DC 37, 6 OCB2d 3 (BCB 2013)

(IP) (Docket No. BCB 3050-12)

Summary of Decision*:** The Union alleged that NYCHA unilaterally implemented a voluntary program consisting of a new method to pay wages, failed to bargain over the new method or its fees, and dealt directly with its members regarding it. The Union argued that such conduct constitutes a failure to bargain over mandatory subjects of bargaining and direct dealing in violation of NYCCBL §§ 12-306(a)(1) and (4) and 12-307(a). NYCHA argued that the new means of payment is not within the scope of bargaining as it neither confers an economic benefit nor results in a reduction in wages and that it did not engage in direct dealing as it neither promised benefits nor threatened reprisals. The Board found that methods of payment are mandatory subjects of bargaining and that NYCHA failed to bargain over the new payment option, but that NYCHA did not engage in direct dealing. Accordingly, the petition is granted, in part, and denied, in part. ***(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,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On September 24, 2012, District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union"), filed a verified improper practice petition against the New York City Housing Authority ("NYCHA"). The Union alleges that NYCHA unilaterally implemented a voluntary program that included a new method to pay wages to City Seasonal Aides, a title represented by

the Union, failed to bargain over the implementation of the new method or its fees, and dealt directly with its members regarding the new payment option. The Union argues that such conduct constitutes a failure to bargain over mandatory subjects of bargaining and direct dealing in violation of §§ 12-306(a)(1) and (4) and 12-307(a) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). NYCHA argues that the new means of payment is not within the scope of bargaining as it neither confers an economic benefit nor results in a reduction in wages. NYCHA further argued that it did not engage in direct dealing as it neither promised benefits nor threatened reprisals. The Board finds that methods of payment are mandatory subjects of bargaining and that NYCHA failed to bargain over the new payment option but that NYCHA did not engage in direct dealing. Accordingly, the petition is granted, in part, and denied, in part.

BACKGROUND

Prior to June 2012, NYCHA paid its employees either by check or direct deposit. Neither option required an employee to pay a fee to NYCHA. In June 2012, NYCHA unilaterally introduced a new method of paying wages ("PayCard Program" or "Program") through a pilot program for City Seasonal Aides, a title represented by DC 37. The Program is a new payment option by which an employee's full wages would be deposited onto a Citibank Visa debit card ("PayCard") every payday. Participation in the Program is voluntary; it is an additional payment option, with the other payment options still available to NYCHA's employees.[1] NYCHA states

[1] The Union maintains that City Seasonal Aides are not eligible for direct deposit, while NYCHA alleges that they are eligible to receive their pay by check or direct deposit. NYCHA also states that prior to the PayCard Program, its employees could have arranged to have a bank or another institution issue them a pre-paid debit card, and that its employees are still free to do so, but the third party institution may charge significant fees.

that, once it deposits the employee's wages onto their PayCard, it has no further involvement in the Program, although NYCHA does have a "PayCard Coordinator in [its] Payroll Division." (Ans., Ex. 1)

There is no enrollment fee for the PayCard Program, and NYCHA does not impose any Program fees, although there are circumstances under which fees are charged by Citibank. NYCHA states that it derives no benefit from the Program fees charged by Citibank. The Program contract with Citibank ("PayCard Agreement"), however, has a "Revenue Share" provision pursuant to which Citibank pays NYCHA "$1.00 per active cardholder account per month . . . . An active cardholder is defined as having at least one payment loaded in the calendar month." (Pet., Ex. C1, Schedule 1) According to NYCHA, the PayCard Program fees stem from the employees' banking relationship with Citibank (not their employment relationship with NYCHA) and the fees are similar to those associated with direct deposit. NYCHA, however, negotiated the Program fees with Citibank, and states that the PayCard Agreement "was drafted in such a way to minimize fees from Citibank." (Ans. ¶ 45)

A week before NYCHA entered into the PayCard Agreement, its Assistant Director of Human Resources ("Assistant Director") informed DC 37 that the PayCard Program would be introduced as a pilot program targeting City Seasonal Aides that would commence on June 4, 2012—the day that City Seasonal Aides were scheduled to commence work. DC 37 requested additional information and a meeting with NYCHA to discuss the Program. On May 24, 2012, the Assistant Director sent DC 37's Director of Quality Life Programs an email entitled "NYCHA PayCard Program Material." (Ans., Ex. 1) The email states in full: "As per your request, please find [an] employee fact sheet and enrollment form. The fact sheet is not the final product but will give you an overview of what will be given to your members." (*Id.*)

The attached draft fact sheet, entitled "PayCard Program Frequently Asked Questions" ("Draft FAQ"), describes the PayCard Program as a "new payroll solution that gives [employees] the option to receive [their] pay via a Visa prepaid payroll card." (Ans., Ex 1) It describes the PayCard as "a personalized and reloadable Visa prepaid card issued to [employees] in place of paper payroll checks." (*Id.*) The Draft FAQ informs employees how to enroll in the Program and states: "If you have any questions, contact the PayCard Coordinator in NYCHA's Payroll Division [number omitted]." (*Id.*) It explains that the PayCard is not a credit card, that there is no credit check or approval process, and that the PayCard will not affect an employee's credit as there is no credit line associated with it.

The Draft FAQ includes a fee schedule for the PayCard Program and explains that there is an "Account Maintenance Fee"—a charge of $3 a month that is incurred if there is no activity (including deposit of pay) on the account for 90 days. (*Id.*) The Account Maintenance Fee is charged until the balance on the PayCard is exhausted. Other Program fees include a $1.75 out-of-network ATM fee and a $.50 charge for balance inquires. The Program allows for one PayCard to be replaced for free but imposes a $6.95 charge for any subsequent card replacement. The Draft FAQ also explains ways that employees could access funds on their PayCard without incurring a fee, such as using an in-network ATM or over-the-counter cash withdrawals at Visa member banks such as Citibank.[2] Citibank created the equivalent of a withdrawal slip for the PayCard, which it calls a Pre-Check. The Pre-Check is issued out to the participant and can be drawn against funds in their PayCard account. The participant fills in the amount and presents it to a Citibank teller to receive funds with no charge. The withdrawal limit is the balance in the PayCard account, and it cannot be overdrawn.

[2] The ATM network has 5,000 ATMs locally and over 65,000 ATMs nationally.

The May 24, 2012 email included as an attachment the PayCard enrollment form ("Enrollment Form"), which states:

> I authorize my wages/salary to be deposited to my PayCard account. I understand I can receive all of my pay in full without cost each pay period by requesting a cash withdrawal from a bank teller at any Visa branded bank. I also understand that I may use the Pre-Check option to access my full pay without any program fees but I understand that third party check-cashing fees may apply. I understand there is no fee for in-network ATM withdrawals, point of sale (POS) purchases, phone purchases and internet purchases and that I can access my account balance at the ATM, online or by phone. I have reviewed the Schedule of Fees.

(Ans., Ex. 1) The fee schedule attached to the Enrollment Form is identical to the one included in the Draft FAQ except it is entitled the "NYCHA PayCard Program Schedule of Fees." (*Id.*)

The PayCard Program commenced as scheduled on June 4, 2012. NYCHA states that all payment options were discussed at the orientation meetings for City Seasonal Aides. NYCHA distributed the Enrollment Form at these meetings, and 213 of the 635 City Seasonal Aides enrolled. NYCHA also distributed a flyer that listed the following Program benefits ("Flyer"):

> **As a NYCHA Employee you are Eligible**
> - No bank account or credit check required
> - Alternative to Direct Deposit
>
> **No More Check Cashing Fees**
> - Access your money immediately on pay day
> - Withdraw your money free at in-network ATMs [*Out of network fees may apply]
> - No need to carry cash
>
> **Flexible Cash Access**
> - Make purchases and get cash at participating merchants where Visa is accepted
> - Checks provided to cash for your card balance, or deposit into your own bank account
> - You still have access to your cash if your card is lost or stolen

Free Online Banking
- Manage your account and pay bills online
- Balance Inquiries[3]

24 Hour Customer Service
- Multi-lingual customer service to answer your questions

(Pet., Ex. C2) (emphasis in original)[4]

Representatives of NYCHA and DC 37 met on June 14, 2012, to discuss the PayCard Program. NYCHA's representatives opined that the Program was a benefit to employees because of its convenience and because employees could avoid onerous check cashing fees. DC 37 requested written materials regarding the Program and time to review it. In a July 5, 2012 letter, DC 37 formally requested bargaining over: "(1) The fees to our members associated with the NYCHA PayCard program [and] (2) Payment of employee's wages upon termination of service." (Pet., Ex. A) The letter noted that DC 37 had not yet received a copy of the PayCard Agreement. In a July 16, 2012 letter, DC 37 repeated its July 5 bargaining request and also demanded "bargaining over the impact of receiving wage and salary payments via the pre-paid debit cards, including, but not limited to such issues as unencumbered access to entire wages on the PayCards, ability to view and receive copies of paystubs, availability and access to free ATMs in the VISA network." (Pet., Ex. B) Subsequently, NYCHA provided DC 37 with copies of the PayCard Agreement, the Flyer, and the finalized FAQ.[5]

On August 6, 2012, the parties again met to discuss the PayCard Program. DC 37 stated that the fees associated with the Program were unacceptable and that it was concerned about

[3] The statement on the Flyer that there are no balance inquiry fees is inconsistent with the fee schedule, which lists a $.50 balance inquiry charge.

[4] The Flyer also listed enrollment dates and a number to call with questions; NYCHA represents that it received less than ten phone calls from employees regarding the Program.

[5] The finalized FAQ is substantively identical to the previously provided Draft FAQ.

members' access to Citibank and in-network ATMs near their residences. NYCHA noted that, while the program was voluntary, it would consider the Union's concerns.

The parties met again on September 18, 2012. NYCHA informed DC 37 that Citibank was not agreeable to renegotiating the fees. NYCHA noted that there were ways that an employee could avoid the fees and suggested that an employee could use the Pre-Check option to remove all of the funds on the PayCard and thus avoid the Account Maintenance Fee. NYCHA also informed DC 37 that participants in the PayCard Program could not add funds to their PayCard; only Citibank could add funds.

On September 24, 2012, DC 37 filed the instant petition requesting that the Board find that NYCHA violated NYCCBL §§ 12-306(a)(1) and (4) and 12-307(a); direct NYCHA to rescind the PayCard Program and bargain in good faith over its fees; order NYCHA to reimburse any fees incurred by bargaining unit members through the use of a PayCard; order the posting of notices; and order any other relief that the Board deems just and proper.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that, by unilaterally implementing the PayCard Program without bargaining, NYCHA violated NYCCBL §§ 12-306(a)(1) and (4) and 12-307(a) because payment methods are a mandatory subject of bargaining.[6] The Union further argues that the fees

[6] NYCCBL § 12-306(a)(1) provides, in pertinent part: "It shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter."

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

associated with the PayCard Program are a term and condition of employment and, thus, a mandatory subject of bargaining. According to the Union, the fact that the fees are charged by Citibank, and not NYCHA, is irrelevant; they were negotiated by NYCHA who receives a portion of the fees charged by Citibank by virtue of the $1 per enrollee per month it receives as a revenue share from Citibank. The Union argues that the Program fees reduce an employee's net wages and that the replacement fee for a lost PayCard is no different than a replacement fee for a lost payroll check, which the Board previously found to be a mandatory subject of bargaining.

The Union argues that it is "disingenuous" for NYCHA to compare the PayCard Program to direct deposit. (Rep. ¶ 89) Direct deposit involves funds being deposited into an account at an institution chosen by the employee, not the employer. The employee, not the employer, thus determines what fees, if any, will be associated with the account. Further, unlike the PayCard, an employee can separately deposit funds into a direct deposit account.

The Union also argues that NYCHA engaged in direct dealing. NYCHA contacted DC 37 members about the PayCard Program before contacting the Union. It did not merely inform its employees; it advertised the Program and arranged to enroll employees. Further, DC 37 states that its Director of Quality Life Programs is not the proper person for an employer to contact regarding a negotiable issue.

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through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

NYCCBL § 12-306(a)(4) provides, in pertinent part: "It shall be an improper practice for a public employer or its agents . . . 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 § 12-307(a) provides, in pertinent part: "Subject to the provisions of [NYCCBL §§ 12-307(b) and 12-304 (c)], public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages . . . hours . . . [and] working conditions . . ."

NYCHA's Position

NYCHA argues that the PayCard Program does not represent a change to the wages paid to its employees; rather, it "merely represents an additional means for payment." (Ans. ¶ 80) NYCHA argues that the Program neither affects the economic benefits flowing from the employment relationship nor involves any deductions to wages and, thus, does not fall within the scope of bargaining. NYCHA claims that the Program is analogous to direct deposit, which has been available to its employees for years. The Program does not modify the timing or amount of payments. Regardless of an employee's choice of payment—direct deposit, check, or PayCard—the employee's full net pay is paid by NYCHA.

NYCHA argues that it did not have a duty to negotiate over the fees associated with the Program as they stem from the employees' banking relationship with Citibank, not their employment relationship with NYCHA. Further, "any fee that an employee might incur as a result of misusing the PayCard [is] not within the scope of bargaining, as no fee has any impact on any employee's wages." (Ans. ¶ 94) NYCHA states that it does not assess any fees, nor benefit from those assessed by Citibank. NYCHA pays the full amount of wages onto the PayCard; thus, it argues, the Program fees do not reduce an employee's wages.

NYCHA argues that it did not engage in direct dealing but merely provided information to its employees about payment options. NYCHA states that it made no threat of reprisal nor promise of benefit and that its communication did not impede reaching an agreement with the Union nor subvert the employees' rights of organization and representation. Direct dealing consists of actions that attempt to mislead employees or persuade them that they will best achieve their objectives directly through the employer. NYCHA argues that the Union has not shown that NYCHA's communications did such.

DISCUSSION

Public employers and employee organizations, pursuant to NYCCBL § 12-306(a)(4), have a duty to bargain in good faith concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment. Thus, under NYCCBL § 12-306(a)(4), an employer commits an improper practice when it refuses to bargain in good faith on matters within the scope of collective bargaining, and the Board has consistently held that an employer commits an improper practice when it makes a unilateral change in a term or condition of employment. *See DC 37*, 3 OCB2d 5, at 8 (DCB 2010). The Board has found that "wages" includes the "direct and immediate economic benefits flowing from the employment relationship." *UFA*, 43 OCB 4, at 202 (BCB 1989), *affd., Unif. Firefighters Assn. v. Off. of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *affd.*, 163 A.D.2d 251 (1st Dept. 1990); *see also Local 621, SEIU*, 2 OCB2d 27, at 10-11 (BCB 2009).

It is undisputed that the PayCard Program is a method of payment. The Board and the Public Employees Relations Board have held that "the method by which the employer distributes compensation to its employees is also a mandatory subject of bargaining." *PBA*, 1 OCB2d 14, at 13 (2008) (citing *City of Troy*, 28 PERB ¶ 4657, at 4912 (1995) (holding that "it is beyond cavil that . . . method[s] of their payment . . . are mandatory subjects of negotiations")) (other citations omitted). *PBA*, 1 OCB2d 14, concerned a voluntary program implemented by the New York City Police Department ("NYPD") under which it advanced new recruits $600 of their contractual $1,000 uniform allowance. We found that the timing and method of payment of the uniform allowance to be a mandatory subjects of bargaining. *See Id.* (citing *Pine Brook Care Center Inc.*, 322 N.L.R.B. 740, 748 (1996) (finding that unilaterally changing the method by which employees receive their uniform allowance is a violation of the employer's duty to bargain

in good faith)); *see also Deer Park Union Free School District*, 43 PERB ¶ 4557 (2010) (holding that direct deposit is mandatorily bargainable); *In the Matter of New York City Transit Authority, upon the Petition for Declaratory Ruling*, 22 PERB ¶ 6601 (1989) (holding that a check cashing facility is mandatorily bargainable); *County of Orange*, 12 PERB ¶ 3114 (1979), *confd.*, 76 A.D.2d 878 (2d Dept. 1980) (holding that the timing of a payment is mandatorily bargainable). Since the payment of wages to employees on a PayCard also involves the method of payment, we find that it too is a mandatory subject of bargaining.

In the Flyer, NYCHA described the benefits of the PayCard Program, including economic benefits such as "No More Check Cashing Fees" and "Free Online Banking." (Pet., Ex. C2) (emphasis deleted). While these benefits may be directly provided by Citibank, Union members are only eligible for them by virtue of the method of payment of their wages, and, thus, their employment relationship with NYCHA. The Program fees are part of the Program's revenue and the PayCard Agreement has an explicit revenue sharing provision pursuant to which NYCHA receives $1 per active enrollee per month. The PayCard replacement fee impacts an employee to the same extent as a check replacement fee, which we have explicitly found to be mandatorily bargainable. *See DC 37*, 3 OCB2d 5, at 8-9 (BCB 2010).

The involvement of Citibank, in and of itself, does not remove the new payment method from being a mandatory subject of bargaining because an employer is not always "insulated from the acts of independent entities when such acts are not beyond its reach and control." *City of Amsterdam*, 28 PERB ¶ 4516, at 4540 (1995); *see also County of Niagara*, 26 PERB ¶ 4582, at 4756 (1993) (employer's acquiescence to third parties' activities can constitute a violation of its obligation to bargain). Here, NYCHA negotiated the PayCard Agreement with Citibank (thus ratifying its fee schedule), arranged for the enrollment of its employees at its premises during

work hours, and has a PayCard Coordinator in its Payroll Division. Additionally, NYCHA receives $1 per employee per month enrolled in the Program. Thus, under the specific facts of the instant matter, we find the Program to be mandatorily bargainable.[7]

The voluntary nature of the Program also does not remove it from being a mandatory subject of bargaining, as the "voluntary participation by individual employees in procedures relating to mandatorily negotiable subjects of bargaining [does not remedy] a failure to negotiate with the certified bargaining agent." *DC 37*, 79 OCB 37, at 12 (BCB 2007) (citations omitted) (explaining that the voluntary nature of an alternative grievance process, a mandatory subject of bargaining, does not cure the failure to bargain). Thus, an employee's ability to avoid fees by not, as NYCHA characterizes it, misusing the PayCard or by not enrolling in the Program does not change our finding. *See DC 37*, 3 OCB2d 5, at 8-9.[8]

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[7] *See PBA*, 3 OCB2d 18 (BCB 2010), *affd., in part, & rev., in part, on other grounds Matter of Patrolmens Benevolent. Assn. v. N.Y.C. Off. of Collective Bargaining*, Index No. 106323/2010, 2012 N.Y. Slip Op. 50997 (Sup. Ct. N.Y. Co. May 29, 2012) (Schoenfeld, J.), in which the court upheld the Board's finding that the City violated NYCCBL § 12-306(a)(4) when the NYPD implemented without bargaining a loan repayment program for new recruits funded by a private foundation. The City argued that the "employer does not violate its duty to bargain in good faith when a benefit provided by a third-party entity is either given or rescinded, because the employer 'can only be deemed to be responsible for its own actions.'" *Id.*, at 26 (quoting *DC 37*, 71 OCB 12, at 8-9 (BCB 2003)) (other citations omitted). We held that "an employer is not always 'insulated from the acts of independent entities when such acts are not beyond its reach and control.'" *Id.* (quoting *City of Amsterdam*, 28 PERB ¶ 4516, at 4540). Rather, we found that acts exercised through third parties may be mandatorily bargainable under certain circumstances, including when the "public employer has the ability to exercise control" or "ratifies the acts of the third party." *Id.* (citing *City of Rochester*, 21 PERB ¶ 4541, *affd.*, 21 PERB ¶ 3040 (1988), *confd. sub nom. City of Rochester v. Pub. Empl. Relations Bd.*, 155 A.D.2d 1003 (4th Dept. 1989); *County of Niagara*, 26 PERB ¶ 4582; *Ford Motor Co. v. NLRB*, 441 U.S. 488, 501-503 (1979) (food services prices found to be a mandatory subject of bargaining even when done by a third party where employer had the "right to review and control.")).

[8] In *DC 37*, 3 OCB2d 5, we found a check replacement fee to be mandatorily bargainble. The City described the fee as "optional," arguing that an employee could avoid it by not requesting a replacement check or by enrolling in direct deposit. We stated that "the fact that employees have

Having found that NYCHA violated its duty to bargain in good faith under NYCCBL § 12-306(a)(4) by unilaterally creating the PayCard Program, we further find that NYCHA likewise derivatively violated NYCCBL § 12-306(a)(1). *See District No. 1, PCD, MEBA, ILA*, 3 OCB2d 4, at 24 (BCB 2010).[9] We do not, however, order reimbursement of fees, since any such employee expenditures have not been established by the Union with any specificity.[10]

However, we do not find that NYCHA impermissibly engaged in direct dealing by the unilateral creation of the PayCard Program, informing employees of the Program, and enrolling them in it. An employer's direct dealing violates 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). Thus, we have held that:

> Direct dealing in violation of [NYCCBL] § 12-306(a)(1) and (a)(4) is characterized by actions that attempt to mislead employees or to persuade them to believe that they will best achieve their objectives directly through the employer rather than through the union; in other words, the employer, by what it says or does,

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the option of not being charged this fee . . . does not affect our finding." *Id.*, at 8-9 (citing *DC 37*, 79 OCB 37, at 12).

[9] As we have found that NYCHA violated its duty to bargain in good faith under NYCCBL § 12-306(a)(4) by unilaterally creating the PayCard Program, we need not reach the issue of whether the impact of the Program on a term or condition of employment is itself bargainable.

[10] *See DC 37*, 4 OCB2d 43, fn. 7 (BCB 2011) (Board declined to order reimbursement where there were "no specific factual allegations about any resulting parking expenses.") As it is undisputed that employees could receive all the services provided by the PayCard Program without incurring a fee, the burden was upon the Union to demonstrate that fees were actually incurred by its members. No such evidence, nor specific factual allegations, were submitted.

> attempts to establish a negotiating relationship with unit employees to the exclusion of the employees' bargaining agent.

PBA, 77 OCB 10, at 14-15 (BCB 2006) (citing *Americare Pine Lodge Nursing and Rehab. Ctr. v. NLRB*, 164 F.3d 867 (4th Cir. 1999); *City of Buffalo*, 30 PERB ¶ 3021 (1997); *Local 1549, DC 37*, 49 OCB 17 (BCB 1992)); *see also DC 37*, 5 OCB2d 1, at 15 (Employer's announcement to employees of specific layoffs before notifying the union constituted a refutation of the collective bargaining agreement but not direct dealing where there was no threat of reprisal, promise of benefit, or effort to engage employees in direct negotiations).

In the instant matter, while NYCHA violated NYCCBL § 12-306(a)(4) by unilaterally altering a mandatory subject of bargaining, it did not seek to by-pass the Union. It notified the Union of the PayCard Program before initiating it and met repeatedly with the Union regarding the Program. NYCHA did not attempt to, and indeed did not, negotiate directly with the Union's members. Nor did NYCHA in anyway imply that the members were better off dealing directly with NYCHA rather than through their Union. *See Local 371, SSEU*, 69 OCB 1, at 7 (2002) (finding that an employer taking employees to visit the location to which the employees would be transferred without informing the union of the visit was not impermissible direct dealing where there was no threat of reprisal nor promise of benefit); *CIR*, 49 OCB 22 (finding no impermissible direct dealing occurred when the employer merely laid out several options

available to employees and made no mention of the union).[11] Thus, we do not find that NYCHA engaged in direct dealing.

[11] In contrast, we found direct dealing in *DC 37*, 5 OCB2d 39 (BCB 2012), where management met with an employee without the union to discuss changing the employee's schedule to one not found in the contract. We found this to be direct dealing because the employer's "actions had the effect of circumventing the [u]nion entirely and thereby subverted the [m]ember's right to be represented by her [u]nion." *Id.*, at 10. *See also Matter of Patrolmens Benevolent. Assn.*, 2012 N.Y. Slip Op. 50997, where the court found that the NYPD's creation of a loan reimbursement program to be direct dealing. The NYPD instituted the program while it was negotiating a collective bargaining agreement with the union. Among the topics under negotiation was the low starting salary of recruits, and the union had proposed a benefit linked to education. The court found that the NYPD "by offering (and extending) a wage benefit outside of the collective bargaining negotiations . . . subverted the [u]nion and the negotiation process." *Id.*, at 10.

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, Docket No. BCB-3050-12, be, and the same hereby is, granted to the extent that it involves claims that the New York City Housing Authority violated NYCCBL §§ 12 306(a)(4) and 12-307(a), and derivatively violated NYCCBL § 12 306(a)(1), by failing to bargain in good faith over the creation of a new payment option known as the PayCard Program; and it is further

ORDERED, that the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, Docket No. BCB-3050-12, be, and the same hereby is, dismissed to the extent that it involves claims that the New York City Housing Authority independently violated NYCCBL § 12 306(a)(1) by impermissibly engaging in direct dealing with Union members by the unilateral creation of a new payment option known as the PayCard Program; and it is further

ORDERED, that the New York City Housing Authority cease and desist in sixty (60) days of service of this order the payment option known as the PayCard Program for City Seasonal Aides until such time as it bargains over this issue in accordance with its obligations under the New York City Collective Bargaining Law; and it is further

ORDERED, that the New York City Housing Authority notify City Seasonal Aides who are participants in the PayCard Program and post appropriate notices detailing the above-stated violations of the NYCCBL.

Dated: March 6, 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 3 (BCB 2013), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, and the New York City Housing Authority.

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

ORDERED, that the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, Docket No. BCB-3050-12, be, and the same hereby is, granted to the extent that it involves claims that the New York City Housing Authority violated NYCCBL §§ 12 306(a)(4) and 12-307(a), and derivatively violated NYCCBL § 12 306(a)(1), by failing to bargain in good faith over the creation of a new payment option known as the PayCard Program; and it is further

ORDERED, that the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, Docket No. BCB-3050-12, be, and the same hereby is, dismissed to the extent that it involves claims that the New York City Housing Authority independently violated NYCCBL § 12 306(a)(1) by impermissibly engaging in direct dealing with Union members by the unilateral creation of a new payment option known as the PayCard Program; and it is further

ORDERED, that the New York City Housing Authority cease and desist in sixty (60) days of service of this order the payment option known as the PayCard Program for City Seasonal Aides until such time as it bargains over this issue in accordance with its obligations under the New York City Collective Bargaining Law; and it is further

ORDERED, that the New York City Housing Authority notify City Seasonal Aides who are participants in the PayCard Program and post appropriate notices detailing the above-stated violations of the NYCCBL.

The New York City Housing Authority
(Department)

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

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