Local Union1969, DC 9, 3 OCB2d 42 (BCB 2010)

(IP)(Docket No. BCB-2738-09)

Summary of Decision: The Union alleged that the New York City Housing Authority interfered with protected activity and failed to bargain in good faith by withdrawing an agreed upon proposal to reduce the number of members scheduled to be laid off in exchange for productivity savings, and retaliated against the Union by laying off unit members for its attempts to enjoin layoffs. NYCHA argued that the layoffs were not mandatory subjects of bargaining, that NYCHA bargained over alleviation of the practical impact of the layoffs, and that NYCHA did not retaliate against the Union but merely implemented its prior legitimate decision to lay off employees after efforts to finalize an agreement failed. The Board found that, as the parties had not reached a meeting of the minds, no enforceable obligation had arisen and that NYCHA had neither refused to bargain in good faith the practical impact of the layoffs nor retaliated against the Union. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

LOCAL UNION 1969, DISTRICT COUNCIL 9, IUPAT,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On January 5, 2009, Local Union 1969, District Council 9, IUPAT, ("Union") filed a verified improper practice petition alleging that the New York City Housing Authority ("NYCHA") violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (3), (4), and (5) by withdrawing its proposal to reduce the

number scheduled layoffs in exchange for productivity savings, and for refusing to enjoin NYCHA layoffs in retaliation for the Union's attempt to appeal a court decision. NYCHA argues that the Union failed to allege any facts supporting its claims of protected activity, improper motivation, or bad faith bargaining. The Board finds that, as the parties had not reached a meeting of the minds, no enforceable obligation had arisen. The Board also finds that NYCHA has neither refused to bargain in good faith the practical impact of the layoffs nor retaliated against the Union. Accordingly, the petition is denied.

BACKGROUND

On February 29, 2008, NYCHA's Director of Human Resources sent to the Union president a letter stating that "layoffs and/or terminations for business necessity [a]re scheduled effective April 18, 2008, affecting employees represented by [the] Union at NYCHA." (Pet. Ex. A.) The letter included a "preliminary" list of affected titles and employees in those titles, subject to change "due to the application of statutory and/or contractual procedures." *Id.* The list included employees in 78 Supervisor Painter positions.[1]

NYCHA and the Union exchanged correspondence and conferred with each other by phone and in person between February 29 and April17, 2008, including seven meetings between March 17 and April 16, 2008. On April 17, 2008, the Union, along with three individual tenants, brought a hybrid state court action, *Delgado v. N.Y.C. Hous. Auth.*, Index No. 30319/08, asserting civil rights claims under 42 U.S.C. § 1983, the Civil Service Law ("CSL") and Article 78 of the Civil Practice Law and Rules ("CPLR"). The action, filed in Supreme Court, Bronx County, sought a temporary

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[1] 81 Supervisor Painter positions were involved, three of which were vacant as of March 2008. These employees served in the in-house title of Paint Inspector whose function was to oversee the work of independent contractors.

restraining order and permanent injunction requiring NYCHA to repaint certain apartments in its buildings, pursuant to federal law and the New York City Housing Maintenance Code.[2] The Union contended that the failure to timely repaint posed health and safety issues to the residents. The Union also alleged that NYCHA's plan to eliminate bargaining unit positions and lay off bargaining unit members was retaliatory and motivated by the Union's public efforts to expose NYCHA's failure to comply with legal requirements to timely repaint its apartments and public spaces." According to the Union, NYCHA was improperly interfering with rights under the First Amendment to the United States Constitution, Article I, § 8 of the New York State Constitution, and CSL § 75-b.[3]

The Union also alleged violations of CSL §§ 61(2) and 80 stemming from NYCHA's plan to assign Paint Inspectors' duties to individuals employed in titles other than Supervisor Painter and to lay off employees in order of assignment rather than by original date of appointment. The Union further alleged that NYCHA's plan to eliminate its entire workforce of Paint Inspectors was arbitrary and capricious. On April 17, 2008, one day before the layoff plan was to take effect, the court granted a temporary restraining order, which was vacated on September 17, 2008, in an order

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[2] The Union relied upon 24 C.F.R.§ 96.6.4(e), promulgated pursuant to 42 U.S.C. § 1437(d)(1), concerning the timely repainting of occupied apartments under jurisdiction of NYCHA as a federally funded public housing authority. The Union also relied upon New York City Housing Maintenance Code (NYC Admin Code, Title 27), § 2013(a)(2) and (b)(2), as establishing NYCHA's obligation to repaint every three years.

