DC 37, 5 OCB2d 1 (BCB 2012)

(IP) (Docket No. BCB-2912-10).

Summary of Decision*:** The Union alleged that DOF and the City violated NYCCBL § 12-306(a)(1), (3) and (4) when they repudiated the Citywide Agreement and past practice, and engaged in direct dealing, by notifying Union members of impending layoffs before conferring with the Union. The City argued that it satisfied its contractual obligations by meeting with the Union in advance of the layoffs and that there was no enforceable unwritten past practice because the parties had already memorialized their agreement on the subject. The City also argued that it had not engaged in direct dealing because the DOF notification merely informed employees of the future layoffs. The Board found that DOF repudiated the parties' agreement, but did not engage in direct dealing or retaliation. Accordingly, the Petition was granted as to the claimed repudiation and denied as to the claims of direct dealing and retaliation. ***(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,
LOCALS 375 and 1113, CIVIL SERVICE TECHNICAL GUILD,

Petitioners,

-and-

THE NEW YORK CITY DEPARTMENT OF FINANCE and
THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On December 2, 2010, District Council 37, AFSCME, AFL-CIO, Locals 1113 and 375, Civil Service Technical Guild, ("DC 37" or "Union") filed a Verified Improper Practice Petition against that the City of New York ("City") and the New York City

Department of Finance ("DOF"). The Union alleges that the City violated § 12-306(a)(1), (3) and (4) of the New York City Collective Bargaining Law ("NYCCBL") when it repudiated the Citywide Agreement and past practice, and engaged in direct dealing, by notifying Union members of impending layoffs before conferring with the Union. The City argues that it satisfied its contractual obligations by meeting with the Union in advance of the layoffs and that there is no enforceable past practice because the parties had memorialized their agreement on the subject. The City also argues that it has not engaged in direct dealing because the notification from DOF merely informed employees of the future layoffs. The Board finds that DOF repudiated the parties' agreement, but did not engage in direct dealing or retaliation. Accordingly, the Petition is granted in part and denied in part.

BACKGROUND

DOF is a City mayoral agency that administers the City's revenue laws related to property, business income, taxes, and parking violation fines. DC 37 represents employees that work for DOF in various titles, including Office Machine Aide, Supervisor of Office Machine Operations, Associate Investigator, Tax Map Cartographer, Associate Engineering Technician, and Stock Worker. DC 37 and the City are parties to the Citywide Agreement. Article XVII of the Citywide Agreement governs layoffs. It reads in pertinent part:

> ARTICLE XVII – JOB SECURITY
>
> Section 1. General Layoff Provisions
> Where layoffs are scheduled affecting full-time employees in competitive class, non-competitive class, and labor classes, the following procedures shall be used:

> a. Notice shall be provided by the Office of Labor Relations to the appropriate Union(s) not less than thirty (30) days before the effective dates of projected layoffs. Such notification(s) shall apply to all proposed layoffs and shall include a summary by layoff unit of the number of affected positions by title (including title code number and civil service status) and shall also include in addition to the above information the name, social security number, city start date, and title start date of each affected employee.
>
> It is understood by the parties that such notice is considered to be preliminary and is subject to change during the 30 days notice period. However, if new title(s) which were not part of the original notice are added to the proposed layoff notice or the number of employees in title(s) contained in the original notice is increased beyond the number in the original notice, an additional 30 days notice will be given to the affected union(s) covering solely such additional title(s) or numbers, except, such additional 30 days notice shall not apply to employees displaced by the "bumping" provisions mandated by the Civil Service Law or by appointments from special transfer, preferred, or other civil service lists. The parties may waive such additional notice by mutual consent.
>
> b. Within such 30-day period designated representatives of the Employer will meet and confer with the designated representatives of the appropriate union with the objective of considering feasible alternatives to all or part of such scheduled layoffs.

(Pet., Ex. F).

On November 18, 2010, the City released its November Financial Plan for Fiscal Year 2011. The City announced this information in a press release, which states in pertinent part:

> Agency Gap Closing Actions
>
> This is the ninth round of budget gap closing actions City agencies have been required to undertake in recent years. The cumulative impact of the last two years of gap closing actions and the latest round of actions is $5.2 billion in savings for Fiscal Year 2012.

> Examples of the latest round of City agency budget gap closing actions include:
>
> * * *
>
> Department of Finance
> Lay off 129 employees to consolidate and modernize organizational units and create efficiencies.

(Ans., Ex. 1).

Thereafter, on November 18, 2010, a newspaper story was published by the *New York Post* regarding the upcoming layoffs at City agencies, including DOF. The article states in pertinent part:

> Mayor Bloomberg today is expected to order thousands of layoffs next year in bruising budget cuts intended to close a massive gap, sources told the Post last night. Bloomberg will announce the widespread job reductions and service cuts as he tries to close the nearly $3.3 billion budget deficit the city is facing next year. . . . The Department of Finance is expected to take a steep hit of about 100 layoffs, several sources said.

(Ans., Ex. 3).

On November 18, 2010, the DOF Commissioner sent a memorandum via email to all DOF staff, which states in pertinent part:

> This morning, the Mayor released the November Financial Plan Update, which included a City-wide headcount reduction of more than 10,000 jobs over the next two years. Included in this reduction are more than 6,000 layoffs. These actions are being taken to help close a $3.3 billion budget deficit next year. There are many rumors circulating about our Agency, and I want to make certain that you hear the facts directly from me.
>
> Among other actions, [DOF] will lay off 129 staff members. We are eliminating the following titles which account for 105 positions: Office Machine Aides, Supervising Office Machine Aides, Associate Investigators,

> Cartographers, Associate Engineers and Stock Workers. We will also be eliminating 10 Deputy Sheriff positions and 14 positions in other titles. Our Human Resource staff will meet with affected individuals in the next week. For all affected permanent civil servants, the termination dates will not occur before January.
>
> Obviously, this is a trying time for those whose positions are being eliminated. To be blunt, I have never been able to adequately capture the difficulty of the moment, or say anything that greatly helps those affected. I thank everyone for their understanding and continued hard work and dedication.

(Ans. ¶ 22; Ex. E).

The City did not give notice of the layoffs to the Union prior to the City's public announcement.[1] DC 37 asserts that the next day, November 19, 2010, it began receiving telephone calls from bargaining unit members employed at DOF regarding the impending layoffs. DC 37 also asserts that on November 18, 19, and 22, 2011, DOF managerial representatives met with several bargaining unit members. During these meetings, employees were informed that they would be laid off before January 2011. The City admits that DOF management representatives met with employees, but denies that that DOF told any employees that they would be laid off before January 2011. According to the City, at these meetings, DOF representatives reiterated that the DOF Commissioner's memorandum stated that DOF would be eliminating the Cartographer title, and that, in the upcoming week, DOF Human Resources staff would meet with affected employees. The parties agree that a DOF representative told one Tax Map Cartographer that her

[1] DC 37 asserts that, for "virtually every other budget modification, the Union received a preliminary briefing as to the plan before it was made public." (Pet. ¶ 9). The City contends that, "in the event of major budget announcements, the City has endeavored to provide advance notice to DC 37 as is feasible." (Ans. ¶ 4).

position would not be eliminated and that she would be the sole employee remaining in her unit.

On November 19, 2010, DC 37's Associate Director of Research and Negotiations contacted the Associate Commissioner of New York City Office of Labor Relations' ("OLR"). DC 37's Associate Director of Research and Negotiations told OLR's Associate Commissioner that Union members informed him that the files of DOF Tax Map Cartographers were being removed from their work location, and DOF management was asking employees to discuss their job duties. OLR's Associate Commissioner told DC 37's Associate Director that she had no knowledge of these issues, and advised him to contact the DOF Assistant Commissioner. She also indicated that she was aware of the email that DOF sent to its employees on November 18, 2010, but had no knowledge of it before it was disseminated.

Later on November 19, 2010, DC 37's Associate Director contacted the DOF Assistant Commissioner. The DOF Assistant Commissioner informed the Union's Associate Director that the *New York Post* contacted DOF about a story that the newspaper would be publishing about DOF's impending layoffs. The City asserted that the DOF Commissioner sent the email to all DOF employees in order "get out ahead of any misinformation or employee anxiety such a story would cause." (Ans. ¶ 22). DC 37's Associate Director requested that DOF refrain from meeting with Union members about layoffs.

On November 29, 2010, by fax and certified mail, OLR notified DC 37 of the DOF layoffs scheduled to take place on January 14, 2011. The notification reads, in pertinent part:

> Enclosed please find a list of layoffs scheduled for the Department of Finance. These layoffs and/or terminations for business necessity are scheduled effective January 14, 2011, affecting employees represented by your Union.
>
> This list is subject to change due to the application of statutory and contractual layoff procedure.
>
> If you wish to schedule a meeting to discuss the matter, please contact this office.

(City Ex. 9).[2]

The Union filed its Improper Practice Petition in this matter on December 2, 2010.

On December 13, 2010, City representatives met with various unions representing affected employees to discuss the DOF layoffs. They also discussed the possibility of using the "special transfer list" provisions for permanent employees to move affected permanent employees to other City agencies. Also on December 13, by fax and certified mail, OLR notified DC 37 that three of the scheduled layoffs were rescinded. On December 23, 2010, by fax, OLR notified DC 37 that the several of the layoffs at DOF scheduled to be effective January 14, 2011, would be rescheduled to January 21, 2011, and January 28, 2011. Also that day, representatives of the City and the Union held a meeting at which OLR's Associate Commissioner distributed written notification of the rescheduled layoffs. The parties again discussed the possibility of transferring affected permanent employees to other City agencies under the "special transfer list" provisions for permanent employees.

[2] At the request of the Office of Collective Bargaining, the City submitted this document after it submitted its pleadings. The document was labeled as "City Exhibit 9" by the Trial Examiner.

POSITIONS OF THE PARTIES

Union's Position

DC 37 alleges that DOF repudiated the layoff procedures in the Citywide Agreement and thereby violated NYCCBL § 12-306(a)(1), (3), and (4) when it sent the email to bargaining unit members before giving notice to and conferring with DC 37. The Union asserts that this action subverted the organizational and representational rights of the Union and its leadership.[3] By its actions, the City engaged in direct dealing and made a unilateral change in layoff procedures and layoff impacts, which are mandatory subjects of bargaining.

The City circumvented the existing layoff procedures as defined by the Citywide Agreement, when it failed to adhere to Article XVII's requirement that the City give the Union 30-day advance notice of layoffs. Instead, the City implemented its own procedures and, thereby, repudiated the Citywide Agreement. Article XVII requires that the union and the City meet to consider "feasible alternatives" to layoffs, and in *Antoine*,

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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 . . .
>
> * * *
>
> (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;
>
> (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.

73 OCB 8 (BCB 2004), the Board recognized that this contractual provision satisfies the parties' obligation to bargain over the impact of layoffs. Further, in the past, the City and DC 37 had always communicated regarding proposed layoffs before bargaining unit members were notified that they would laid off; this constitutes a past practice. The City repudiated the Citywide Agreement when it informed individual union members of the layoffs before informing DC 37; the fact that the City met subsequently with DC 37 is inconsequential. The City's actions also undermined DC 37's authority and leadership. The City disseminated its letter to all DOF employees, which detailed the number of staff from each title that would be laid off, and met with individual employees to notify them of their own layoff information.

DC 37 also asserts that Union members have a fundamental right to have their Union's assistance when facing a layoff and interference with this right is inherently destructive. The Board has found that interference with an employee's right to bring a grievance is a violation of NYCCBL § 12-306(a)(1). Layoffs, however, generally have an even greater effect on employees than grievances. Therefore, interfering with the layoff process should be considered interference in violation of NYCCBL § 12-306(a)(1).

The City has ignored § 1(b) of Article XVII, which clearly states that the objective for a meeting of employer and union representatives is to discuss "feasible alternatives" to layoffs. The City disregarded that provision when it notified bargaining unit members of its decision regarding layoffs at DOF before meeting with DC 37; its meetings with DC 37 were only for show. Thus, the City has engaged in direct dealing as well as contract repudiation.

While § 1(b) of Article XVII is silent regarding when the meeting between a union and the employer must occur, the provision clearly contemplates that such a meeting take place before an agency decides which employees will be laid off, and when the layoffs would occur. Moreover, the 20-year practice of the parties has been to meet prior to the time that employees are notified that they may be laid off.

City's Position

The City first argues that it has a managerial right pursuant to NYCCBL § 12-307(b) to lay off employees. The City also asserts that it has no duty to bargain over the impact of the layoffs in question because the City has already satisfied its contractual obligations by meeting with the Union on multiple occasions, in advance of the layoffs taking place, to discuss the feasibility of alternatives. At these meetings, several alternatives to layoffs were discussed, including utilization of special transfer lists for permanent employees.

The City also asserts that its dissemination of a November 18, 2011 email to employees regarding future employee layoffs without reference to the Union was not inherently destructive of important employee rights. The City has not engaged in direct dealing; the DOF Commissioner's email to employees merely described the future layoffs. His message does not state or imply that DOF sought to bargain with employees individually regarding layoffs. The email "does not summarize, or even refer, to any discussions with any unions regarding layoffs . . . [it] is addressed directly to employees, and describes a decision that management had already arrived at." (Ans. ¶ 68).

The City argues that there is no enforceable past practice concerning layoff notification except from that which is delineated in Article XVII, § 1(a), of the Citywide

Agreement, which obligates the City to provide notice to "the appropriate unions not less than thirty days before the effective date of projected layoffs." Article XVII is a result of the parties' negotiations over what the City's enforceable obligations should be concerning employee layoffs. By creating Article XVII, the duty to bargain over the impact of layoffs was satisfied, thereby waiving further bargaining rights on this subject. DC 37 is therefore precluded from seeking enforcement of an unwritten practice related to layoff notification. While the City often notified DC 37 of layoffs before notifying employees, the order in which these two notifications occurred in the past cannot constitute an enforceable past practice. The parties have negotiated this subject, and the memorialized agreement does not compel the City to notify the Union before the employees.

The City asserts that the parties have satisfied their mutual duty to bargain layoff procedures as demonstrated by the creation of Article XVII. The negotiated layoff procedures constitute the parties' entire obligation on this topic, and DC 37 is therefore precluded from seeking to enforce what it asserts is an unwritten practice. Even if a matter would constitute a mandatory subject of bargaining, the fact that parties have already negotiated procedures precludes a finding that they failed to bargain. It is undisputed that the parties have negotiated layoff procedures, and memorialized their agreement in Article XVII. Instead, the parties dispute the meaning of the Citywide Agreement. However, clearly, this does not alter the fact that the duty to bargain has been satisfied.

Moreover, contract reversion is not at issue here; the City never implemented a practice inconsistent with its obligations under the Citywide Agreement. If anything, DC

37's asserted past practice is not an inconsistent alternative to Article XVII, but instead an extra-contractual obligation.

Finally, the City asserts that the Board should find no derivative violation of NYCCBL § 12-306(a)(1) because it has demonstrated that it did not violate its duty, under NYCCBL § 12-306(a)(4), to bargain in good faith.

DISCUSSION

The Union makes two major claims in this matter. It alleges that when DOF notified employees that layoffs would occur before first notifying the Union and engaging in meaningful discussions aimed at finding alternative to layoffs, it repudiated Article XVII of the Citywide Agreement in violation of NYCCBL § 12-306(a)(4) and derivatively, § 12-306(a)(1). It also alleges that DOF's actions amount to direct dealing in violation of NYCCBL § 12-306(a)(1).

As we explained in *SSEU, L. 371*, 77 OCB 35 (BCB 2006), "systematically disregarding a quintessential aspect of the parties' collective bargaining agreement . . . constitutes a deliberate interference with employees[']' rights and amounts to a failure to bargain in good faith." *Id*. at 21. *See DC 37, Local 1508*, 67 OCB 11, at 6 (BCB 2001) (citing *Addison Central School District*, 17 PERB ¶ 3076 (1984)). Such a violation of the duty to bargain in good faith includes actions "designed to set at naught and systematically frustrate" rights provided in a collective bargaining agreement, "essentially *de facto* carv[ing] out a provision of a collective bargaining agreement for willful non-enforcement." *SSEU, L. 371*, 77 OCB 35, at 22, 21.

When the parties wrote Article XVII § 1(b), they set forth the parties' understanding and agreement that representatives of the Employer and the Union would "meet and confer . . . [to] consider[] feasible alternatives to all or part of the scheduled layoffs." Against the backdrop of this provision, the DOF Commissioner notified employees that layoffs would indeed be occurring. Specifically, he stated that he "want[ed] to make certain that [employees] hear the facts directly from [him]." (Ans., Ex. E). Those "facts" included that "[DOF] will lay off 129 staff members," naming seven specific titles. (*Id.*). He stated that in the upcoming week, DOF's Human Resource staff would meet with "affected individuals." (*Id.*). These announcements speak of the layoffs as a *fait accompli*, leaving no room for the Union to represent its members' interest in seeking "feasible alternatives" to the layoffs, as the Citywide Agreement requires.

Just as the DOF Commissioner stated, and before meeting with the Union, DOF representatives spoke directly with employees regarding the upcoming layoffs, stating without equivocation or qualification to certain employees that their position would be eliminated, while informing one employee that she would remain as the sole employee in her unit. DOF's "informational" meetings with employees would reasonably leave employees with an impression that DOF's stated plan of action was final. By telling employees unconditionally that they will be laid off on a date certain, and with no indication that the decision was subject to efforts by their Union representative to negotiate alternatives to the layoffs, DOF frustrated the express purpose of Article XVII, § 1(b), of the Citywide Agreement. We find that DOF's actions effectively repudiated

the layoff provisions of the Citywide Agreement and thwarted the reasonable expectations of the Union in entering into this agreement.[4]

We acknowledge that, after the Union complained to OLR and DOF about the failure to give notice first to the Union, OLR gave formal written notice to the Union and, thereafter, the City and the Union held meetings in accordance with the Citywide Agreement's requirement that the parties "meet and confer . . . *[to] consider[] feasible alternatives to all or part of the scheduled layoffs*." Citywide Agreement, Art. XVII, § 1(b)(emphasis added). After these meetings were held, several changes were made to the scheduled layoffs; some of the layoffs were postponed, others were completely rescinded. However, these meetings did not occur until after DOF proclaimed with certainty to employees that Union members would definitely be laid off. As we have held repeatedly, an "improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased." *OSA*, 1 OCB2d 45, at 13 (BCB 2008) (citing *DC 37, Local 1457*, 1 OCB2d 32, at 22-23 (BCB 2008); *Plainedge Union Free School District*, 31 PERB ¶ 3063 (1998) (corrective action may effect remedy but "does not render moot the District's violation.")). Thus, the fact that after DOF's acts in repudiation of the Citywide Agreement, City representatives gave notice to and met with the Union to discuss the layoffs as required by the contract does not remove the violation, or render moot the improper practice petition. Indeed, "[a] contrary holding would discourage good labor relations by encouraging brinksmanship." *OSA*, 1 OCB2d 45, at 13 (BCB 2008).

[4] Further, we are not swayed by assertions that DOF desired to quell concerns raised by the *New York Pos*t article when it sent the memorandum. Motivation or intention is not a defense to a claimed violation of NYCCBL § 12-306(a)(4).

However, we find that the record does not support a claim of direct dealing. "[A]n employer's direct communications with Union members violates the NYCCBL when [the employer] bypasses a certified bargaining representative and negotiates directly with members," which constitutes a subversion of the members' right to representation by their Union. *UFT*, 4 OCB2d 4 (BCB 2011) (internal quotations omitted) (quoting *DC 37, L. 2507*, 2 OCB2d 28, at 10 (BCB 2009)). In *UFT*, we found that the employer engaged in direct dealing when it issued a memorandum to employees, which invited them to negotiate individually with management regarding a new breakdown in their hours worked, a mandatory subject of bargaining. Here, DOF did indeed communicate directly with Union members when it sent its November 18, 2010, memorandum stating plainly that layoffs would occur. An employer engages in direct dealing when, in its communications with employees, it obtains or endeavors to obtain the employees' agreement to some matter affecting a term or condition of employment, whether by making either "a threat of reprisal or promise of benefit," or "otherwise subvert[ing] the members' organizational and representational rights." *CIR*, 49 OCB 22, at 22 (BCB 1992); *see also PBA*, 3 OCB2d 18, at 33 (BCB 2010). The DOF memorandum and the informational meetings that followed, however, contained neither a threat of reprisal nor a promise of benefit. They also demonstrate no effort to engage the employees in direct negotiation. Rather, DOF communicated its intention to act in a specific matter, without seeking to obtain the employees' assent thereto. Therefore, we find that direct dealing has not been established. *See, e.g., DC 37, L. 2507*, 2 OCB2d 28, at 10-11.

Finally, the Union has also alleged a violation of NYCCBL 12-306(a)(3), which requires a showing of discrimination in retaliation for protected Union activity. No facts are alleged to establish the elements of such a claim, and, therefore, this claim is summarily dismissed.

Accordingly, the Petition is granted in part as to the repudiation claim, and denied in part as to the claims of direct dealing and retaliation.

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, Locals 375 and 1113, against the New York City Department of Finance and the City of New York, docketed as BCB-2912-10, is granted in part as to the claimed repudiation in violation of the duty to bargain under NYCCBL § 12-306(a)(4), and derivatively NYCCBL § 12-306(a)(1); and denied as to the claim of direct dealing in violation of NYCCBL § 12-306(a)(1); and denied in part as to the claimed retaliation in violation of NYCCBL § 12-306(a)(3); and it is further

ORDERED, that the New York City Department of Finance and the City of New York cease and desist from breaching its duty to bargain in good faith; and it is further

ORDERED that the New York City Department of Finance and the City of New York post appropriate notices detailing the above-stated violations of the NYCCBL.

Dated: January 25, 2012
New York, New York

MARLENE A.GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER B. PEPPER
MEMBER

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 5 OCB2d 1 (BCB 2012), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, Locals 375 and 1113, Civil Service Technical Guild and the New York City Department of Finance and the City of New York.

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, Locals 375 and 1113, Civil Service Technical Guild, docketed as BCB-2912-10 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 Department of Finance and the City of New York cease and desist from breaching its duty to bargain in good faith; and it is further

ORDERED that the New York City Department of Finance and the City of New York post appropriate notices detailing the above-stated violations of the NYCCBL.

The New York City Department of Finance
(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.