***(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 2507,

Petitioners,

- and -

THE CITY OF NEW YORK AND
THE NEW YORK CITY FIRE DEPARTMENT,

Respondents.

DECISION AND ORDER

On May 8, 2009, District Council 37 ("Union") and its affiliated Local 2507 ("Local") filed a verified improper practice petition against the City of New York ("City") and the New York City Fire Department ("FDNY" or "Department") alleging that the FDNY violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (2), and (4) when it posted a letter addressed to the Local President

on bulletin boards at work locations, which the Union alleges set forth bargaining positions and demands and threatened bargaining unit members with reprisals for work actions. The City contends that the letter was a legitimate communication from management to the bargaining unit members and that the Union has not alleged facts necessary to state a claim that the FDNY engaged in direct dealing. The Board finds that the FDNY did not engage in direct dealing and did not interfere with the administration of the Union. Accordingly, the Union's petition is dismissed in its entirety.

BACKGROUND

The FDNY's Emergency Medical Services ("EMS") command responds to medical emergencies in the City and employs various personnel, including emergency medical technicians, paramedics, and fire inspectors. The Union represents City employees that serve at the FDNY EMS in the titles Emergency Medical Specialist–EMT and Emergency Medical Specialist–Paramedic; these employees work in various locations throughout the City. Because the Union's membership is located throughout the City, the Union often updates its members by sending Member Updates referred to as "blast faxes," which are sent simultaneously to all of the various locations at which bargaining unit members work.

During 2007 and 2008, the Union and the FDNY bargained and negotiated a Twelve Hour Pilot Program ("Pilot Program") pursuant to which bargaining unit members would work 12-hour tours, alternating between 36 hours per week and 48 hours per week. On or about October 16, 2008, the parties signed a Memorandum of Agreement, which included a side letter concerning the Pilot Program. Among other things, the side letter discussed overtime compensation and also stated that "[a] labor/management committee [would] be established to address implementation issues as they arise." (Ans., Ex. 2). Representatives of the Union and the FDNY visited EMS stations together to

present information about the Pilot Program and answer questions from bargaining unit members. After the agreement was reached, the FDNY informed the Union that when members were working 36 hour weeks, they could be called in for training on days on which they were not working, but would only be called in for eight hours and would only be paid at the time and one-half overtime rate for the final four hours worked. On or about March 1, 2009, the Pilot Program was implemented throughout the City.

According to the Union, the Local received complaints from members regarding disciplinary action related to operating EMS vehicles in January 2009, after which the Local issued a Member Update by blast fax, which stated:

Member Update

> Due to an increase in command discipline involving motor vehicle accidents we are asking members to review the Operating Guide Procedure on Safe Operation of EMS vehicles.
>
> Operate all service vehicles in a safe and prudent manner. Obey all guidelines set forth in this policy while operating in emergency mode. Vehicle operators shall bring the vehicle to a complete stop at all red lights and stop signs.
>
> When entering an intersection ensure that all oncoming traffic is stopped prior to continuing your response. Utilize lights and warning devices on those priority calls designated in this procedure.
>
> Sirens are rarely used while transporting a patient. Always obey all traffic signals in a prudent manner to protect the patient, the public and yourself.

(Pet., Ex. A). On March 31, 2009, the Local re-sent this Member Update by blast fax and sent another Member Update that it characterizes as concerning the Union's work with the FDNY management in Albany on funding for EMS Operations, which stated:

Member Update

> While the Union was busy in Albany securing funds to avert deep cuts in EMS tours and personnel, our noble chiefs were busy thinking up ways to abuse the rank and file.
>
> Rather than demonstrate some true leadership skills, the 7th Floor would prefer to violate the alternative work schedule agreement. Rather than pay you the overtime you should receive, the Department is scheduling members for training days for eight hours consisting of four at straight time and four of overtime. This is not what we agreed to and it would appear that the Department is doing all it can to undermine this pilot program.
>
> Attempts to get them to reconsider were met with the standard line of "too bad file a grievance." We will be doing this immediately and will be providing additional direction shortly.

(Pet., Ex. B) (emphasis removed).

On April 1, 2009, John J. Peruggia, FDNY Chief of EMS Command sent a letter responding to the Member Updates, which was addressed to Local President Patrick Bahnken. Chief Peruggia's letter was sent by facsimile and regular mail to the Local President, but it was also faxed to all EMS divisions and posted on bulletin boards as were the Member Updates. Chief Peruggia's letter states in pertinent part:

> Dear Mr. Bahnken . . . .
>
> **With regard to the Update Concerning the 12 hour tour Pilot:**
>
> The City was made aware of the issue with Medicaid funding and invited the Union to participate in the lobbying effort to correct it. The assistance provided to restore this Medicaid funding for EMS is greatly appreciated. However, you fail to mention that for two days, the Union lobbied along with myself [and] the Assistant Commissioner for budget and staff from the Mayor[']s Office. I take exception to allegation[s] that this was done by the union while simultaneously "the noble chiefs" were concocting ways to abuse the men and women of the EMS Command. In all fairness, both EMS Operations and Division 3 have been extremely flexible in crafting the policy to make this pilot program successful.

Your issue regarding the scheduling of members from Division 3 to attend core and the "violation" of a work schedule agreement are incorrect. Members are entitled to overtime compensation for hours worked in excess of forty (40) [hours]. Members will be scheduled to attend core training on one of their scheduled tours during the four day work week. Therefore, on that week, they will work a total of forty-four (44) hours, and as such, will receive four hours of overtime. As a reminder, this shall occur only twice per year. To suggest that they be paid for additional overtime, which is not worked, is not acceptable.

Further, my discussions with you on this topic did not offer the standard line of "file a grievance" but instead, suggested that the union request a labor/management meeting on this topic and to schedule one through the Office of Labor Relations.

With regard to the update concerning the Safe Operation of EMS Vehicles:

I applaud you in reminding your members to operate their vehicles in a safe and prudent manner consistent with EMS Operating Guide Procedure #107-01. The health and safety of our EMTs and Paramedics is always a high priority. However, there has not been an increase in the issuance of Command Discipline involving motor vehicle accidents. In actuality, during the first quarter of 2009, no CDs were issued resulting in the loss of time or money as related to an MVA despite an increase in these unfortunate events. To suggest that as a means to build "Culture of Safety" is very misleading.

Furthermore, contrary to your memo suggesting that members bring their vehicle to a complete stop at all red lights and stop signs, it is important that members realize that OGP-107-1, section 5.1.13.D states, "***While in Emergency Mode, the driver may proceed past a steady red signal, a flashing red signal or stop sign, but only after slowing down as may be necessary for safe operation***."

Lastly, I remind you that actions invoked by members that may adversely affect normal EMS Operations may be construed as a "job action" which could have ramifications.

Both the Local and the Leadership of the EMS Command have always enjoyed a positive and healthy working relationship and yet

> despite our differences at times, have always been able to achieve an amicable solution that best serves the Department, the Union and its membership, but more importantly, the men and women of the City of New York who count on us being at our BEST when they need us the most. I look forward to discussing these matters with you and as always, remain available.

(Pet., Ex. C) (emphasis in original).

Thereafter, the Union contacted the FDNY, demanding that Chief Peruggia's letter be rescinded and removed from the bulletin boards on which it was placed. The FDNY stated its approval of Chief Peruggia's letter, and stated it would not remove the letter. Chief Peruggia sent a letter to all station and battalion chiefs ordering the letter be disseminated and posted for EMS personnel.

Also on April 1, 2009, the Union held a general membership meeting.[1] During the meeting, the Local President received a call on his cellular phone from Chief Peruggia. During the conversation, Chief Peruggia allegedly stated "I have never been called noble before."

On April 6, 2009, representatives of the Union and of the FDNY met to discuss the way in which training would be scheduled in light of the Pilot Program, the topic was listed on the sign-in sheet as being "L. 2507 12-hr Tour/Core Training."[2]

POSITIONS OF THE PARTIES

Union's Position

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[1] The Union alleges, and the City disputes, that Chief Peruggia was aware that the Union was holding a general membership meeting on April 1, 2009.

[2] The sign-in sheet from the meeting reflects that eleven people were at the meeting, including FDNY management and labor relations as well as representatives of the Union and the Local.

The Union argues that FDNY management violated NYCCBL § 12-306(a)(1) by distributing to its members Chief Peruggia's April 1, 2009 letter, which coerced bargaining unit members and interfered with their rights pursuant to NYCCBL § 12-305.[3] Also, the Union alleges, the FDNY violated NYCCBL § 12-306(a)(2) by interfering with the communications between the Local and its membership, by questioning the Union's leadership, and by attempting to "belittle, intimidate, harass and undermine the leadership."[4] (Union's Memorandum of Law at 9). Although the letter was addressed to the Local President, in actuality, it was an open letter to all bargaining unit members that was written in order to threaten and intimidate Local members and undermine the Local's leadership. Further, "if FDNY merely sent a letter to bargaining unit members clarifying its position on certain matters, [the Union] may not be able to establish a violation of the NYCCBL.

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[3] 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;

Further, § 12-305 of the NYCCBL 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. . . .

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

> It shall be an improper practice for a public employer or its agents:
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;

However, the fact that [the FDNY] disseminated a letter that purported to be a private correspondence with President Bahnken to all bargaining unit members was an attempt to undermine the leadership of [the Local] and interfere with the administration of the Union." (Reply at 29).

The Union argues that Chief Peruggia's letter contained bargaining demands and positions regarding the alternative work schedule. Thus, by issuing the letter, the FDNY dealt directly with bargaining unit members as the letter set forth bargaining positions and demands and also contained threats of reprisal, thereby violating its obligation to bargain in good faith on mandatory subjects of bargaining pursuant to NYCCBL § 12-306(a)(4).[5] In contrast to Chief Peruggia's letter, the Member Update to which he responded did not set forth specific bargaining demands; "[i]t simply stated that the Chiefs were undermining the alternative work schedule." (Union's Memorandum of Law at 7). While the parties had entered into an agreement regarding the Pilot Program, the parties had not reached agreement regarding all aspects of the program when Chief Peruggia posted his letter. In particular, the parties had not reached agreement regarding payment for training. In his letter, Chief Peruggia attempted to negotiate with bargaining unit members as he set forth the FDNY's bargaining position in response to the Union's demands concerning training days. Further, while the City insists that Chief Peruggia was merely trying to clarify factual inaccuracies in the Union's Member Updates, such could have addressed the employees directly instead of trying "to undermine the Union's leadership by disseminating a letter, which purported to be a private correspondence to President

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

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

Bahnken, to all bargaining unit members." (Rep. ¶ 26).

The Member update about safe driving, to which Chief Peruggia responded with threats, "simply reiterated the proper operating procedure and reminded members that there has been an increase in disciplinary action regarding Safe Operation of EMS Vehicles." (Union's Memorandum of Law at 7). Chief Peruggia's statement concerning a job action and potential ramifications "is a thinly veiled threat to discipline bargaining unit members as "[b]ased on the totality of circumstances, including the fact that the 'job action' comment was made in a letter which purported to be a private communication to the union president, a reasonable person would construe Chief Peruggia's comments as a threat and not merely a restatement of the standard by which FDNY determines that a job action occurred." (Rep. ¶¶ 27, 28).

City's Position

The City argues that the Union's petition must be dismissed because the actions of which it complains, specifically Chief Peruggia's posting the letter, do not amount to a violation of the NYCCBL. The Union has not shown that the FDNY engaged in direct dealing as such requires a showing of "a threat of reprisal, a promise of benefit, an attempt to impede reaching agreement with a union, or a subversion of the employees' rights of organization," none of which was shown by the Union. (Ans. at 4).

While the City generally agrees with the Union's recitation of the facts, these facts are insufficient to show direct dealing. The FDNY did not take any action that interfered with, restrained, or coerced the bargaining unit members' rights under NYCCBL § 12-305. The letter from Chief Peruggia was a permissible management action; it was "a reasonable clarification" in response to the Union's memos, and it did not contain threats of reprisal and did not subvert rights to

representation. Regarding the alleged violation of NYCCBL § 12-306(a)(4), the Union has not shown that the FDNY failed to bargain, as in fact, the parties had already bargained over the Pilot Program. Further, the Union has not asserted facts necessary to establish a violation of NYCCBL § 12-306(a)(2); it has not alleged that the FDNY showed preferential treatment to a union, interfered with administration or formation of the Union, or assisted the Union such that it would be deemed a creation of the FDNY.

DISCUSSION

The claims and defenses raised in this case require this Board to examine the distinctions between impermissible direct dealing, on the one hand, and an employer's right to communicate with its employees, on the other. To ascertain the applicability of these concepts to the facts of this case, we begin our examination with a review of the case law relevant to each. We have held that "direct communication by an employer will violate the NYCCBL if the employer made threats of reprisal or force, or promises of benefit, or if the direct dealing otherwise subverted the members' organizational and representational rights." *UFA*, 69 OCB 5, at 7 (BCB 2002) *citing Committee of Interns and Residents,* 49 OCB 22, at 22 (BCB 1992); *see also Local 1549, DC 37*, 49 OCB 17 (BCB 1992). Therefore, in order to establish direct dealing, "an employee organization must allege . . . that an employer impermissibly bypassed the employee organization for the purpose of negotiating or attempting to negotiate with an employee or a group of employees aimed at reaching an agreement on the subject under discussion." *Dutchess Comm. College*, 41 PERB ¶ 3029, 3129 (2008); citing *County of Cattaraugus*, 8 PERB ¶ 3062 (1975); *City of Schenactady*, 26 PERB ¶ 3047 (1993); *Town of Huntington*, 26 PERB ¶ 3034 91993); *CUNY*, 38 PERB ¶ 3011 (2005); *see also*

PBA, 77 OCB 10, at 14-15 (BCB 2006) (importance of context of employer speech to establish purpose of negotiation with employees and subverting union) *citing*, *inter alia*, *Americare Pine Lodge Nursing and Rehabilitation Center v. NLRB*, 164 F.3d 867 (4th Cir. 1999); *City of Buffalo*, 30 PERB ¶ 3021 (1997).

We have also held that an employer "has a right to disseminate information and to express any views, argument, or opinion in any media form" as long as the expression does not include a threat of reprisal, offer a promise of a benefit, attempt to impede reaching agreement with a union, or subvert the employees' rights of organization and representation." *PBA*, 77 OCB 10, at 14, *citing NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, at 134 (2d Cir. 1986) *quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (editing marks omitted). Thus, not all employer communication with employees constitutes direct dealing; an "employer has a right to speak to its employees about, for example, the status of negotiations, the proposals made, its positions and opinions, and its reasons for those." *PBA*, 77 OCB 10, at 13-14 (BCB 2006) *citing Pratt & Whitney*, 789 F.2d at 134-136. Such communication constitutes direct dealing with employees only when it amounts to bypassing a certified bargaining representative and negotiating directly with members. *UFA*, 69 OCB 5 (BCB 2002).

The Union relies heavily upon our decision in *UFA*, in which we found that the FDNY engaged in direct dealing when the Fire Commissioner had a message published in a FDNY newsletter concerning his position regarding a mandatory subject of bargaining, openly chastised the Union leadership, and made an explicit promise of benefit. However, this case differs from *UFA* in several important respects. First, unlike the Commissioner in *UFA*, we find that Chief Peruggia was not making a bargaining offer to the members, but was instead stating his interpretation of the

Pilot Program, a matter upon which the parties had reached agreement and memorialized in the side letter. To the extent that their views on the agreement differ, such would involve a dispute over a matter of contractual interpretation, not continued bargaining.[6]

In addition, contrary to the Union's contention, we do not view Chief Peruggia's statements regarding "ramifications" for failing to comply with existing Department policy as a impermissible threat that would undermine the representational and organizational rights of the Union; an employer may give its opinion of possible adverse consequences of a Union's proposed action without committing an improper practice. *See City of Albany*, 17 PERB ¶ 3068 (1984). We note, in this regard, that failure to follow existing written agency policy often may provide a basis for corrective or disciplinary action. Absent evidence of improper motive, which we do not find in this matter, advising employees of such "ramifications" cannot be deemed to be an improper practice. Concerning the language that Chief Peruggia used in his letter directly referring to what he viewed as inaccuracies in the Union's communications to members, we find that, given the circumstances in which the statements were made, they were legitimate "opinionated response[s] to what the [City] considered to be a distortion . . . of the facts . . . and [an] effort to clarify [the City's] position on the matters raised" by the Union. *Civil Service Employers Association, Inc. Local 100,* 27 PERB ¶ 4525 (1994) (editing marks in original); *see also City of Yonkers*, 23 PERB ¶ 3055 (1990).[7] We find that

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[6] We note also that the side letter stated that a labor management committee would be established to address implementation issues concerning the program.

[7] We also are persuaded by the analysis of the Fourth Circuit in *Americare Pine Lodge Nursing and Rehabilitation Center*, where the employer sent a letter regarding bargaining proposals to the Union's business office and copied the letters to the employees in which it found "no support for a rule requiring employers to delay informing its employees of a proposal until the union has had some period of time to consider it." 164 F.3d at 876. The Fourth Circuit reasoned that:

> [T]he publication [to the employees] of the exact offer that is properly

the FDNY did not engage in direct dealing, and therefore we find no violation of NYCCBL § 12-306(a)(1) or (4).

The Union also alleges a violation of NYCCBL § 12-306(a)(2) asserting that Chief Peruggia's letter was written "to threaten and intimidate Local 2507 members and undermine the leadership of the Local," thereby "subvert[ing] the organizational and representational rights of the Union and its leadership." (Union Memorandum of Law at 8). We have found violations of NYCCBL § 12-306(a)(2) in instances where "the record shows preferential treatment of one union over another, interference with the formation or administration of the union, or assistance to the union to such an extent that it must be deemed the employer's creation." *Sergeants' Benevolent Assn.*, 75 OCB 22, at 20 (BCB 2005) *citing Local 237*, 67 OCB 12 (BCB 2001); *see also Local 237*, 67 OCB 12 (BCB 2001) (finding a violation of NYCCBL § 12-306(a)(2) where a manager repeatedly met with rank and file members at their designated meeting place and had discussions related to the collective bargaining agreement and to internal union matters), *Seabrook*, 55 OCB 7 (BCB 1995) (finding a violation of NYCCBL § 12-306(a)(2) where an employer actively encouraged one slate of candidates to engage in electioneering while denying a similar opportunity to a competing candidate). We have considered Chief Peruggia's authoring of the letter in question, and we find that it in no way may be construed as interference and domination of the Union. Accordingly, this

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> before the union for consideration in no way erodes a union's position as the bargaining representative. There is no hint of a separate quid pro quo arrangement between the employer and employees in such circumstances and there is no danger of coercion. Instead, such notification tends to support the free exchange of information that aids employees in making informed decisions and promotes a stable bargaining relationship.

Id.

claim is also dismissed.

The Union has failed to allege facts sufficient to assert a violation of NYCCBL § 12-306(a)(2) or (4). As such, we find no derivative violation of NYCCBL § 12-306(a)(1).

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, docketed as BCB-2767-09, filed by District Council 37, AFSCME, AFL-CIO, Local 2507, be, and the same hereby is denied in its entirety.

Dated: September 24, 2009
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER