DC 37, 6 OCB2d 8 (BCB 2013)

(IP) (Docket No. BCB-3036-12)

Summary of Decision*:** The Union alleged that DPR violated NYCCBL § 12-306(a)(1), (a)(4), and (c)(4) by failing and refusing to provide information pertaining to the staffing of certain DPR programs and the conversion of independent consultants working at DPR to City employees. The City argued that the information does not exist in the form requested and that DPR has no duty to create records to facilitate the Union's request. It further argued that DPR complied with some information requests, rendering part of the petition moot, and demonstrated that it has undertaken good faith efforts to compile the remaining information. This Board found that DPR violated the NYCCBL by failing to respond to some of the information requests and failing to comply with other information requests within a reasonable time period, and that no portion of the petition is rendered moot. 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, AFSCME, AFL-CIO
and its affiliated LOCAL 299,

Petitioners,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On August 7, 2012, District Council 37, AFSCME, AFL-CIO, filed a verified improper practice petition on behalf of its affiliated Local 299 (collectively, "DC 37" or "Union") against the City of New York ("City") and the New York City Department of Parks and Recreation

("DPR"). The Union alleges that DPR violated § 12-306(a)(1), (a)(4), and (c)(4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing and refusing to provide information concerning the staffing of certain DPR programs and the conversion of independent consultants working at DPR to City employees. The City argues that the information does not exist in the form requested and that it has no duty to create records to facilitate the Union's request. It further argues that DPR complied with some information requests, rendering part of the petition moot, and demonstrated that it has undertaken good faith efforts to compile the remaining information. This Board finds that DPR violated the NYCCBL by failing to respond to some of the information requests and failing to comply with other information requests within a reasonable time period, and that no portion of the petition is rendered moot. Accordingly, the Union's improper practice petition is granted.

BACKGROUND

DPR is the City's principal provider of recreational and athletic facilities and programs. Local 299 is an affiliate of DC 37 whose members work at various City agencies, including DPR, and hold titles at DPR such as Recreation Specialist, Recreation Director, and Recreation Supervisor. In the spring of 2012, the Union made separate requests to DPR for information pertaining to (1) the agency's staffing of its Aquatics and Learn-To-Swim programs, and (2) the City's conversion of certain independent consultants working at DPR to City employees.

Information Requests Pertaining to the Aquatics and Learn-to-Swim Programs

On March 15, 2012, Michelle Trester, an Assistant Director in DC 37's Research and Negotiations Department, sent an e-mail to Joseph Trimble, DPR's Director of Labor Relations,

requesting a meeting to discuss DPR's staffing plans for the 2012 Aquatics and Learn-to-Swim programs. The e-mail provided:

> In the interest of tying up loose ends from our last round of meetings, here is a list of questions as well as the outstanding issues we still need information about:
>
> - Have you started advertising for this season? If so, please provide us with a copy of any fliers used.
> - What is the planned staffing for this season?
> - We still need that roster of who worked last season, their titles and rates of pay.
> - Please confirm the rates of pay for the Rec. Specialists last season, and for this season.
> - Any updates on whether those working a nearly full-time schedule were given more hours?

(Pet., Ex. A)[1]

Subsequently, by letter dated June 20, 2012, Trester wrote to Trimble:

> In October 2011, we met to resolve problems in hiring and pay practices of the Aquatics/Learn-to-Swim programs. We agreed then to meet at the start of the 2012 Aquatics summer season so that the union could be apprised of the program's staffing plans. We also requested a roster of the employees scheduled to work during the 2012 season, including title, hours of work, salary rate and work location.
>
> We have not met since then, nor have we received any of the requested information or updates on these two programs . . . .
> Please provide [the Union] as soon as possible with the data we requested, and contact me to schedule a meeting.

(Pet., Ex. B)

[1] In an affidavit attached to Respondents' Answer, Trimble stated that, at the time of this correspondence, DPR had not yet made any decisions regarding the staffing questions referenced in the e-mail. He also stated that DPR does not maintain a roster "as requested by the Union" in the regular course of business, nor does it possess a roster for the previous season. (Ans., Ex. 1) There is no evidence that DPR communicated this information to the Union during the period prior to the filing of the petition.

On July 25, 2012, having still not received the requested information, Trester sent an e-mail to Trimble reiterating the Union's request for a roster of who worked in the Aquatics and Learn-to-Swim programs, including "name, title, location, hours of work, pay rate, ODA, civil service status and yr. round or summer." (Pet., Ex. C) Trester asked Trimble to e-mail the information to her before August 3, 2012 because she was leaving for vacation shortly thereafter.

On July 31, 2012, Trester sent Trimble a follow-up e-mail stating: "Just a reminder that we need the information I listed below. Please get back to me." (Pet., Ex. D) Later that day, Trimble responded to Trester by e-mail, stating: "I'll try to get this together by the end of the week." (Pet., Ex. E) The last day of that work week was August 3, 2012.

As of the August 7, 2012 filing of the petition, the Union had not received any responsive information from DPR. On or about August 31, 2012, DPR provided the Union with a document listing the requested information pertaining only to the 2012 summer season (*i.e.*, "this season") for the Aquatics and Learn-to-Swim programs, and not the 2011 summer season (*i.e.*, "last season.").

Information Requests Pertaining to the Conversion of Independent Contractors

On or about April 4, 2012, Union and DPR representatives met to discuss DPR's plans to convert independent contractors to DPR employees. At the meeting, the Union requested a list of the independent contractors who were to be converted and the civil service titles to which they would be assigned.

By letter dated June 18, 2012, Trester informed Trimble that the Union had not yet received a response to its April 4, 2012 information request. Trester stated:

> On April 4, 2012, we met to discuss [DPR]'s use of Fitness Consultants in Recreation programs. At that meeting, [DPR] made a commitment to convert Consultants into [DPR] employees by July 1, 2012. We also agreed to meet before July 1 so that the

> agency could present its plan of how this would be accomplished. We requested a timetable, and an estimate of the number, titles and scheduled hours of the Consultants becoming [DPR] employees.
>
> We have not met since then, nor have we received any updates or the requested information. Please provide DC 37 written verification that these independent contractors working under Consultant Agreements with [DPR] will be made City employees in appropriate titles, effective July 1, 2012, with appropriate union membership. Please include the intended City titles, salary rates, work locations, and hours of work per week once they are classified as City employees.

(Pet., Ex. F) DPR did not respond to the Union's letter or provide documents responsive to its request. By e-mail dated July 25, 2012, Trester restated the Union's document requests pertaining to the conversion of independent consultants to DPR employees and asked Trimble to email the information to her before August 3, 2012, because she was going on vacation.[2] By e-mail dated July 31, 2012, Trester reminded Trimble that the Union still had not received the requested information. Later that day, Trimble responded to Trester by e-mail, stating, "I'll try to get this together by the end of the week." (Pet., Ex. E)

In a September 18, 2012 affidavit, Trimble stated that "[s]taff in my office is continuing to compile the requested information regarding the consultant positions." (Ans., Ex. 1) As of October 22, 2012, the date the Union filed its reply, DPR had not provided any information responsive to the Union's request pertaining to the conversion of consultants.[3]

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[2] The referenced e-mail is the same July 25, 2012 correspondence in which Trester requested that Trimble provide information on the Aquatics and Learn-to-Swim programs.

[3] In February 2013, the Trial Examiner provided the parties with an opportunity to supplement the record with any relevant developments which may have occurred subsequent to the filing of the Union's October 22, 2012 reply, such as the production of additional responsive information by DPR, by filing a joint statement of undisputed facts. However, no such statement was submitted.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that DPR violated NYCCBL § 12-306(a)(1), (a)(4), and (c)(4) by failing and refusing to provide information that is relevant and necessary for it to fulfill its statutory obligation to represent employees in the administration and enforcement of its collective bargaining agreements.[4] The Union contends that the information requested, including data relating to wages, classification of civil service titles, and whether bargaining unit work is being performed by non-bargaining unit members, is required for it to fulfill its obligation to determine whether grievances should be filed. This obligation is the gravamen of its duty as the certified bargaining representative of Union members employed by DPR. The Union further contends that the information it requested is maintained by DPR in the regular course of business because it involves data pertaining to individuals employed by DPR,

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[4] 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; [and]
>
> ***
>
> (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 § 12-306(c) provides that:

> The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation . . . (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining[.]

including their work hours and rates of pay. Moreover, it argues that such information is not overly burdensome for DPR to produce.

According to the Union, the City's argument that the petition must be dismissed because DPR produced information responsive to one request and provided a "good faith representation" that it is in the process of compiling information responsive to the second request must fail. (Rep. ¶ 16) The Union contends that a "good faith intent" neither relieves Respondents of their obligations under the NYCCBL, nor satisfies the Union's information request. (Rep. ¶ 19) Accordingly, Respondents have violated NYCCBL §12-306(a)(1), (a)(4), and (c)(4).

The Union argues that, by failing and refusing to produce this relevant and necessary information, Respondents have also interfered with, restrained, and coerced public employees in the exercise of their rights guaranteed by NYCCBL § 12-305. This failure constitutes a violation of NYCCBL § 12-306(a)(1).

City's Position

The City offers three defenses to the Union's allegations. First, it contends that DPR is not required to provide the requested information. Specifically, it asserts that the information, "in the form requested by the Union," does not exist in DPR's records and DPR has no obligation to compile information that it does not maintain in the regular course of business. (Ans. ¶ 41) Therefore, the Union's requests fall outside the scope of DPR's duty to disclose information.

The City asserts that DPR never refused to provide the requested information to the Union, and thus there can be no violation of NYCCBL § 12-306(a)(4) or (c)(4). DPR initiated in good faith the process of compiling the requested information pertaining to the Aquatics and Learn-to-Swim Programs from various data sources and transmitted its response on August 31,

2012. Indeed, the City maintains that DPR provided such information despite being under no legal obligation to do so. It argues that, because it complied with the information request, this portion of the petition must be dismissed as moot.

With regard to the Union's request for information regarding the conversion of consultants to DPR employees, the City asserts that compiling a "suitable response" requires the "effort and man-hours of DPR staff" because the information is broad in scope and is not maintained "in a single data repository in the regular course of business." (Ans. ¶ 43) Nonetheless, it claims that it has begun the process of compiling the information. According to Respondents, this process is "ongoing" and the information will be transmitted to the Union "upon completion." (Ans. ¶ 44) The City notes that the Union cites to no rule, regulation, contractual provision, or decision that imposes a specific time frame within which the employer must comply with an information request.

Finally, the City argues that the Union has failed to state a derivative claim that Respondents interfered with, restrained, or coerced any employee in the exercise of union rights, in violation of NYCCBL § 12-306(a)(1). The City contends that the Union has not alleged facts to support a claim that DPR's conduct was motivated by anti-union animus, nor has it demonstrated that DPR's actions were inherently destructive of members' NYCCBL § 12-305 rights. It further contends that the Union's allegation is vague and conclusory. For all of these reasons, the Board should dismiss the Union's claim that Respondents violated NYCCBL § 12-306(a)(1).

DISCUSSION

NYCCBL § 12-306(c)(4) provides that a public employer's duty to bargain collectively in good faith includes the duty to furnish "data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."[5] This duty extends to information that is relevant to and reasonably necessary for purposes of collective negotiations or contract administration. *See PBA*, 73 OCB 14, at 10-11 (BCB 2004), *affd. as modified*, *Patrolmen's Benevolent Assn. v. City of New York*, No. 1113062/04 (Sup. Ct. N.Y. Co. Feb. 4, 2005), *affd.*, 27 A.D.3d 381 (1st Dept. 2006). The Union's burden to establish that it is entitled to receive specific information "is not an exceptionally heavy one, requiring only a showing of probability that the desired information is relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NYSNA*, 3 OCB2d 36, at 13 (BCB 2010) (quoting *Comar, Inc.*, 349 NLRB 342, 354 (2007) (quotation marks omitted)). Assuming the information request is reasonable and necessary for this purpose, an employer that does not possess the requested information must make a good faith effort to obtain the information sought. *PBA*, 73 OCB 14, at 11.

We find, and the City does not contend otherwise, that the requests for information set forth in the Union's March 15, June 18, and July 25, 2012 letters are relevant to or reasonably necessary for collective bargaining or contract administration purposes. Accordingly, we find

[5] Under the NYCCBL, the obligation to furnish the other party with data normally maintained in the regular course of business is a component of a party's duty to bargain in good faith. *See* NYCCBL § 12-306(c). Consequently, a failure to comply with NYCCBL § 12-306(c)(4) necessarily constitutes a violation of the duty to bargain in good faith, pursuant to NYCCBL § 12-306(a)(4).

that the failure to supply the information in response to these requests is a violation of NYCCBL § 12-306(a)(1), (a)(4), and (c)(4). [6]

We also find that, with regard to the information the City did supply, its failure to do so in a reasonable time period was a violation of the NYCCBL. In *OSA*, 1 OCB2d 45 (BCB 2008), we held that the employer violated NYCCBL § 12-306(c)(4) when it failed to comply with the union's document request in a timely manner. *Id.*, at 16. Specifically, the employer failed or refused to provide nine out of thirteen requested functional job descriptions until after the petition was filed and had still failed to provide two descriptions even after the conclusion of the hearing in the matter. *Id.; see New York City Transit Authority*, 41 PERB ¶ 3022, at 3102 (2008) (holding that a party is "obligated, under the [Taylor] Act, to respond to a request for information within a reasonable period of time under the facts and circumstances of each particular case"); *see also Addison Central School District*, 16 PERB ¶ 4623, at 4782 (1983) (Sabin, ALJ) ("Inherent in the duty to negotiate in good faith is the duty to timely respond to requests for information, even if the response is negative.")

In response to the March 15 letter, we find that DPR failed to respond to some of the Union's information requests within a reasonable time period and did not provide any information in response to other requests in the letter. The Union requested information pertaining to DPR's Aquatics and Learn-to-Swim programs, including an employee roster and other data concerning the 2011 and 2012 summer seasons. Without providing an explanation to the Union, DPR simply did not produce any of this information until the end of August 2012, shortly after the Union filed its improper practice petition, and then only produced information

[6] We do not find that the Union alleged an independent violation of NYCCBL § 12-306(a)(1). However, we do find a violation of NYCCBL § 12-306(a)(1) as derivative of the finding of an NYCCBL § 12-306(a)(4) violation.

pertaining to the 2012 summer season. Under this particular fact scenario, we find that DPR's actions, or lack thereof, amounted to a failure and an unreasonable delay in producing information relevant to and reasonably necessary for purposes of collective negotiations or contract administration, in violation of NYCCBL § 12-306(a)(1), (a)(4), and (c)(4).

With regard to the Union's request for information concerning the City's conversion of consultants to DPR employees, the Union made its initial request during an April 4, 2012 conference and followed up with a June 18, 2012 letter. The parties' correspondence reflects that DPR informed the Union that the conversions would commence by July 1, 2012, yet it is undisputed that by the time the Union filed its reply in late October 2012, DPR still had not provided any information responsive to the request. We find that DPR's failure to provide the requested information relevant to and reasonably necessary for purposes of collective negotiations or contract administration, without explanation to the Union, is a violation of NYCCBL § 12-306(a)(1), (a)(4), and (c)(4).

We are unpersuaded by the affirmative defenses the City offers for DPR's failure to timely comply with the information requests. The City contends that DPR does not maintain the information sought "in a single data repository" in the regular course of business. (Ans. ¶ 40) It therefore had to create new records by compiling information from a variety of sources into a single response using the "effort and man-hours of DPR staff." (Ans. ¶ 43) Yet, the Union never sought the requested information in any specific form. Moreover, even if the Union had made such a request, a responding party bears no duty to disclose information in the specific form requested, "as long as the information supplied satisfies" the request. *See NYSNA*, 3 OCB2d 36, at 14 (quoting *State of New York* (*Office of the State Comptroller*), 35 PERB ¶ 4565,

at 4717 (2002) (Mayo, ALJ)). Thus, we reject the City's argument that DPR could not comply because it was obligated to create new records.

The City also contends that DPR officials had not made decisions that were prerequisite to its ability to respond to some of the Union's requests and did not possess some of the other information that was requested. Notwithstanding these claims, there is no evidence in the record that DPR made the Union aware of these obstacles to compliance at any time prior to the filing of the petition. *Cf. PBA*, 73 OCB 14, at 11 (finding that the City satisfied its NYCCBL § 12-306(c)(4) duty by, among other things, "stating the basis for its non-possession" of requested data); *see also Hampton Bays Union Free School District*, 41 PERB ¶ 3008 (2008) (encouraging the responding party to communicate with the party seeking information rather than simply ignoring or refusing the request). Accordingly, we reject this defense.[7]

We are also unpersuaded by the City's claim that the petition should be dismissed as moot because DPR complied with the Union's request concerning the Aquatics and Learn-to-Swim programs and provided a good faith representation that it was in the process of compiling a response to the consultant conversion request. We have held that "a party cannot render moot a failure to provide information claim merely by providing the requested information in response to an improper practice petition. A contrary holding would discourage good labor relations by encouraging brinksmanship." *OSA*, 1 OCB2d 45, at 13. We have also held that an improper practice claim does not become moot "merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the

[7] The City also appears to contend that DPR's "good faith effort" to comply with the Union's information request amounts to actual compliance. Regardless of whether this argument is even colorable, we need not address it because the City failed to offer any evidence of a good faith effort by DPR to fulfill the information request.

matter of deterring future violations remain open to consideration." *DC 37*, 75 OCB 14, at 13 (BCB 2005).

Here, we are compelled to find that the instant matter is not moot. DPR did not produce any information responsive to the Union's requests until three weeks after the improper practice petition was filed, and over five months after the Union communicated its initial request. Moreover, DPR still had not fulfilled its obligation to respond to the remaining information requests relating to the consultant conversions by the time the Union filed its reply on October 22, 2012. This scenario, in which a party delays compliance with an information request, without explanation, until after petition is filed, is capable of repetition. Accordingly, we find that to hold this matter to be moot would be akin to encouraging parties to avoid their responsibilities under the NYCCBL "unless and until an improper practice charge is filed." *OSA*, 1 OCB2d 45, at 14.[8]

The City's reliance upon *PBA*, 73 OCB 14, is misplaced because the facts upon which we relied in dismissing the petition in *PBA* are distinguishable from those in the instant matter. In *PBA*, we dismissed the petition because the City produced the requested information that was in its possession and made a good faith effort to obtain information not in its possession, including communicating with the petitioners concerning the availability of that information. *Id.*, at 8-9. As a result, the petitioners were kept apprised of the status of their request and the City's ability to obtain the information requested. In contrast, in the instant matter, DPR did not supply all the

[8] Even if we were to find that the dispute had been rendered moot, the circumstances present here fit within "the established exception to mootness for disputes capable of repetition, yet evading review." *OSA*, 1 OCB2d 45, at 15 (quoting *DC 37, L. 1457*, 1 OCB2d 32, at 24 (BCB 2008)).

requested information, failed to respond for months, and supplied some information only after the petition was filed.[9]

In light of the above, we direct DPR to provide the Union, within thirty (30) days of the date of this Decision, with any and all information that the Union requested in its March 15, June 18, and July 25, 2012 letters.

[9] The City's attempt to distinguish *OSA*, 1 OCB2d 45, from the instant matter is also unavailing. The City asserts that, unlike the employer in *OSA*, DPR has not "waited until an improper practice charge is filed to provide the requested information." (Ans. ¶ 58) Rather, it contends, DPR voluntarily undertook a "good faith effort" to compile the requested information. It is undisputed that DPR failed to provide any responsive data until after the Union filed its petition. Other than the pronouncement that DPR undertook such a good faith effort, the City offered no evidence of what comprised that effort.

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-3036-12, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 299, against the City of New York and the New York City Department of Parks and Recreation, be, and the same hereby is, granted; and it is further

ORDERED, that the New York City Department of Parks and Recreation provide to District Council 37, AFSCME, AFL-CIO, and its affiliated Local 299, within thirty (30) days of the date of service of this Decision and Order, any and all information requested in the March 15, June 18, and July 25, 2012 correspondence which has not been produced as of the date of service of this Decision and Order; and it is further

ORDERED, that the New York City Department of Parks and Recreation post the attached notice for no less than 30 days at all locations it uses for written communications with employees represented by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 299.

Dated: April 15, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
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 6 OCB2d 8 (BCB 2013), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, and its affiliated Local 299, and the City of New York and the New York City Department of Parks and Recreation.

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, Docket No. BCB-3036-12, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 299, and the same hereby is, granted to the extent that the New York City Department of Parks and Recreation has violated New York City Collective Bargaining Law §§ 12-306(a)(1), (a)(4), and (c)(4); and it is further

ORDERED, that the New York City Department of Parks and Recreation provide to District Council 37, AFSCME, AFL-CIO, and its affiliated Local 299, within thirty (30) days of the date of service of this Decision and Order, any and all information requested in the March 15, June 18, and July 25, 2012 correspondence which has not been produced as of the date of service of this Decision and Order; and it is further

ORDERED, that the New York City Department of Parks and Recreation post the attached Notice to employees for no less than thirty (30) days at all locations it uses for

written communications with employees of District Council 37, AFSCME, AFL-CIO, and its affiliated Local 299; and it is further

ORDERED, that the petition is dismissed in all other respects.

New York City Department of Parks and Recreation
(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.