[3] Civil Service Law § 75-b(2)(a), provides, in pertinent part:

> A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.

dismissing all claims. The Supreme Court found that the facts as pleaded by the Union failed to make out a claim of retaliation. (Ans., Ex. 3 at 43, 59).

On October 3, 2008, NYCHA's Director of Human Resources wrote to the Union president informing him that NYCHA would proceed with layoff plans. On October 15, 2008, the parties met for the first time since April 2008. In an October 17 letter, NYCHA summarized the discussion to date and reiterated that only the effective date of the layoffs, November 14, 2008, had changed. NYCHA counsel reiterated that the interpretation or application of the CSL had "been thoroughly considered, explained, reviewed, and discussed at the table" and would not be bargained. (Pet. Ex. C). NYCHA counsel identified only "seniority" for establishing assignments, or "pick lists," as a "possible remaining issue for impact bargaining." *Id.* NYCHA counsel also expressed NYCHA's willingness to meet "outside of impact bargaining so that the Union may have an opportunity to present new ideas that were not previously presented to NYCHA." *Id.* (Internal quotation marks omitted.)

On October 20, 2008, Union counsel again wrote to NYCHA's Director of Human Resources posing 49 questions about the NYCHA plan and requesting that NYCHA meet with the Union "concerning the 'layoffs and/or terminations . . . ." (Pet. Ex. D). NYCHA asserts that the letter was identical to one the Union sent on March 14, 2008, and to which NYCHA had attempted to respond. However, NYCHA did agree to meet again, and additional meetings were held on October 30 and November 3, 2008. At the latter meeting, the Union presented a proposal which it asserted would obviate layoffs by decreasing NYCHA's use of outside contractors. NYCHA's financial manager inquired about the cost estimates, some of which the Union was able to answer at the meeting.

On November 5, 2008, the Union filed a Notice of Appeal of the court's judgment dissolving

the temporary restraining order and dismissing the complaint. NYCHA's Law Department received a copy of the Notice of Appeal the following day. On November 7, 2008, a committee of NYCHA employees, established to consider the Union's November 3 proposal, convened.

At a November 10 meeting of the parties to discuss the Union's November 3 proposal, NYCHA disputed the Union's calculations of cost savings as insufficient to obviate the need for layoffs. However, NYCHA counter-proposed to cut in half the number of employees in the Painter title who were scheduled for layoff and to retain the other 20 Painters for at least six months, provided that the entire in-house painting staff met certain productivity requirements. Failure to meet those productivity requirements would result in the layoff of an additional 20 employees in the Painter title. The NYCHA counter-proposal contained "no reduction in the number of Supervisor Painter positions to be eliminated[.]" (Ans. ¶ 23, 163).

NYCHA did not explicitly condition its proposal on the Union's discontinuing the appeal. However, NYCHA contends that its proposal was explicitly conditioned upon the reduced number of layoffs as well as a cooperative, good faith effort toward improving productivity.

At 9:00 am, on November 12, 2008, the Union president phoned NYCHA's deputy director of labor relations and informed him that the Union was prepared to support NYCHA's productivity plan as set forth by NYCHA at the November 10 meeting. The NYCHA labor relations deputy director responded that, based on the Union's decision to cooperate with the productivity/reduced layoff plan, he would send out a notice memorializing the reduction in the number of layoffs.

Only a few hours later, counsel for the Union phoned NYCHA's law department and notified NYCHA counsel, as required under the Appellate Division's Rules, that the Union would appear before the Appellate Division the next day to apply for an interim order staying the layoffs. At the

end of the day, NYCHA's Deputy Director of Labor Relations sent an e-mail to the Union president which stated the following:

> Two hours after our conversation this morning, I learned that your attorney notified NYCHA's Law Department that the Union is again going into court to prevent NYCHA's implementation of its layoff plan. I am dismayed that you failed to make mention of your intention when we spoke.
>
> In light of your apparent intent to resolve the issues surrounding the layoffs through litigation, NYCHA is planning to proceed with the layoff plan as it was originally presented to you. . . .

(Pet. Ex. F).

On November 13, Union counsel moved for a stay of NYCHA's layoffs pending appeal before the Appellate Division, and counsel for NYCHA opposed. The motion was denied.

Also on November 13, 2008, the Union president wrote a letter to NYCHA's Deputy Director of Operations, claiming that NYCHA's November 10 response to the Union's proposal was based on "misconceptions and incorrect calculations" regarding the Union's proposal. (Pet. Ex. G). The Union president also again asked NYCHA to "stop or at least delay" the planned layoffs. (*Id.*).

The next day, November 14, 2008, NYCHA commenced the planned layoffs. Each of the 78 individuals who had been in Supervisor Painter positions "bumped" a Painter and assumed positions in that title.[4] In all, 38 Painters were "bumped" and laid off. NYCHA also created 40 new Painter positions and filled those new positions with reassigned Supervisor Painters.

On October 29, 2009, the Appellate Division affirmed the lower court's dismissal of all

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[4] CSL § 80, *et seq.*, governs layoff procedures with respect to employees in the competitive civil service class, including the displacement or "bumping" of other employees in a title with a direct line of promotion to that of the laid off employee.

claims in *Delgado v. New York City Hous. Auth.*, 66 A.D.3d 607 (1st Dept 2009).[5] The Appellate Division found that neither the New York City Housing Maintenance Code nor federal law provide tenants a private of action to enforce the painting requirements. 66 A.D.3d at 607-608. The court also dismissed the claims brought on behalf of the Union:

> There is also no merit to petitioners' claim that NYCHA violated the prohibition in [CSL] § 61(2) against assigning civil servants to out-of-title work by assigning housing development management to supervise painting contractor work that had previously been supervised by NYCHA's painting supervisors. Such supervisory work clearly falls within the official statement of duties attending the positions of housing managers and building superintendents. NYCHA's method of calculating employee seniority based on the date the employee actually reported for work on a permanent basis, and not, as petitioners urge, on the date the employee was given notice of having been hired, is a rational reading of [CSL] § 80(1), (2). NYCHA demonstrates that the restructuring plan was motivated by economic and administrative concerns and was not otherwise arbitrary and capricious.

66 A.D.3d at 608-609 (citations omitted).

The Appellate Division rejected the remaining arguments and claims made by the Union, stating "[w]e modify solely to declare in NYCHA's favor."66 A.D.3d at 609.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that NYCHA violated NYCCBL § 12-306 (a) (1), (3), (4) and (5).[6] The

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[5] We take administrative notice of the Appellate Division's decision in this matter, which is warranted in that the parties have affirmatively interjected the litigation and the appellate procedures before us. *DC 37, L. 768*, 3 OCB2d 7, at 15, et *seq.* (BCB 2010).

[6] Section 12-306(a) of the NYCCBL provides, in pertinent part, as follows:
It shall be an improper practice for a public employer or its agents:

Union specifically claims that NYCHA retaliated against it in violation of NYCCBL §12-306(a)(1) by unilaterally terminating negotiations with the Union over proposed layoffs and by withdrawing its proposal to reduce the layoffs in exchange for productivity savings. The Union asserts that the lawsuit was protected activity under the NYCCBL and that the Union's decision to pursue a preliminary injunction was a motivating factor in NYCHA's decision. The Union asserts that these acts violate § 12-306(a)(3), in that NYCHA retaliated against the Union's members by unilaterally terminating negotiations and withdrawing its proposal.

The Union contends also that NYCHA's decision to implement the layoffs constituted retaliation against Union members who participated in the litigation seeking to enjoin the proposed employment action against the entire unit. The Union argues that various deputy directors of NYCHA had the requisite knowledge and wrongful motive for the Board to find violations under NYCCBL § 12-306(a)(3), as well as derivative claims of interference under § 12-306(a)(1).

Additionally, the Union claims that NYCHA violated NYCCBL § 12-306(a)(4) by refusing to bargain in good faith over a mandatory subject of bargaining, namely "the elimination of

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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;
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> * * *
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .
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> (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.

[NYCHA's] Paint Inspector workforce, the consequent demotion of Paint Supervisors to Painter positions, the resulting layoff of Painters, and the impact that NYCHA's non-compliance with the Housing Maintenance has on workplace safety."[7] (Pet.¶ 41).

In its reply, the Union asserts that NYCHA's retaliatory act was "rescind[ing] the agreement reached between the parties to reduce the number of painters laid off in exchange for increased productivity by the Painters." (Rep. ¶11). It argues that NYCHA is guilty of bad faith bargaining as well as retaliation for rescinding an offer which the Union "had already accepted, citing Local 1969's decision to pursue its legally sanctioned remedies." (Rep. 45, 46-47).

The Union contends that NYCHA failed to bargain in good faith when it implemented layoffs after the Union sought to avert the action by costing out and proposing alternatives. While NYCHA engaged in bargaining for a period of time, it had an obligation to continue bargaining to alleviate the impact of the layoffs until either agreement or impasse could be reached.

The Union raises other claims as well. First, it asserts that NYCHA's plan to eliminate the Paint Inspector workforce was in retaliation for the Union's exercise of constitutional free speech interests. Second, it asserts that, by NYCHA's plan to transfer the duties performed by Supervisor Painters in their capacity as Paint Inspectors, NYCHA has violated the CSL's rule against out-of-title assignments. Third, it asserts that NYCHA has violated the CSL by planning to lay off employees by original date of assignment rather than original date of appointment.

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[7] Section 12-305 provides, in pertinent part, as follows:

> 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. . . .

NYCHA's Position

NYCHA maintains that both parties bargained over a continuing course of time over the impact of the layoffs, as the Union admits. NYCHA further maintains that, in good faith, it considered the Union's final proposal to avert the layoff of Supervisor Painters and the Painters scheduled to be bumped. It asserts that the Union's bad faith rendered further discussions fruitless. The Union subverted the bargaining process by continuing litigation without disclosing the fact to NYCHA's negotiators even as the parties were reaching a settlement of the layoff issue.

NYCHA contends that the Union's claims of retaliation are groundless. First, NYCHA asserts that the litigation does not constitute protected union activity. NYCHA claims that the litigation primarily asserts the rights of the named tenants and that "the Union was merely riding the tenants' litigation coattails." (Ans. ¶ 205). Accordingly, the litigation "is not union activity" protected by the NYCCBL. *Id.*. Second, NYCHA denies that its decision to implement the layoffs as originally planned was retaliatory in nature. Rather, NYCHA asserts, "the Union's actions were inconsistent with the its word, and its actions invalidated or cancelled out the verbal commitment it made to work with NYCHA and accept the implementations of the reductions and the layoff" as modified by NYCHA's November 10 proposal. (Ans. ¶ 213).

NYCHA acknowledges that it did not specifically rest its proposal to avert layoffs on the specific demand that the Union refrain from further litigating the matter which it had earlier lost in court. However, NYCHA asserts that it had an agreement with the Union as of November 12, 2008, and that the Union's failure to apprise its negotiators of the Union's continuing efforts in court, notwithstanding the agreement, amounted to bargaining in bad faith.

NYCHA agrees that it had a continuing duty to bargain to alleviate the impact of the proposed

layoffs. NYCHA insists, however, that, on all but one occasion, the Union failed to come to the table to bargain over any *per se* practical impact of the layoffs on the remaining employees, nor has the Union requested a session for the purpose of impact bargaining. Such topics as benefits or employment opportunities available to laid off employees, payments for accrued leave, whether productivity or other types of work-related changes would be considered, and what information would be included in the layoff package were never raised by the Union. Instead, the Union sought to "bargain" over NYCHA's decision to lay off employees and the economic reasons for NYCHA's making that decision. Additionally, the Union sought to bargain over the layoff procedures set forth in the CSL and their application. None of these issues constitutes impact bargaining. The duty to bargain over impact in this case is conditioned upon a request by the Union that such bargaining occur. NYCHA cannot be faulted for not following through on what it describes as a non-existent request.

Finally, NYCHA contends that the layoffs were carried out for reasons of business necessity, specifically, budgetary restraints, and were done in conformity with the applicable provisions of the CSL. The Union has produced no basis for its conclusory assertion that the layoffs were retaliatory or discriminatory for any union activity on the part of unit members.

DISCUSSION

The claim before the Board here is whether NYCHA's decision to reinstate its decision to layoff employees in the Painter title, rescinding a proposal (the "Tentative Agreement") to reduce the number of layoffs through productivity gains, violated NYCCBL § 12-306(a)(1), (3), (4), and (5). NYCHA's decision to follow through with the layoffs was made after NYCHA was notified of the

Union's decision to seek a temporary restraining order barring layoffs of painters from the Appellate Division, and was responsive to that decision. The Union asserts that NYCHA breached the duty to bargain in good faith, interfered with and retaliated against the Union and its members in and for the exercise of their statutory rights. NYCHA asserts that, to the contrary, it was and remains ready to bargain over the alleviation of the practical impact of the layoffs but that the Union was interested only in reversing the underlying decision to lay off employees. NYCHA contends that it was prepared to attempt a cooperative joint approach to reduce the number of layoffs but the Union's aggressive efforts to enjoin the very layoffs required to implement the agreed upon proposal constituted a repudiation of the Tentative Agreement and invalidated any such agreement.

This Board finds that, under the circumstances established here, no meeting of the minds had been reached on essential terms of the cost-savings proposal made by NYCHA. Although the parties each claim that some level of agreement was reached, their fundamentally inconsistent understandings of the agreement's contents render any such tentative agreement void and unenforceable. In essence, NYCHA believed that implicit in the Tentative Agreement was an acceptance by the Union of layoffs, albeit in a reduced number. The Union appears to have understood its agreement to be limited to meeting NYCHA's productivity goals and not to encompass cessation of its litigation efforts to avert all layoffs. Under these circumstances, no enforceable agreement can be found to have existed.

We further find that NYCHA's decision to lay off employees in the Painter title did not violate its duty to bargain in good faith, and no showing has been made that NYCHA refused to bargain in good faith over alleviation of the practical impact of that decision. Finally, we find that NYCHA's decision to reinstate the layoffs was not retaliatory but responsive to its discovery that the parties had not in fact reached an agreement which could avert the need for a portion of the layoffs. 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.[8] We have consistently held that 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." *SSEU, L. 371*, 2 OCB2d 16 (BCB 2009), at 10; *NYSNA*, 71 OCB 23, at 11 (BCB 2003). However, we also reiterated in *SSEU* that:

> under both the NYCCBL, specifically § 12-307(b), 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.

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[8] NYCCBL § 12-307(a) provides, in pertinent part, as follows:

> 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), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law . . .
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> b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

SSEU L. 371, 2 OCB2d 16 at 10-11 (additional citations and parentheticals omitted).

As we reaffirmed in *SSEU*, "[u]nder NYCCBL § 12-307(b), questions concerning the practical impact of management's decision to layoff employees [are] bargainable." *Id* at 11, n. 8 (quoting *Antoine*, 73 OCB 8, at 11; *citing, inter alia, Local 1180, CWA*, 63 OCB 19, at 13-14 (BCB 1999); *DC 37, Local 983*, 45 OCB 6, at 28 (BCB 1990).

In the instant case, there is no dispute that NYCHA was required to, and in fact did, bargain over alleviating the impact of the layoffs at issue here. The parties agree they had multiple meetings and exchanged proposals. The Union's assertion that NYCHA has violated its obligation to bargain over the amelioration of the practical impact of NYCHA's decision is predicated on its contention that the decision to layoff, and the number of employees to layoff, fall within the scope of impact bargaining. However, such is not the case. We have held long held that the "duty to bargain in a layoff case extends to alleviating the impact of the layoffs, not to the decision whether to layoff employees." *Local 1180, CWA*, 63 OCB 19, at 15. Moreover, "prolonged bargaining does not limit management's discretion to implement its right to layoff." *Id.*

The record before us does not support, and the Union does not allege, that NYCHA has refused to negotiate over potential means of alleviation of the impact of the layoffs which we have found to be bargainable, such as "severance pay, layoff procedures, reasonable notice, [and] recall rights." *DC 37, L. 983*, 65 OCB 6, at 27, n. 47 (BCB 1990); *see also Local 1180*, *CWA*, 63 OCB at 14 (alleviation could include "layoffs lists, seniority lists, preferred lists, and special transfer lists," as well as efforts to place employees in vacant positions in other agencies). Rather, the Union complains of the decision to implement the layoffs as originally projected and not to reduce the number of affected employees, as the Union demanded. Such does not relate to alleviation of the

layoffs but to the underlying decision. *Local 1180, CWA*, 63 OCB 19, at 15; *SSEU, L. 371*, 2 OCB2d 16, at 11; *DC 37, L. 983*, 65 OCB 6, at 27.

That the parties both plead that the Tentative Agreement on NYCHA's counterproposal had been reached on the morning of November 12, 2008, does not support a different conclusion.[9] An "essential element to a finding that parties have agreed to the terms of a collectively negotiated agreement is that there is a meeting of the minds between the parties." *Riverhead Cent. Sch. Dist.*, 43 PERB ¶ 4501, at 4504 (Maier, ALJ 2010) (citing *Deer Park Teachers Assn*, 13 PERB ¶ 3048 (1980); *Yonkers Fedn. of Teachers, L. 860*, 8 PERB ¶ 3020 (1975)). In *Riverhead Central School District*, where the union's filing of a class size grievance made clear the parties' lack of agreement on that issue, no meeting of the minds, and thus no enforceable agreement, was found. *Id.* at 4504-4505 (citing *Incorp. Village of Sag Harbor*, 18 PERB ¶ 3002 (1985); *Village of Wappingers Falls*, 40 PERB ¶ 3020 (2007)).

Such is the case here. In *Riverhead Central School District*, "[t]he fact that the issue arose demonstrates that parties never reached a meeting of the minds. The reason that this latent issue arose when it did is attributable to the [Union's] having filed a grievance, thereby prompting the District's closer evaluation of this issue." 43 PERB ¶ 4501, at 4505. Here, the Union's providing notice to NYCHA of its intention to seek injunctive relief from the Appellate Division likewise brought the latent issue of accepting the layoffs, as opposed to supporting the productivity goals, into relief. By so doing, it became clear that the parties clearly "never had a meeting of the minds on an entire agreement." *Riverhead Cent. Sch. Dist.*, 43 PERB ¶ 4501, at 4504.

Our view of the record gains further support from the Union's letter of November 13 urging

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[9] Compare Ans. ¶¶168, 213 and Rep. ¶¶11, 45-47.

NYCHA "stop or at least delay" the planned layoffs, and does not claim that a final, binding agreement based on NYCHA's counterproposal had been breached. (Pet. Ex. G). We therefore find that the undisputed record "demonstrates that at no time did the parties come to a meeting of the minds on all items under negotiation." *Riverhead Cent. Sch. Dist*., 43 PERB ¶ 4501, at 4505. Accordingly, we find that the Union has not established a breach of the duty to bargain in good faith.

The Union's retaliation claim likewise is deficient. In order to establish retaliation in violation of NYCCBL § 12-306(a)(3) and (1), a petitioner must establish, *inter alia*, that protected union activity "was a motivating factor in the employer's decision" to take action adverse to the Union. *DEA*, 79 OCB 40, at 21 (BCB 2007). However, as we held in that case, adverse actions cannot, as a matter of law, "be persuasively shown to have been retaliatory in nature [where] they *antedated* the protected activity, let alone any knowledge on the part of management thereof ." *Id*. at 22 (citing Wilson v. New York City Housing Auth., 2007 U.S. Dist. LEXIS 25258 at * 30 (S.D.N.Y. April 2, 2007) ("Where the decision to take adverse employment action is reached prior to a plaintiff's protected activity, the causal connection necessary to link the adverse action to that protected activity is lacking")); *see also*, *Edwards*, 1 OCB2d 22, at (BCB 2008) (same). In the instant case, the causal link is the opposite to that needed to establish retaliation: the decision to layoff the employees at issue was the predicate for the litigation, and not the converse.[10] *Id.* Nor can NYCHA's decision to

[10] Here, the Union's pleadings may be read to assert two variants of protected union activity: the prosecution of the litigation in general, and the application for a temporary restraining order. We note that the first theory was squarely rejected by the Supreme Court and the Appellate Division, First Department. The Appellate Division upheld the Supreme Court's factual finding that "the restructuring plan was motivated by economic and administrative concerns and was not otherwise arbitrary and capricious." *Matter of Delgado*, 66 A.D.3d at 609. Moreover, that plan was first presented eleven months prior to the filing of the instant proceeding, and any claim arising therefrom is clearly barred by the NYCCBL's four-month statute of limitations. *See UFA,* 3 OCB3d 13, at (BCB 2010) at 9-10 (citing cases applying NYCCBL § 12-306(e)). Therefore, we only address the

implement the layoffs in the wake of its discovery that no meeting of the minds had been reached on NYCHA's cost saving proposal be deemed retaliatory. Thus, the decision to layoff having been made prior to any protected activity, and extensive bargaining having been held between the parties on topics both mandatory and permissive, no basis exists for any finding of retaliation. This is especially the case where it is not alleged that NYCHA has refused to bargain over means of alleviating the impact of the layoffs, short of revoking them. For the same reasons, we find that the record does not support a claim of interference with the Union or with its members.

Accordingly, we dismiss the Union's claim that NYCHA breached its duty to bargain to ameliorate the practical impact of the layoffs, under §§ 12-306(a)(4) and (5) of the NYCCBL. We further hold that the Union has failed to prove a violation under §§ 12-306(a)(3). Moreover, we find no derivative or independent violation of § 12-306(a)(1). Thus, the instant petition is dismissed in its entirety.[11]

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latter theory.

In so doing, we reject NYCHA's argument that the inclusion of other plaintiffs and claims somehow removes the application for a temporary restraining order from the ambit of protected activity, as we have repeatedly held that litigation initiated by an employee organization and in which union members participate may be protected activity under the NYCCBL where it relates to the employment relationship and is undertaken on behalf of those members *See, e.g., Kingsley*, 1 OCB2d 31, at 14 (BCB 2008); *L.1757, DC37*, 41 OCB 48, 13-22 (BCB 1988); *United Probation Officers Ass'n*, 45 OCB 71, at 8 (BCB 1990). NYCHA has provided no rationale why the participation of other interested parties would render otherwise protected litigation unprotected, and we find no such basis.

[11] We do not rule upon the Union's other claims which arise under statutes other than the NYCCBL, and in any event, are precluded by the Appellate Division's affirmance on the merits of the Supreme Court's dismissal of such claims. See *DC 37*, 79 OCB 25, at 10-11, 13-14 (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-2783-09, filed by Local Union 1969, District Council 9, IUPAT, be, and the same hereby is, dismissed in its entirety.

Dated: September 22, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER