DC 37, 4 OCB2d 47 (BCB 2011)

(IP) (Docket No. BCB-2828-10).

Summary of Decision: The Union claimed that NYCHA breached its duty to bargain by unilaterally changing the policies governing NYCHA employees' use of the employer's computer, internet, and email systems for union business. The Union further claimed that this change interfered with its members' statutory rights because the new policy prohibited use of these systems for union business. NYCHA contended that the instant improper practice petition is untimely and that the issuance of the memorandum falls within its managerial prerogative. NYCHA also contended that the Union has no statutory or contractual right to use NYCHA's resources. Finally, NYCHA argued that it did not make a unilateral change to a mandatory subject of bargaining because employees' previous use of these systems did not create a practice, over which the Union can now seek to bargain. The Board found that NYCHA violated its duty to bargain in good faith by unilaterally changing its policies regarding employees' use of the employer's computer, internet, and email systems for union business. In addition, the Board found that NYCHA's change to its policy interfered with employees' exercise of protected rights under NYCCBL §12-305. Accordingly, the Board granted the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On January 20, 2010, District Council 37 ("DC 37" or "Union") filed a verified improper practice petition against the New York City Housing Authority ("NYCHA") alleging that NYCHA

violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (4). The Union claims that, on September 21, 2009, NYCHA issued a memorandum unilaterally changing its policy governing employees' use of its computer, internet, and email systems ("Computer Systems") for union business, which constitutes a mandatory subject of bargaining. The Union further alleges that this memorandum's prohibition on use NYCHA's business and communications systems for union-related business constitutes interference with statutory rights under NYCCBL § 12-305. NYCHA contends that the instant improper practice petition should be dismissed because it was filed more than four months after NYCHA issued its original policies addressing its computer, internet, and email systems and because it had authority to issue this memorandum under NYCCBL § 12-307(b). NYCHA further claims that the Union has no statutory or contractual right of access to NYCHA's resources. Finally, NYCHA argues that this memorandum does not constitute a change to a mandatory subject of bargaining and that the employees' previous use of these systems did not create a past practice over which the Union can now seek to bargain. The Board finds that the Union's petition is timely. The Board finds that NYCHA's issuance of the September 29, 2009 memorandum breached its duty to bargain in good faith by unilaterally changing its policy concerning permissible employee use of its computer, internet, and email systems for union business. In addition, the Board finds that the September 21, 2009 Memorandum interfered with employee protected rights under NYCCBL § 12-305. Accordingly, the Board grants the petition.

BACKGROUND

DC 37 and its affiliated local unions, including the Civil Service Technical Guild, Local 375

("Local 375"), represents approximately 2,300 employees at NYCHA in various titles. Local 375's members at NYCHA work at locations throughout the City of New York. For the most part, Local 375 members at NYCHA work in offices where they are assigned to work with computers.

NYCHA's Computer Systems Policies

NYCHA's Internet Policy states, "use of the Internet will be limited to the support of agency business functions, insofar as these will be enhanced by such Internet use."[1] (Ans., Ex. 2). This policy also defines "Appropriate Use" as: "Use of the Internet will be limited to business-related information, products or services clearly identified as being in the interest of the New York City Housing Authority." (*Id.*). "Inappropriate Use" is defined as: "Use of the Internet for commercial purposes, personal business, or any other purpose unrelated to NYCHA business is prohibited. Such use may lead to disciplinary action." (*Id.*). Further, the Internet Policy specifically identifies categories of prohibited uses. Finally, this policy states that internet "usage must be in conformity with . . . NYCHA's Communications and Business Systems Policy" and "must not be used knowingly to violate any applicable law and regulations." (*Id.*).

NYCHA's Communications and Business Systems Policy section of it Personnel Manual ("Communications and Business Systems Policy") states that systems covered by the policy include "telephones, voice mail, answering machines, facsimile ('fax') machines, computers, electronic mail

[1] On September 29, 1999, NYCHA's Board of Directors adopted Board Resolution Number 99-9/29-28 governing the use of its communications and business systems. On November 20, 2002, NYCHA revised this policy to include its internet system. This amended policy is referred to herein as the "Internet Policy," and the relevant portions are set forth more fully in Appendix A of this Decision.

('e-mail'), Internet Access and photocopiers".[2] (Ans., Ex.3). The Communications and Business Systems Policy expressly provides that it is designed to "further NYCHA's interests" such as: "increasing employee's effectiveness," "preventing conduct or behavior . . . that may be illegal or may adversely affect NYCHA," and "preventing inappropriate non-business usage." (*Id.*). Like the Internet Policy, the Communications and Business Systems Policy contains definitions of "Appropriate Use" and "Inappropriate Use." Chapter 1, Section K, of the Communications and Business Systems Policy applies to all business systems and states that "[l]imited personal use is appropriate and expected, however such use should be kept to a minimum." (*Id*.).

In addition, NYCHA asserts that use of its office and technology resources such as computers, internet, and email systems are governed by its General Regulations of Behavior section ("General Regulations of Behavior") of its Human Resource Manual. According to these rules, NYCHA employees shall not, among other prohibited acts: "post or hang any unauthorized notices or posters on [NYCHA] property," "fail to comply with [NYCHA's] Conflicts of Interest Guidelines," "engage in any [non-NYCHA] activity during working hours other than appropriately minimal personal use of [NYCHA] communications and business systems," and "use [NYCHA] resources . . . for any [non-NYCHA] purpose, other than to the limited extend contemplated by . . . the Communications and Business Systems Policy." (Ans., Ex. 4). These rules further state that NYCHA employees shall not violate the "Communications and Business Systems Policy relating to the use of computers, the Internet, telephones, voice mail, answering machines, facsimile (fax) machines, electronic mail, and photocopiers." (*Id.*).

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[2] The relevant provisions of NYCHA's Communications and Business Systems Policy are set forth more fully in Appendix B of this Decision.

NYCHA's Human Resources Manual also contains a section governing employee organizations. This section provides that all NYCHA-approved employee organizations, "including social, educational, and fraternal organizations, shall register with the Director of Human Resources." (Ans., Ex. 8). Further, this section provides that NYCHA-approved employee organizations may post materials on NYCHA property, provided that these postings have been approved by NYCHA, and may conduct organization meetings "during regularly designated working hours," as long as these meetings have been approved by NYCHA. (*Id.* at 15).

NYCHA's Internet, Communications and Business Systems Policy and the portions of its other policies relating to use of its computers that pre-date September 21, 2009, are collectively referred to here as the "Computer Systems policies."

September 2009 Memorandum

On September 21, 2009, NYCHA's Director of Human Resources issued an memorandum entitled "Use of NYCHA Communication and Business Systems for Personal, Private or Union Business" ("September 2009 Memorandum"). This document was issued to all NYCHA employees, including those in Local 375. The September 2009 Memorandum states:

> All employees are expected to be familiar with NYCHA's policies related to the use of its communications and business systems and the General Regulations of Behavior, all of which is available through NYCHA's Intranet. Any employee without access to the Intranet may request copies of these documents from their supervisor. Violations of these policies may be subject to disciplinary action.
>
> The policies establish that the employees shall use [NYCHA] Communications and Business Systems primarily for NYCHA-related purposes. These systems include, but are not limited to: computers, the Internet, telephones, voice mail, answering machines, facsimile (fax) machines, electronic mail; radios; and photocopiers. Responsible and professional behavior is expected to be maintained in all such use.

> Personal use of NYCHA's communications and business systems is discouraged. However, if such use is made, must be kept to a minimum and use should be limited to urgent matters.
>
> Use of NYCHA's communications and business systems for any commercial purpose or any other purpose unrelated to NYCHA business or appropriately limited and urgent personal business, including but not limited to, non-profit organizations, volunteer organizations, NYCHA-approved employee organizations, or union-related business, is prohibited except where specifically authorized in accordance with NYCHA rules, regulations, policies or procedures.

(Pet., Ex. A).

On January 20, 2010, the Union filed the instant improper practice petition against NYCHA alleging that its unilateral implementation of the September 2009 Memorandum violates NYCCBL § 12-306(a)(1) and (4).

Events That Precipitated the September 2009 Memorandum

In April 2008, NYCHA served disciplinary charges on the current President of Chapter 25 of Local 375 for improperly using NYCHA's Computer Systems. A 13-day disciplinary hearing was held before a NYCHA Trial Officer from May 2008 to September 24, 2009.[3] During that hearing, the Chapter President testified that he, like other Union officials and members, regularly utilized NYCHA's computer, internet, and email to disseminate communications, postings, and memoranda concerning union-related matters, but argued that this use was not improper. Based on the information and testimony elicited at the disciplinary hearing, NYCHA claims that it decided to issue the September 2009 Memorandum to remind its employees of the prohibitions contained in the pre-existing policies. (*See* Ans. ¶¶ 41-42).

[3] In March 2010, the Trial Officer recommended a penalty of two-day suspension.

On August 18, 2008, while the Chapter President's disciplinary hearing was proceeding, the Chapter President filed an improper practice petition with the Board alleging, in part, that NYCHA's Computer Systems policies unlawfully targeted union-related activity and that NYCHA discriminated against him by disciplining him for violating these policies.[4] On July 30, 2009, during the hearing on the Chapter President's improper practice, Joshua Barnett, another union representative also testified concerning his own and other employee use of NYCHA's computers for union-related and personal business.

On September 18, three days before it issued the September 2009 Memorandum, NYCHA sent a memorandum to Barnett memorializing a discussion it had with him that same day concerning his use of NYCHA's Computer Systems for union business. ("Barnett Memorandum"). The memorandum states that NYCHA's "communications and business systems policies prohibit the use of its systems for any non-NYCHA business, including union business." (Ans., Ex. 7.) It also notes that prior to July 30, 2009, Barnett's usage "appeared to be sufficiently limited that a decision was made to excuse it as limited personal use while litigation related to this issue was ongoing." *Id.* However, Barnett's testimony at the improper practice hearing "revealed that your inappropriate usage was not limited, but was excessive." (*Id.*). The Barnett Memorandum further states,

> Union business is non-NYCHA business. Conducting union business during scheduled work hours or using NYCHA equipment, systems, or property, whether real or virtual at any time for union business, is prohibited, except when expressly authorized by NYCHA as a result of NYCHA and union negotiations or where NYCHA otherwise approved a request in accordance with its policies and procedures.

(*Id*.). The Barnett Memorandum concludes by stating that, "union related business will be treated

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[4] This improper practice was docketed as BCB-2716-08.

and regarded as the same as conducting a personal business." (*Id.*).

Other Proceedings Involving NYCHA's Computer Systems Policies

In the Board's decision on the Chapter President's improper practice petition (Case No. BCB-2716-08) issued today, we found that NYCHA discriminated against the Chapter President by investigating and disciplining him for his union activity in violation of §§ 12-306(a)(1) and (3). Specifically, NYCHA's discipline of the Chapter President for using email and internet for union-related purposes and for storing union-related documents on his computer was found to constitute disparate treatment and the legitimate business reasons advanced by NYCHA were found to be pretextual. *See Feder*, 4 OCB2d xx (BCB 2011).

Certain of our factual findings in *Feder* are relevant to this proceeding and we take administrative notice of these findings. First, the Board held that NYCHA's Computer Systems policies did not prohibit use for union-related business. Instead we found that consistent with personal use, these policies permitted some limited use for union-related business. We stated that,

> NYCHA's Computer Systems policies do not contain any broad prohibition specifically for union business or even mention union-related business. NYCHA asserts that the Union is not an approved employee organization under its policies, but it treated unions the same as approved employee organizations and therefore entitled them to "limited personal use." In other words, NYCHA does not view union-related use as NYCHA business, and therefore under its policies, it considered use for union business to fall under the rubric of "personal" use. NYCHA's Computer Systems policies, however, do not expressly state this interpretation. On the record herein it is clear that employees did not necessarily understand that NYCHA considered union use and personal use to be synonymous. Similarly, NYCHA's Trial Officer correctly noted that NYCHA's policy on personal internet use was not clear. Although the Internet policy prohibited use for anything other than NYCHA business, this prohibition was contradicted by NYCHA's overall Business Systems and Communications Policy, which provides for limited personal use. (Trial Officer's Report at 32.)

(*Id.* at 48-49.). In addition, the Board found that under its Computer Systems policies, NYCHA had not enforced only limited personal use, but had permitted widespread use of its email and internet by its employees for personal and/or union-related business.

> Numerous emails in evidence establish that Petitioner, as well as other Union representatives, openly communicated with NYCHA management for years using email without reprimand or notice that such communication was prohibited or should be limited. It is clear from Eagle and Marcinek's email responses to Petitioner, Barnett and others on union-related subjects prior to January 2008, that use of email for union-related business communication was not being limited or restricted. Therefore, by its actions prior to 2008 NYCHA management permitted unlimited employee use of the Computer Systems for union-related matters other than union election campaigns.
>
> Similarly, the record shows that employees regularly used NYCHA's Computer Systems to proliferate various personal, non-NYCHA-related announcements and information. Emails concerning retirement parties, deaths in families, religious events, and gambling pools were all frequently disseminated using these systems. In addition, the record also includes hundreds of pages of documents demonstrating that employees regularly and consistently utilized NYCHA computers to send emails on behalf of NYCHA-approved employee organizations. There is no evidence that NYCHA enforced any limitations on these types of personal use or on use on behalf of NYCHA-approved employee organizations. Often these emails were sent to management representatives as well as other employees, and sometimes these emails were initiated by supervisors or management representatives.

(*Id.* at 50-51.) (footnote omitted).

POSITIONS OF THE PARTIES

Union's Position

The Union claims that the instant petition is timely filed because the claims at issue accrued

on September 21, 2009, when NYCHA issued the September 2009 Memorandum.[5] This memorandum was a new policy and not simply a restatement or clarification of the prior policy. This proceeding was filed on January 20, 2010 within the four month period of statute of limitations.

On the merits, the Union argues that NYCHA violated NYCCBL § 12-306(a)(1) by interfering with employees' statutory rights under NYCCBL § 12-305. The Union claims that the September 2009 Memorandum is overbroad and unlawfully targets union-related activity by prohibiting use of NYCHA's communications and business systems for union-related business. In contrast, the pre-existing policies made no specific mention of union-related use. NYCHA's targeting of union-related activity both establishes a change from the prior practice and interferes

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[5] NYCCBL § 12-306(e), in pertinent part, states:

> A petition alleging that a public employer . . . 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.

Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") § 1-07(b)(4) provides:

> One or more public employees or any public employee organization acting on their behalf or a public employer may file 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 § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

OCB Rule § 1-12(f) provides, in relevant part:

> In computing any period of time prescribed or allowed by these rules, or by order or direction, the day of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday or legal holiday, in which event the period shall run to the next business day.

with the statutory rights of its employees. NYCHA's effort to invoke § 12-307(b) is baseless because that provision does not allow employers to restrict union activity, which is protected by the NYCCBL.

The Union also argues that NYCHA violated NYCCBL § 12-306(a)(1) and (4) when it unilaterally changed a mandatory subject of bargaining. The Union contends that case law dictates that employee use of an employer's property has been found to be mandatory subject of bargaining. The September 2009 Memorandum narrows permissible use of NYCHA's computer systems to "appropriately limited and urgent" business and prohibits all use for union-related business. (Pet., Ex. A.). According to the Union, prior to the September 2009 Memorandum, its members regularly utilized NYCHA's computer, internet, and email systems to communicate with other Union members, Local 375, and DC 37. In addition, its members distributed security alerts to each other; shared job postings, notices of civil service preparatory classes, and examinations; and discussed Union meetings, contract negotiations, and conditions of employment. Thus, NYCHA's issuance of the September 2009 Memorandum represents a unilateral change from NYCHA's prior policies on a mandatory subject of bargaining and violated NYCCBL § 12-306(a)(1) and (4) .

NYCHA's Position

NYCHA claims that the instant petition should be dismissed because it is untimely. The Computer Systems policies and the parties' collective bargaining agreement were all promulgated prior to September 2009. Although the Union claims that NYCHA's issuance of the September 2009 Memorandum constituted a violation of the NYCCBL, this memorandum does not state a new policy but merely restates and summarizes the rules contained in the pre-existing policies. Accordingly, the instant petition is untimely.

With respect to the merits of the petition, NYCHA argues that the Union's petition should be denied because DC 37 failed to show a change in a mandatory subject of bargaining. NYCHA argues that NYCCBL § 12-307(b) allows NYCHA to determine and limit employees' use of its computer, internet, and email systems and therefore to unilaterally issue the September 2009 Memorandum. NYCHA has a managerial right to select and determine use of its space and equipment. An employer has a right to maintain order and to control its proprietary interests in such equipment. The Union is allowed to utilize NYCHA's equipment only within the limits set forth in NYCHA's policies and collective bargaining agreement.

NYCHA additionally argues that the Union is not entitled to bargain over such use of NYCHA's computer, internet, and email systems because although DC 37 attempted to secure certain rights regarding this topic in the past, no contractual language grants the Union any rights concerning these systems. While NYCHA acknowledges that a union may have a right to negotiate access to an employer's property or to use a bulletin board, it argues that this right is limited for purposes of contract administration. In contrast to DC 37, NYCHA cites to new contract language proposed by the Organization of Staff Analysts ("OSA") that permits certain NYCHA employees a right to use NYCHA's computer systems for "specific union business purposes." NYCHA notes that its agreement with OSA, although only "tentative" at the time NYCHA filed its Answer, contains some mutually agreed upon employee use. (Ans., at ¶ 31). NYCHA asserts that DC 37 should have similarly bargained for a contract with such a provision. Instead, DC 37 did not seek to bargain, but "commandeered" NYCHA's equipment for union use. (NYCHA Ans. at ¶101.).

Further, NYCHA argues that the Union cannot demonstrate that the September 2009 Memorandum changed its Computer Systems policies. As stated earlier, it argues that the

memorandum merely gave its employees notice of the existing Computer Systems policies. All its employee organizations must abide by the Personnel Manual, which provides that approved employee organizations must seek authorization from NYCHA to use bulletin boards or similar electronic media, like NYCHA's Intranet. Failure to comply with these policy provisions is a violation of NYCHA rules. NYCHA contends that if the Union wants to use NYCHA's Computer Systems, it need merely request authorization from NYCHA, pursuant to these policies.

NYCHA also alleges that it has consistently enforced its Computer Systems policies and that such enforcement has been consistent with the September 2009 Memorandum. However, NYCHA concedes that the manner of enforcement of these provisions varies because alleged violations of these policies are discovered in different ways, such as through employee complaint, supervisor complaint, routine systems checks, and/or searches related to on-going litigation. Furthermore, NYCHA acknowledges that, despite its currently-existing Computer Systems policies, there have been occasions in which NYCHA failed to enforce these rules, regulations, and policies in a uniform and comprehensive manner. For example, "announcements for events such as baby showers [or] retirement parties" have been disseminated using NYCHA's computer, internet, and email systems despite NYCHA's policies governing this area. (Ans. ¶ 56).

Moreover, NYCHA argues that the Union cannot show a binding past practice concerning use of NYCHA Computer Systems for union-related use. It argues that NYCHA was not aware of employee use of its systems for union-related business until it heard the testimony of the Chapter President at his disciplinary hearing.

DISCUSSION

Timeliness of the Improper Practice Petition

As a preliminary matter, we find that DC 37 timely filed the instant improper practice petition. Pursuant to the NYCCBL, a party must file an improper practice charge no later than four months from the date the disputed action occurred. *See* NYCCBL § 12-306(e); OCB Rules §§ 1-07(b)(4) and 1-12(f). Here, the act complained of is NYCHA's issuance of the September 2009 Memorandum prohibiting use of NYCHA's Computer Systems in connection with union-related business. Since the Union's claims accrued on September 21, 2009, the date the memorandum was issued, and the instant petition was filed on January 20, 2010, we find that DC 37 timely filed its claims against NYCHA within the four-month statute of limitations. *See generally, Morris*, 3 OCB2d 19, at 13 (BCB 2010); *CSTG, L. 375*, 3 OCB2d 14, at 11 (BCB 2010).

In so holding, we reject NYCHA's assertion that DC 37's claims in the instant matter are time barred because the September 2009 Memorandum merely restates and clarifies the pre-existing Computer Systems policies, all of which were issued before September 21, 2009. As set forth in the discussion below, we find that NYCHA's September 2009 Memorandum changed its pre-existing policies concerning use of its Computer Systems for union business. Accordingly, we find the instant petition timely and continue with our analysis of DC 37's claims herein.

Failure to Bargain in Good Faith Claim

DC 37 alleges that NYCHA breached its duty to bargain in good faith over a mandatory subject. It is an improper practice under NYCCBL § 12-306(a)(4) for a public employer to refuse to bargain in good faith on matters within the scope of collective bargaining. *See, UMD, L. 333*, 2 OCB2d 44, at 19 (BCB 2009), *affd.*, *Matter of the City of N.Y. v. Bd. of Collective Barg.*, Index No.

400177/10 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Schlesinger, J.); *see also, DC 37*, 47 OCB 16, at 6-7 (BCB 1991). Under NYCCBL § 12-307(a), mandatory subjects of bargaining are defined as wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment.[6] *See, DC 37*, 75 OCB 8, at 6-7 (BCB 2005). In addition, NYCCBL § 12-307(b) identifies those subjects that are reserved for managerial discretion, such as the right to direct employees or to maintain the efficiency of government operations. "Since neither the NYCCBL nor the N.Y. Civil Service Law expressly delineates the nature of 'working conditions,' or 'conditions of employment,' both this Board and PERB determine on a case-by-case basis the extent of the parties' duty to negotiate." *DC 37,* 4 OCB2d 19, at 27 (BCB 2011); *CEU,* 2 OCB2d, at 14 (BCB 2009); *see also, DC 37, L. 1457*, 77 OCB 26, at 12 (BCB 2006); *UFOA, L. 854,* 45 OCB 4, at 8 (BCB 1990); *DC 37,* 45 OCB 1, at 7-8 (BCB 1990). In making this determination the Board does a balancing test that weighs the interests of the public employer and those of the employees concerning the subject in issue. (*Id.*)*;* (citing *DC 37,* 75 OCB 8, at 7-8); *see also, State of N.Y. (Dept. of Corr. Serv.)*, 38 PERB ¶ 3008 (2005). Implementing a policy concerning employees' use of an employer's computer, internet, and email systems is not among the rights specifically referred to in the NYCCBL. Therefore, to determine whether the alleged change concerns a mandatory subject of bargaining, this Board will examine the interests of the employer and of the employees.

Here, NYCHA argues that it issued the September 2009 Memorandum in order to ensure that

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[6] NYCCBL § 12-307(a) provides 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), working conditions.

its resources, namely its Computer Systems, are being used primarily for NYCHA-related business. NYCHA's Computer Systems policies permit some limited personal use, but other non-NYCHA related usage is prohibited. On the other hand, the Union asserts that employees have a statutory right to engage in union activity and that NYCHA employees utilize computer, internet, and email systems to perform their work and also use these systems to regularly communicate with other Union members, Local 375, DC 37 and management concerning union-related and other personal matters. Although NYCHA does not concede the regularity or extent of such non-NYCHA related use, it recognizes that such use has occurred in the past and still does occur.[7]

Based on the facts and circumstances of this case, we conclude that employee use of NYCHA's computer, internet, and email systems for union business is a mandatory subject of bargaining. NYCCBL § 12-305 provides that employees have the "right to self-organization, to form, join or assist public employee organizations, [and] to bargain collectively through certified employee organizations." Implicit in this statutory language is the right of employees to communicate with each other concerning union-related matters and with their union. Today, workplace communication is accomplished through a variety of methods, including face-to-face discussions, telephone conversations, emails, and posts on internet message boards, as well as the more traditional use of an employer's bulletin board. The NYCHA employees at issue here work in offices and have regular access to computers and they use NYCHA's computer, internet, and email systems to regularly communicate with each other and management concerning NYCHA

[7] Indeed, in *Feder*, 4 OCB 2d xx, the Board held that NYCHA employees regularly use its computers to send and receive various non-NYCHA related email messages and such use was only limited or prohibited in narrow circumstances, specifically use for union campaign purposes and use for a private commercial business. (*Id.* at 50-53.).

business.

While NYCHA's interest in maximizing productivity and protecting its property are legitimate, we cannot conclude that prohibiting, or limiting to only urgent matters, use of computer, internet, and email systems is necessary to serve NYCHA's interests. Indeed, by its own admission, NYCHA negotiated some permissible employee use for union-related purposes with another union. Therefore, we cannot conclude that NYCHA's interests outweigh the employees' interests. In reaching this conclusion, we note that employee use of other communications devices, namely employer telephones, was found to be a mandatory subject of bargaining. *See* COBA, 27 OCB 16, at 67 (BCB 1981) (demand to negotiate over personal use of employer phones for emergencies falls within the scope of bargaining.) Further, PERB has held that employee use of email and phones is a mandatory subject of bargaining. *Town of Fishkill*, 42 PERB 4577 (ALJ 2009) ("email is an alternative to using a telephone to communicate, and the use of the employer's email system for personal use is also a mandatory subject of bargaining."); *County of Saratoga*, 37 PERB 3024 (2004) (employee use of employer's telephones for personal calls during the workday is a mandatory subject of bargaining), *rev'd on other grounds*, 21 A.D.3d 1160(3d Dep't 2005); *New York City Transit Auth.*, 23 PERB 3016 (1990) (noting, union's right to use employer's telephone to conduct union business during work hours was not automatically conferred but is a mandatory subject of bargaining).

Having found, in this particular circumstance, that employee use of NYCHA's Computer Systems for union business is a mandatory subject of bargaining, we now must determine whether a unilateral change has occurred. "The petitioner must demonstrate the existence of such a change from the existing policy" on a mandatory subject of bargaining in order to establish a violation of

NYCCBL § 12-306(a)(4). *Dist. No. 1, PCD, MEBA, ILA,* 3 OCB2d 4, at 20 (BCB 2010) (quoting *PBA*, 79 OCB 43, at 7 (BCB 2007)); *see also DC 37, L. 376*, 73 OCB 12, at 17 (BCB 2004); *Town of Stony Point*, 26 PERB ¶ 4650 (1993). Where such a change has occurred, we must also determine whether that change was *de minimis*. *PBA*, 73 OCB 12, at 16-17 (BCB 2004), *affd., Matter of Patrolmen's Benevolent Assn. v. N.Y. City Bd. of Collective Barg.,* No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *affd.,* 38 A.D.3d 482 (1st Dept. 2007) (holding that a change in a policy's language regarding employees' participation in interviews was *de minimis*); *DC 37, AFSCME*, 77 OCB 34, at 17 (BCB 2006).

Prior to the September 2009 Memorandum, NYCHA's Computer Systems policies provided for some limited personal use of NYCHA's Computer Systems and other equipment, including telephones and voicemail. The Communications and Business Systems Policy and the General Regulations of Behavior provided that limited personal use of NYCHA's resources was permissible and made no distinction between the type of equipment or systems that were covered by these policies. All of NYCHA's Computer Systems policies, in some form or another, also set forth prohibited uses which were characterized as "Inappropriate Uses." (Ans., Exs. 2 and 3). Nevertheless, none of the policies define limited personal use. In addition, none of the policies specifically discuss union-related use, or define use for union business as either personal use or prohibited use. When reviewing these same policies in *Feder*, 4 OCB2d xx, at 48-49 (BCB 2011), the Board found that NYCHA did not interpret its Computer Systems policies to prohibit use for union-related business. Instead, we held that NYCHA considered union-related use to be synonymous with personal use, therefore some limited use for personal and/or union-related business was permissible.

The September 2009 Memorandum makes two distinct changes from the pre-existing Computer Systems policies. First, the memorandum modifies permissible personal use to be limited to only "urgent" matters. Although, the word "urgent" helps to define acceptable personal use, arguably it further limits acceptable use. Second, in the next to last paragraph of the September 2009 Memorandum, NYCHA for the first time includes union-related business in the list of types of use that is expressly prohibited.

However, neither the September 2009 Memorandum, nor the Barnett Memorandum issued on September 18, 2009, make clear whether some limited use of NYCHA's computer systems for union-related business is permissible or prohibited. The next to last paragraph of the September 2009 Memorandum could be interpreted as treating union-related use the same as use for commercial purposes, or use for any other non-NYCHA purposes, all of which are prohibited. On the other hand, the phrase "union-related business" in this paragraph could also be read as a sub-category of "limited and urgent personal business," which is permissible if kept to a minimum and limited to "urgent matters." NYCHA's position in this matter, presents a third possible interpretation, inasmuch as it contends that union-related use of its communications and business systems is permissible only to the extent that the Union receives express permission to do so. NYCHA articulates this interpretation, in the Barnett Memorandum on September 18, 2009. Notably, this position is inconsistent with NYCHA's position in *Feder*, *supra.,* in which NYCHA asserted that it considered union-related use to be personal use and therefore some limited use for that purpose was permissible.

Under any of these interpretations, we find that the September 2009 Memorandum changed permissible employee use of NYCHA's Computer Systems for union business. Since we previously

held that NYCHA's Computer Systems policies prior to September 2009 permitted some limited use for union-related business, the September 2009 Memorandum was a change in policy to the extent it either prohibits use for union-related business, limits union-related use to only matters that are urgent or permits union-related use only when express permission is granted. Accordingly, we find that NYCHA's issuance of the September 2009 Memorandum unilaterally changed a mandatory subject of bargaining, thereby violating NYCCBL § 12-306(a)(1) and (4).[8] Further, we do not deem any of these changes to be *de minimis* since the change directly limits use of these systems in connection with union-related business, which is protected activity under the NYCCBL.

We note that our conclusion that employee use of NYCHA's computer, internet, and email systems for union business is a mandatory subject of bargaining should not be read as establishing an absolute right of of employees' to use an employer's computers, internet, or email. *See generally, CWA, L. 1180*, 71 OCB 28, at 10 (citing *DC 37*, 29 OCB 30, at 8-9 (BCB 1982); *see also New York City Transit Auth.*, 23 PERB 3016 (1990) (noting union's right to use employer's telephone to conduct union business was not automatically conferred but is a mandatory subject of bargaining). The instant decision should not be interpreted to be a ruling on any or all policies governing all employees' use of an employer's computer, internet, and email systems. Here, NYCHA permitted some usage of its Computer Systems for union business and based on these facts we find that it cannot unilaterally rescind or alter this policy without bargaining to agreement or impasse.

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[8] Any violation of NYCCBL § 12-306(a)(4) is derivatively a violation of NYCCBL § 12-306(a)(1). *See UMD, L. 333*, 2 OCB2d 44, at 22 (BCB 2009); *DC 37*, 71 OCB 20, at 5-6 (BCB 2003) (when an employer violated its duty to bargain in good faith, there is a derivative violation of NYCCBL § 12-306(a)(1)).

Interference Claim

DC 37 also contends that the September 2009 Memorandum prohibits employee use of its Computer Systems for union-related business and therefore independently interferes with the exercise of employees' statutory rights under the NYCCBL. It is unlawful for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. . . ." NYCCBL § 12-306(a)(1). Actions which are inherently destructive of important employee rights may constitute unlawful interference even in the absence of proof of improper motive. *Local 1180, CWA*, 71 OCB 28, at 9-10 (BCB 2003); *Assistant Deputy Wardens Assn*., 55 OCB 19, at 27 (BCB 1995). *See also Committee of Interns and Residents*, 51 OCB 26 (BCB 1993), *aff'd sub nom. Matter of Committee of Interns and Residents v. Dinkins*, Index No. 127406/93, slip op. at 47 (Sup. Ct. N.Y. Co., Nov. 29, 1993). Similarly, the New York State Public Employment Relations Board ("PERB") has stated:

> The Taylor Act guarantees to public employees in this State the right to participate in an employee organization and to be represented by an employee organization in the negotiation of their terms and conditions of employment. Conduct of an employer or one acting in his behalf which has a predictably chilling effect on such employee organization's activities clearly discourages membership in or participation in the activities of the employee organization. Thus, conduct of an employer which is inherently destructive of such employee rights is a violation of § 209.a-l© even in the absence of proof of any intention to weaken the employee organization.

United Federation of College Teachers, Local 1460, 5 PERB ¶ 3018 (1972), *rev'd on other grounds*, *sub nom. Matter of Fashion Institute of Technology v. Helsby*, 44 A.D.2d 550 (1st Dept. 1974). Further, a party is presumed to have intended the consequences that it knows or should have known would inevitably flow from its actions. *Local 1180, CWA*, 71 OCB 28, at 10 (employer

interfered with protected rights when, in departure from its existing practice, it barred union meeting on employer premises).

Recently, in *District Council 37*, 3 OCB2d 56 (BCB 2010), this Board held that an agency's decision to prohibit use of its office and technology resources by employees solely for union activity interfered with the employees' statutorily protected rights. The agency's unilateral change in its office technology usage policy constituted a violation of NYCCBL § 12-306(a)(1) because the policy explicitly treated union activity in a uniquely disparate manner to other non-agency-related use. *Id.*, at 13; *Town of Henrietta*, 25 PERB ¶3040 (1992) (town engaged in interference by discontinuing union use of fax machine and telephone while permitting other personal use).

We find that the September 2009 Memorandum interfered with, restrained or coerced employees in the exercise of their rights protected by NYCCBL § 12-305, because NYCHA admits that the September 2009 Memorandum was promulgated in response to testimony from the Chapter President and Barnett that themselves and other employees used NYCHA's Computer Systems for union business. (Ans., ¶¶ 32-42, 46-47). Prior to issuance of the September 2009 Memorandum, there is no evidence that union-related use was prohibited or limited to urgent matters. As stated earlier, some limited use of NYCHA's Computer Systems for union-related as well as other non-NYCHA purposes was permitted. *Feder*, 4 OCB2d xx, 47. The September 2009 Memorandum was issued as a direct result of the Chapter President's use of NYCHA's Computer Systems for union business and further limited, if not prohibited, employees' permissible use of the Computer Systems for union activity. Accordingly, we must conclude that the September 2009 Memorandum was intended to discourage union activity and interfered with employees' exercise of protected rights in 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 filed by District Council 37, AFSCME, AFL-CIO, docketed as BCB-2828-10 be, and the same hereby is, granted, and we find a violation of NYCCBL § 12-306(a)(1) and (4); and it is further

ORDERED, that the New York City Housing Authority rescind the September 2009 Memorandum as it relates to employee use its computer, internet, and email systems for union business; and it is further

ORDERED, that the New York City Housing Authority, upon request, bargain with District Council 37, AFSCME, AFL-CIO, concerning a policy governing employee use of its computer, internet, and email systems for union business; and it is further

ORDERED that the New York City Housing Authority post appropriate notices detailing the above-stated violations of the NYCCBL.

Dated: New York, New York
August 18, 2011

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES MOERDLER
MEMBER

PETER B. PEPPER
MEMBER

APPENDIX A

Relevant Provisions of NYCHA's Internet Policy:

I. PURPOSE

[U]se of the Internet will be limited to the support of agency business functions, insofar as these will be enhanced by such Internet use.

* * *

III. INTERNET USE

A. Appropriate Use:

Use of the Internet will be limited to business-related information, products or services clearly identified as being in the interest of the New York City Housing Authority.

* * *

B. Inappropriate Use:

Use of the Internet for commercial purposes, personal business, or any other purpose unrelated to NYCHA business is prohibited. Such use may lead to disciplinary action.

The Internet may not be used for:

- illegal, disruptive, or unethical activities, or for personal gain;

- the distribution of copywritten [sic] software programs or documents without proper authorization;

- the display of discriminatory, sexually explicit, harassing, offensive, vulgar threatening or inappropriate images or documents. Accessing such material will lead to disciplinary matter . . . ;

- the transmittal of confidential information, or information received from third parties on a confidential or contractual basis, to unauthorized individuals.

* * *

(Ans. Ex. 2).

APPENDIX B

Relevant Provisions from NYCHA's Human Resources Manual, Personnel Manual, Chapter 1, Section K, Concerning Use of NYCHA Office and Technology Resources:

3. Appropriate Use

- all NYCHA communications and business systems are tor be used primarily for NYCHA-related purposes.

- Responsible and professional behavior is expected to be maintained in all such use.

- Limited personal use is appropriate and expected; however, such use should be kept to a minimum.

4. Inappropriate Use:

- private commercial work;

- the creation sending, or disseminating of discriminatory, harassing, offensive, vulgar, or threatening messages or images;

* * *

- interference or disruption of network services or equipment . . .;

- transmission of confidential information . . .;

- posting information about NYCHA on any electronic bulletin board or chat room . . . ;

- use of another employee's password or accessing another employee's computer system, email account, voice mail or answering machine without authorization;

- storage of information that is not related to one's job on any computer system or email account;

- reading or editing documents or email messages without authorization; and

- dissemination, reproductions, or printing of copyrighted materials, including articles and software.

(Ans. Ex. 3).

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 4 OCB2d 47 (BCB 2011), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, and the City of New York and the New York City Housing Authority.

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 filed by District Council 37, AFSCME, AFL-CIO, docketed as BCB-2828-10 be, and the same hereby is, granted regarding a violation of NYCCBL § 12-306(a)(1) and (4); and it is further

ORDERED, that the New York City Housing Authority rescind the September 2009 Memorandum as it relates to employee use of its computer, internet, and email systems for union business; and it is further

ORDERED, that the New York City Housing Authority, upon request, bargain with District Council 37, AFSCME, AFL-CIO, concerning a policy governing employee use of its computer, internet, and email systems for union business; and it is further

ORDERED that the New York City Housing Authority post appropriate notices detailing the above-stated violations of the NYCCBL.

The New York City Housing Authority
(Department)

Dated: _____ **(Posted By)**
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.