DC 37, 5 OCB2d 39 (BCB 2012)

(IP) (Docket No. BCB-2966-11)

Summary of Decision*:** The Union asserted that DOHMH engaged in direct dealing when it asked a Union member to change her collectively bargained work schedule and meal period, in violation of NYCCBL § 12-306(a)(1) and (4). The City argued that it had a managerial right to assign its employees and that it did not have a duty to bargain over a member's reassignment to another work location. The City asserted that it offered the member the option of changing her work schedule and did not threaten her with reprisal, or promise her any benefit, or attempt to subvert her organizational or representational rights. The Board found that DOHMH violated NYCCBL § 12-306(a)(1) and (4) by engaging in direct dealing and by refusing to bargain in good faith regarding terms and conditions of employment. Accordingly, the petition was granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFCSME, AFL-CIO, on behalf of its affiliated LOCAL 436,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondents.

DECISION AND ORDER

On July 5, 2011, District Council 37, AFSCME, AFL-CIO ("Union" or "DC 37"), on behalf of its affiliated Local 436, filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Health and Mental

Hygiene ("DOHMH") alleging that DOHMH violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (4).[1] The Union asserts that DOHMH engaged in direct dealing when it asked Union member Delores Buford ("Member") to change her collectively bargained work schedule and meal period, in violation of NYCCBL § 12-306(a)(1) and (4). The Union also asserts that the City engaged in similar conduct with other Union members. The City argues that it has a managerial right to assign its employees and that it did not have a duty to bargain over the Member's reassignment to another work location. The City asserts that it offered the Member the option of changing her work schedule and did not threaten her with reprisal, or promise her any benefit, or attempt to subvert her organizational or representational rights. The City further argues that the Union had not pled with sufficient specificity its claims as to the unnamed Union members. This Board finds that DOHMH violated NYCCBL § 12-306(a)(1) and (4) by engaging in direct dealing and by refusing to bargain in good faith regarding terms and conditions of employment. Accordingly, the petition is granted.

BACKGROUND

DOHMH is a mayoral agency responsible for promoting the health and welfare of City residents. The Office of School Health ("OSH") is jointly run by DOHMH and the Department of Education ("DOE"). OSH promotes the health of students enrolled in City

[1] In its petition, the Union included an allegation that the member was involuntarily transferred in retaliation for refusing to change her work schedule in violation of NYCCBL § 12-306(a)(3). On September 11, 2012, the Union withdrew that claim. The Union's related request for relief is thus also withdrawn.

schools and provides various services to students, including case management of chronic health problems.

DOHMH employs Junior Public Health Nurses ("JPHN") and Public Health Nurses ("PHN"); these employees are represented by the Union. They work thirty-five hours per week, seven hours per day. Each work day is eight hours and includes a one-hour duty-free lunch break ("DOHMH Schedule"). During the unpaid meal period, DC 37 nurses are off-duty and may leave school grounds; they are not required to be available to students during this period. The Member is a DOHMH-employed PHN. She is assigned by OSH to work at New York City Public School 163 ("School").

DOE also employs nurses that are assigned to work at OSH; these nurses are represented by another union, the United Federation of Teachers ("UFT"). Unlike the schedule of the DC 37-represented nurses, UFT-represented nurses work six hours and fifty-five minutes per day, with a half-hour paid meal period ("DOE Schedule"). These nurses are considered to be on-duty during their meal period.

According to the City, in April 2011, OSH reviewed the clinical needs of a particular child at the School and determined that the child's condition required that an OSH nurse be on-site and able to respond to the student in case of a medical emergency. On April 20, 2011, OSH's Assistant Nursing Director spoke directly with the Member in order to discuss the medical needs of this particular student and informed her that, due to this student's needs, OSH required that a nurse be on-site during the entire school day. The Assistant Nursing Director asked whether the Member would be willing to change her work schedule to meet the needs of this student. The Member declined. In an email

dated April 20, 2011, the Assistant Nursing Director wrote to the Member to confirm their conversation. The email states, in pertinent part:

> The current needs of the student involve having an OSH nurse on school grounds at all times. As you are aware this would involve the nurse to be on site at all time[s] during the student's presence in school.
>
> I'm confirming with you that you choose to continue your work schedule as a DOHMH nurse, continuing to have you[r] one hour lunch[,] which entitles you to leave the building. You are declining the option offered to you of working ½ hour less, remaining in the school for the entire day and leaving the school at 3pm.
>
> If this is your choice[,] I suggest that you review the vacancy list and choose another site at this time or the OSH will reassign you to another school site.
>
> The OSH will assign a nurse that will be able to meet the clinical needs of the student attending [the School].

(Union Ex. B).

Later that day, a Union representative wrote an email on the Member's behalf to the Assistant Nursing Director. It states:

> This email is [i]n response to the memo given to [the Member] about her choice to continue to work the schedule of the DOHMH nurses, which is an 8 hour work day with a 1 hour duty free lunch. Traditionally[,] DOHMH nurses who are [Union] members have worked this schedule. Although you offer [the Member] this option to change her work schedule [that] does not mean that she should be obligated to. To transfer her to another school would seem *punitive*. While we understand that there is a "clinical need", clearly the agency should be able to come up with other options considering that there are children who are diabetic throughout the [C]ity. If you think that this student might need a *different accommodation*, you might consider making this a two nurse school or offering [the Member] overtime. What do you do in other schools . . . and why is this different?

> Also[,] I need to understand what are you asking [the Member] to do[.] Are you asking her to work [seven] hours with no lunch[?] Any time that there is going to be change in the conditions of employment[,] the [U]nion should be involved. Please call me so that we can discuss this matter at your earliest convenience.

(Union Ex. C) (emphasis in original).

Subsequently, the Member was transferred to another work location where she maintained her contractually mandated work schedule.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that DOHMH violated NYCCBL § 12-306(a)(1) and (4) by engaging in direct dealing with bargaining unit members regarding meal periods, which is a mandatory subject of bargaining.[2]

Union-represented nurses employed by DOHMH work an eight-hour day, and they have a one-hour meal break that is duty-free. Now, DOHMH is requiring Union-represented nurses to forgo their one-hour duty-free meal period and, instead, work a paid half-hour meal period and a shorter work day. The change from a one-hour duty-free

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[2] 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 [§] 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.

meal period to a half-hour on-duty meal period involves a mandatory subject of bargaining.

In this case, the Member was instructed directly to change her work schedule, or forego her one-hour meal period. The Assistant Nursing Director bypassed the Union by negotiating directly with the Member. In addition, her email contained a direct threat of reprisal, informing the Member that she would be involuntarily transferred if she did not change her schedule. The Union asserts that, upon information and belief, other unnamed Union-represented nurses assigned to OSH have also been asked to change their schedule from the DOHMH Schedule to the DOE Schedule.

The Union argues that the City's focus on its managerial right to transfer and/or reassign employees is misplaced. Here, the Member was not simply transferred or reassigned in order to meet OSH's managerial needs. In fact, before transferring the Member, DOHMH first engaged her in direct dealing; only after she refused to change her work schedule and forego her lunch period was she transferred. Further, the threat of reprisal is clear. The Member was asked to forego her contractually negotiated duty-free lunch period, or otherwise be forced to accept a punitive involuntary transfer. Also, the Assistant Nursing Director's direct communication with the Member subverted her organizational and representational rights. Asking a union member to forego a contractual benefit or face adverse action diminishes the Union's role and importance.

Thus, DOHMH has bypassed the Union's statutory right and obligation to bargain on behalf of its members; it has forced the Member and other Union members, upon information and belief, to directly negotiate with their employer over meal periods. As

Union members, these nurses have a right to be represented by the Union in negotiations with the employer over meal periods.

As relief, the Union requests that the Board order the Respondents to cease and desist from direct dealing with bargaining unit members; to bargain in good faith with the Union over changes in meal periods and work hours for bargaining unit members; and to rescind all changes to hours and meal periods for bargaining unit members. The Union also requests that the Board order the posting of appropriate notices and other further just and proper relief.

City's Position

The Union's claims involve an express managerial right, and, therefore, the petition should be dismissed. DOHMH did not have a duty to bargain over the Member's reassignment to another work location. Moreover, the reassignment was made because the Member's schedule was not compatible with the medical needs of a student at the School. DOHMH informed the Member that she would have to be replaced by a nurse whose schedule allowed the nurse to be on school premises during the entire school day. Further, DOHMH did not unilaterally change a term in the Member's employment; there has been no change in her wages, hours, or working conditions. Although the Union argues that the City failed to bargain over the Member's lunch period, assuming that such would be a mandatory subject of bargaining, the Union does not assert that the Member's lunch period was changed.

As to the unnamed other members that the Union describes, the Union's factual pleadings deal only with the events of April 20, 2011, involving the Member and the Assistant Nursing Director and do not identify any unit members other than the Member.

The petition does not plead with specificity the acts that allegedly constitute an improper practice, identifying neither the names of the individuals involved, nor the date, time and place of the alleged statements.

The City also argues that the Union has not established its direct dealing claim. The Assistant Nursing Director's email to the Member merely informed her of the employer's need to staff the School to meet the medical needs of the particular student. In the Assistant Nursing Director's communications with the Member, she did not threaten her with reprisal or promise any benefit; she did not attempt to impede the reaching of an agreement with the Union or attempt to subvert the Member's organizational or representational rights. The Assistant Nursing Director never discussed the Union. The Assistant Nursing Director simply informed the Member that because her work schedule could not accommodate the medical needs of a student, she would be transferred to another location from the vacancy list and replaced at the School with a nurse whose schedule could meet these needs. When the Member expressed her desire to remain at her current work location, the Assistant Nursing Director offered her the option to work a schedule that would accommodate the student's medical needs. This schedule change was merely an option, and was prompted entirely by the Member's expressed preference to stay at the School. Further, the Union has not established that the City otherwise violated NYCCBL § 12-306(a)(1) by interfering with, restraining, or coercing her from exercising protected rights.

Finally, as the Union has not established any violation of the NYCCBL, the Union has also failed to establish a derivative violation of NYCCBL § 12-306(a)(1).

DISCUSSION

The Union's claim is that DOHMH violated NYCCBL § 12-306(a)(1) and (4) when the employer spoke directly to the Member about changing a contractually mandated term of employment, her work schedule, or otherwise being transferred. There is no dispute that the Assistant Nursing Director directly contacted the Member, a Union-represented employee, and offered a change in her work schedule, which was a negotiated term of employment. When the employee refused to change her schedule, she was transferred. For the reasons stated below, we find that DOHMH violated NYCCBL § 12-306(a)(1) and (4).

As we have long held, "[a]n employer engages in direct dealing [in violation of NYCCBL § 12-306(a)(1)] 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 subverting the members' organizational and representational rights.'" *DC 37*, 5 OCB2d 1, at 15 (BCB 2012) (internal alterations omitted) (quoting *CIR*, 49 OCB 22, at 22 (BCB 1992)); *see also DC 37, L. 2507*, 2 OCB2d 28, at 10 (BCB 2009).

The Assistant Nursing Director's actions constitute direct dealing. The Assistant Nursing Director communicated with the Member to offer her a different work schedule than that set forth in the collective bargaining agreement. As the City underscored, the Assistant Nursing Director, in her communications with the Member, never discussed the Union or attempted to involve or engage the Union in its offer for a new work schedule. This fact only serves to strengthen the Board's finding because "an employer's direct

communications with Union members violates the NYCCBL when [the employer] bypasses a certified bargaining representative and negotiates directly with members." *UFT*, 4 OCB2d 4, at 22 (BCB 2011) (internal alterations omitted) (quoting *DC 37, L. 2507*, 2 OCB2d 28, at 10). Regardless of the Assistant Nursing Director's subjective intention, her actions had the effect of circumventing the Union entirely and thereby subverted the Member's right to be represented by her Union. We also find that the Assistant Nursing Director violated NYCCBL § 12-306(a)(4) when she offered to change the employee's contractually mandated schedule without bargaining with the Union. By this action, DOHMH "refuse[d] to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." NYCCBL § 12-306(a)(4).

The City argues that it has the managerial right to assign and schedule employees; therefore, its actions did not violate the NYCCBL. Similarly, it argues that the Assistant Nursing Director did not violate the NYCCBL because the consequence of the Member not agreeing to a schedule change involved the exercise of an express managerial right to assign and schedule employees. However, here, the City sought to change the work schedule for an individual without bargaining with the Union.

The City also argues that DOHMH did not unilaterally change a term of the Member's employment. However, the Member is represented by a Union that has negotiated a contract governing her terms and conditions of employment, including her work schedule, which is, therefore, a mandatory subject of bargaining. Although the Member's contractually-bargained work schedule ultimately was not changed, the

Assistant Nursing Director violated NYCCBL § 12-306(a)(1) and (4) when she discussed with the Member the possibility that she change her work schedule.

Thus, we find that DOHMH violated NYCCBL § 12-306(a)(1) and (4). Accordingly, the petition is granted.

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, Local 436, docketed as BCB-2966-11, 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 Health and Mental Hygiene cease and desist from engaging in direct dealing in violation of NYCCBL § 12-306(a)(1), by seeking to change the work schedules contained in the parties' collective bargaining agreement without bargaining with the Union; and it is further

ORDERED, that the New York City Department of Health and Mental Hygiene bargain in good faith with the Union before implementing any changes to the work schedules and meal periods as contained in the parties' collective bargaining agreement; and it is further

ORDERED, that the New York City Department of Health and Mental Hygiene post appropriate notices detailing the above-stated violations of the NYCCBL.

Dated: December 18, 2012
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

GWYNNE A. WILCOX
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 39 (BCB 2012), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, Local 436, and the City of New York and the New York City Department of Health and Mental Hygiene.

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, Local 436, docketed as BCB-2966-11, be, and the same hereby is, granted regarding a violation of NYCCBL § 12-306(a)(1) and (4); and it is further

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ORDERED, that the New York City Department of Health and Mental Hygiene bargain in good faith with the Union before implementing any changes to the work schedules and meal periods as contained in the parties' collective bargaining agreement; and it is further

ORDERED, that the New York City Department of Health and Mental Hygiene post appropriate notices detailing the above-stated violations of the NYCCBL.

The New York City Department of Health and Mental Hygiene

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.