DC 37, L. 420, 5 OCB2d 19 (BCB 2012)

(IP) (Docket No. BCB 2982-11)

Summary of Decision*:** The Unions alleged that HHC violated NYCCBL § 12-306(a)(1) and (4) when it unilaterally posted its members' names and photographs on bulletin boards in a HHC facility. HHC argued that the claim was untimely, that the postings were within its managerial prerogative, and that there was no change in policy or, at most, a *de minimis* change, since the material posted was already publically displayed on the employees' photo identification badges. Further, HHC argued that its interest in ensuring that patients can readily identify staff outweighs the employees' alleged privacy interest in the distribution of already public material. The Board found that the postings did not involve a mandatory subject of bargaining as HHC's interest outweighed the employees' privacy interest in the distribution of publicly available material. Accordingly, the Board denied the petition in its entirety. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and its affiliated LOCAL 420,

Petitioners,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On September 16, 2011, District Council 37, AFSCME, AFL-CIO ("DC 37") and its affiliated Local 420 (collectively, "Unions") filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation ("HHC") violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title

12, Chapter 3) ("NYCCBL") by unilaterally posting its members' names and photographs on bulletin boards in a HHC facility. HHC argues that the claim is untimely, that the postings were within its managerial prerogative, and that there was no change in policy or, at most, a *de minimis* change, since the material posted is already publically displayed on the employees' photo identification ("ID") badges. HHC further argues that its interest in ensuring that patients can readily identify staff outweighs the employees' alleged privacy interest in the distribution of already public material. This Board finds that the claim is timely, but that the postings did not involve a mandatory subject of bargaining as HHC's interest outweighed the employees' privacy interest in the distribution of publicly available names and photographs. Accordingly, the petition is denied.

BACKGROUND

Local 420 represents HHC employees in the titles of Patient Care Associate, Certified Nurse's Aide, Nurse's Aide, and Services Aide and is affiliated with DC 37, which is the certified bargaining representative for those titles. HHC has a long-standing policy of requiring all employees on duty to wear in a conspicuous place photo ID badges that display the employees' photograph, full name, and position so that patients can identify the staff members who are treating them.

HHC avers that, in April 2011, in an effort to make it easier for patients to identify staff, Coney Island Hospital began posting on bulletin boards in its Unit hallways and the Emergency Department the same information contained on its employees' photo ID badges, along with slightly larger copies of the photographs used on the photo ID badges. The Unions assert that,

while it became aware of HHC's intention to post its members' names and photographs in April 2011, the actual postings did not begin until May 19, 2011.

By letter dated April 8, 2011, Local 420 requested a labor-management meeting with Coney Island Hospital to address, among other topics, "[p]osting pictures of members on units." (Ans., Ex. 5) Local 420 also requested that HHC "provide more information" regarding the posting of pictures. (*Id.*) When Local 420 received no response, it re-sent the identical letter on April 25, 2011. The requested labor-management meeting was held on May 19, 2011. The Unions aver that Local 420 was informed at that meeting that the posting of its members' names and photographs would begin on that day.

On June 1, 2011, HHC sent Local 420 a letter summarizing the May 19 labor-management meeting. Regarding the posting of photographs, the letter notes that:

> . . . this is a project of [a Coney Island Hospital Deputy Executive Director]. This would increase patient satisfaction. All levels of staff including Doctors have have [*sic*] their pictures posted. These pictures have the same information as [photo] ID badges, with no personal information.
>
> Employees enjoy the letters of praise that follow compliments from patients, who can now readily identify staff.
>
> [Local 420's Council Representative] said first there were locator badges. Now staff have their pictures posted on the floor. [A Coney Island Hospital representative] stressed no personal data such as Social Security data is given out.

(Ans., Ex. 6)

On September 16, 2011, the Unions filed the instant improper practice petition requesting that the Board order HHC to bargain over the posting of its members' names and photographs in Coney Island Hospital's hallways, to cease and desist such postings, to remove those already posted, and to post notices, as well as any other relief the Board deems just and proper.

POSITIONS OF THE PARTIES

Unions' Position

The Unions argue that the instant petition is timely because HHC did not provide them with definitive notice of the postings until the May 19 labor-management meeting and that the postings did not begin until that day. The instant petition was filed within four months of May 19, 2011, and is, therefore, timely.

The Unions argue that posting its members' names and photographs on bulletin boards in public hallways without prior consent violates NYCCBL § 12-306(a)(1) and (4) as a unilateral change in a term or condition of employment that unnecessarily invades its members' privacy interests.[1] The NYCCBL requires that an employer's right to manage its affairs be balanced against the employees' right to negotiate the terms and conditions of their employment. As HHC employees are already required to wear photo ID badges, HHC has an effective, less intrusive means of achieving its mission of assisting patients in identifying hospital staff. Therefore, the employees' privacy interest outweighs HHC's stated need for further publication of its employees' names and photographs.

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[1] NYCCBL 12-306(a) provides, in pertinent part, that:

> 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 [§] 12-305 of this chapter;
>
> * * *
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

NYCCBL § 12-305 provides, in pertinent part: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

Responding to HHC's argument that the postings are a management prerogative, the Unions argue that the postings have a practical impact upon its members' privacy interests as they are in areas accessible to the general public, and not just patients and staff. Additionally, "the added exposure of the staff lends itself to an increased basis for discipline of the employees and therefore affects their terms and condition of employment." (Rep. ¶ 29) As the postings unnecessarily intrude on the employees' privacy interests and give rise to disciplinary issues, they are a mandatory subject of bargaining. The Unions argue that, in any balancing test, the employees' privacy interests in not having their names and photographs displayed in public hallways outweigh the employer's purported interest, as HHC already has an effective, less intrusive means to achieve its goals—the photo ID badges.

Finally, the Unions argue that the postings are a material change, as Coney Island Hospital had not previously posted employees' names and photographs. HHC's photo ID badge policy does not refer to the posting of employees' names and photographs on bulletin boards and HHC's Employee Handbook states that the bulletin boards are "to keep employees informed of various matters." (Rep. ¶ 39) (quoting Ans., Ex. 3) Thus, the postings constitute a substantial and material change.

HHC's Position

HHC argues that the April 2011 letters from Local 420 establish that the Unions were aware of the postings more than four months prior to the September 2011 filing of the instant petition. The four month statute of limitations precludes the Board from considering the substantive merits of untimely claims, even where the delay in filing has not prejudiced the respondent. Therefore, the petition must be dismissed in its entirety as untimely.

HHC further argues that its actions fall squarely within the managerial rights clause of NYCCBL § 12-307(b) and, therefore, are outside of the scope of collective bargaining.[2] The goal of the postings is to maintain and increase the efficiency of Coney Island Hospital's operations by facilitating patients' ability to distinguish staff from the general public and to identify the staff members who impact their care. This interest concerns the manner and means by which HHC effectuates its central mission of providing quality patient care. If the petition is construed as raising a claim of failure to bargain over a practical impact, such a claim is premature as no duty to bargain arises until after the Board declares that an impact exists and that the employer failed to correct or minimize that impact. Here, the Board has made no such determination. Further, the petition lacks the specific factual allegations necessary to support a finding of practical impact.

HHC also argues that the postings are not a mandatory subject of bargaining because they do not have a significant or material relationship to a condition of employment. While the Unions allege a privacy interest, the exact information posted on the bulletin boards is already publically available on the employees' photo ID badges. The New York State Public Employment Relations Board ("PERB") has noted the importance of employee identification and

[2] NYCCBL § 12-307(b) provides, in pertinent part, that:

> It is the right of the . . . public employer . . . to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the . . . 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 employees, such as questions of workload or manning, are within the scope of collective bargaining.

has held that employee privacy interests are outweighed by issues of "mission, safety, and policy." (Ans. ¶ 66) Coney Island Hospital has a legitimate interest in ensuring that its patients are informed. Further, the photo display helps preserve the safety of the premises from intrusion by unauthorized persons.

Finally, HHC argues that the Unions have failed to demonstrate a change in existing policy. The postings supplement HHC's long-standing photo ID badge policy but do not change it, are no more intrusive than the photo ID badges, and require no more employee participation. Therefore, any change is, at most, *de minimis*. Thus, the instant matter is distinguishable from the cases cited by the Unions.

DISCUSSION

The Unions claim that the unilateral posting on bulletin boards of its members' names and photographs constitutes a violation of the City's duty to bargain with respect to terms and conditions of employment. We find that it does not.

Timeliness

We first address HHC's argument that the instant petition is untimely. *See Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (timeliness is a threshold question). The statute of limitations under NYCCBL § 12-306(e) and § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) to file an improper practice petition is four months. Thus, "an improper practice charge 'must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence.'" *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd., Matter of Mahinda v. City of New York.*, Index No. 117487/09 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.*, 91

A.D.3d 564 (1st Dept. 2012) (quoting *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. N.Y. Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (Beeler, J.)). However, "[a]s the statute of limitations is an affirmative defense, the burden of proving notice where such is subject to dispute lies upon the party raising the defense." *USA, L. 831*, 3 OCB2d 27, at 7 (BCB 2010) (citations omitted); *see also CSBA*, 65 OCB 9, at 11 (BCB 2000), *affd.*, *Matter of City of New York v. DeCosta*, Index No. 403335/00 (Sup. Ct. N.Y. Co. June 7, 2001) (Kapnick, J.); *DC 37*, 45 OCB 1, at 5-6 (BCB 1990).

HHC has not presented any evidence regarding the exact date that the postings began. Instead, it argues that the Unions' April 2011 letters establish that the Unions were "aware employee photos were being posted as early as April 8, 2011, and no later than April 25, 2011." (Ans. ¶ 45) The April letters, however, do not establish when the postings actually began but only that the Unions were aware by April 8 that Coney Island Hospital intended to post "pictures of members on units." (Pet., Ex. 5) However, "[w]e do not necessarily consider an action to have occurred on the date a party announces an intended change. The statute of limitations begins to run 'after the intended action is actually implemented and the charging party is injured thereby.'" *UFT*, 4 OCB2d 2, at 9 (BCB 2011) (quoting *DC 37, L. 1508*, 79 OCB 21, at 19 (BCB 2007)). The instant petition was filed on September 16, 2011. Since HHC has failed to demonstrate that the policy was implemented more than four months prior to the filing of the instant petition, we find that it is timely.[3]

[3] Further, the Unions' request for, and HHC's agreement to, a labor-management meeting to discuss the issue would toll the statute of limitations until that meeting was held. *See OSA*, 1 OCB2d 45, at 11 (BCB 2008); *Great Neck Water Pollution Control Dist.*, 27 PERB ¶ 3057, at 3134 (1994).

Duty to Bargain

NYCCBL § 12-306(c) requires public employers and employee organizations "to bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *CEU, L. 237, IBT* ("*CEU*"), 2 OCB2d 37, at 11 (BCB 2009) (citing *UFA*, 47 OCB 63, at 18 (BCB 1991)) (other citations omitted). NYCCBL § 12-306(a)(4) provides that it is an improper practice for a public employer "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." As a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice. *See CEU*, 2 OCB2d 37, at 11 (citing *PBA*, 63 OCB 4, at 10 (BCB 1999)). To establish "an improper practice requires a showing first that the matter sought to be negotiated is a mandatory subject of bargaining." *Id.* (citations omitted). "Additionally, the union must also 'demonstrate the existence of such a change from the existing policy or practice.'" *Id.* (quoting *UFOA*, 1 OCB2d 17, at 9 (BCB 2008)).

It is well-established that, "[s]ince neither the NYCCBL nor the 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, L. 1457*, 77 OCB 26, at 12 (BCB 2006) (citations omitted). This "case-by-case determination takes the form of a balancing test which weighs the interests of the public employer and those of the union with respect to that subject under the circumstances of the particular case." *CEU*, 2 OCB2d 37, at 14 (citing *DC 37*, 75 OCB 8, at 7-8; *State of New York (Dept. of Corr. Serv.)*, 38 PERB ¶ 3008 (2005)). The employment of such a balancing test has been approved by the New York State Court of Appeals. *See Matter of Levitt v. Bd. of Collective*

Bargaining of the City of N.Y, 79 N.Y.2d 120 (1992); *Matter of Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. N.Y. State Pub. Empl. Rel. Bd.*, 75 N.Y. 2d 660, 670-71 (1990) ("*Matter of Board of Education*"). The issue presented in the instant case "is not one of the specific subjects which have been 'pre-balanced' by the Legislature and require no further analysis by this Board . . . [nor is it] a subject identified in NYCCBL § 12-307(b) as reserved for managerial discretion." *CEU*, 2 OCB2d 37, at 14-15 (citations omitted). Thus, we must balance the parties' interests in order to resolve the issue before us.

HHC describes its interest as facilitating patients' ability to identify staff, which it argues goes to its core mission of providing quality health care. The Unions argue that its members' privacy interests in the public display of their names and photographs outweigh HHC's interest as HHC has an effective less intrusive means of achieving its goal—the photo ID badges. Thus, both parties characterize the interests at stake as concerning the distribution of information. We recently noted that "generally, the balancing test weighs in favor of the employer's interest when the requested information is publicly available. However, where the information sought is private and personal, the balancing test weighs in favor of the employee." *DC 37, L. 1759*, 4 OCB2d 26 at 9-10 (BCB 2011) (citing *Matter of Levitt* and *Matter of Board of Education*). *See also LBA*, 63 OCB 23, at 13 (BCB 1999) (where the City is "only seeking a narrow range of information to verify that which the employee has already put forth" on a tax form, its interest in preventing fraud outweighs the employee's privacy interest), *affd.*, *Matter of Lieutenants Benevolent Assn. v. City of New York*, Index No. 403410/99 (Sup. Ct. N.Y. Co. Oct. 27, 1999) (York, J.), *affd.*, 285 A.D.2d 329 (1st Dept. 2001).

The content of the postings at issue in the instant case—employees' names and photographs—is publically available, not private and personal, as it is undisputed that this

information is already publically displayed on the employees' photo ID badges. The universe of those persons who could view the postings on the bulletin boards is the same as those who could view the photo ID badges (*i.e.*, patients, staff, and visitors) and the bulletin boards are located in areas where the photo ID badges are worn. Thus, while the postings may make the names and photos more accessible, they are not more intrusive than the photo ID badges and are reasonably related to the employer's ability to perform its mission. *See Middle Country Secretarial Assn.*, 30 PERB ¶ 4556 (1997) (school permitted to unilaterally implement photo identification card system as it "goes directly to the manner and means of delivery of services . . . it is necessary or beneficial for the public served to know the identity of its public employees"). Thus, we find that, since the previously required photo ID badges made available the same data, "the attenuated nature of the interest of the employees, under the circumstances presented in this case, is outweighed by the interest articulated on behalf of the public employer." *CEU*, 2 OCB2d 37, at 17; *see also Matter of Levitt*, 79 N.Y.2d at 131 (balancing test favors employer where "virtually all of the information sought—if not already in the City's possession—is a matter of public record.").[4]

Accordingly, we find that, on balance, the employer's interest in facilitating patients' ability to identify staff members outweighs the inconvenience employees may experience in having the names and photographs that appear on their photo ID badges also posted on bulletin

[4] We find *Buffalo Sewer Authority*, 27 PERB ¶ 3002 (1994), in which PERB ordered the employer to rescind a new policy of random checks of the trunks of employee vehicles, unpersuasive. PERB found that the employer had "failed to show that the policy, which requires employee participation and invades their privacy interests, is the least intrusive method of eliminating thefts and the unauthorized dumping of personal property." *Id.* *Buffalo Sewer Authority* is distinguishable from the instant case as it involved work rules that resulted in an "expanded degree of scrutiny and level of employee participation" and carried "an implicit disciplinary component for noncompliance." *Id.* The instant case does not involve a work rule nor employee scrutiny, no employee participation is required, and, as there is nothing for the employee to comply with, there is no disciplinary component for noncompliance.

boards.[5] Further, the Unions have not identified any concrete ramifications of the policy outside of those addressed in the balancing of interests. Therefore, we find no cognizable practical impact claim has been stated. Thus, we find that, under the circumstances of this case, the postings constitute a non-mandatory subject of bargaining, do not give rise to a duty to bargain, and, therefore, no violation of the NYCCBL has been established.

[5] As we have found the postings not to be mandatorily bargainable, we do not reach HHC's argument that no change has occurred, or that any change is *de minimis*. We note, however, that the factors considered in the balancing test—*i.e.* that the bulletin boards display the same names and photographs contained on the photo ID badges to the same people and in the same areas where the photo ID badges are worn—indicate that the change is *de minimis*.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, docketed as BCB-2982-11, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 420, against the New York City Health and Hospitals Corporation, hereby is dismissed in its entirety.

Dated: May 29, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

PETER PEPPER
MEMBER